

INDEX

	PAGE
Writ of Certiorari	1
Return	3
Employee's Claim Petition for Compensation	4
Respondent's Answer to Employee's Claim Petition	9
Determination of Facts and Rule for Judgment	12
Petition to Reopen	14
Order to Dismiss Petition to Reopen	19
Notice of Appeal	23
Order Extending Time for Filing Transcript	25
Determination and Judgment of Affirmance..	26
Determination and Judgment of Affirmance..	28
Reasons	30
Transcript of Testimony	33
Ore Carter—Direct	39
Cross	41
Re-direct	46
Re-cross	47
Re-direct	48
Recalled—Re-direct	54
Re-cross	54
H. L. Warren—Direct	48
Cross	50
Re-direct	52
Re-cross	52
Charles Ozza—Direct	56
Cross	56
Re-direct	62
Dr. Paul J. Finegan—Direct	62
Cross	69
Re-direct	71
Re-cross	74
Re-direct	77
Re-cross	83
Re-direct	84
Recalled—Re-direct	87
Re-cross	87

	PAGE
Recalled—Re-direct	135
Re-cross	136
Re-direct	147
Dr. John A. Holland—Direct	84
Cross	86
Joseph Faley—Direct	89
Cross	92
Motion for Dismissal	95
Dr. Maurice L. Charnock—Direct	103
Cross	117
Re-direct	133
Re-cross	133
Recalled—Re-direct	174
Re-cross	176
Dr. Roy Griffith—Direct	148
Cross	153
Re-direct	157
Re-cross	158
Re-direct	159
Re-cross	159
Dr. Henry H. Kessler—Direct	160
Cross	163
Re-direct	165
Re-cross	165
Dr. Otis L. Chapman—Direct	166
Cross	168
Re-direct	170
Re-cross	171
Motion to Reopen	178
Certification	192
Opinion of Supreme Court	193
Order Affirming Judgment	197
Notice of Appeal and Ground.....	198

New Jersey Supreme Court.

TRENTON MALLEABLE IRON
COMPANY,

Prosecutor-Respondent,

vs.

JOSEPH FALEY,

Petitioner-Defendant.

On
Certiorari.

WRIT OF CERTIORARI

(Filed November 10, 1934.)

NEW JERSEY, SS.

The State of New Jersey to the Court
[SEAL] of Common Pleas of the County of Mercer. 10

Greeting:

We being willing, for certain reasons to be certified of a certain judgment before you lately found against Trenton Malleable Iron Company, a corporation of New Jersey, prosecutor, in a certain action under the Employer's Liability Act of the State of New Jersey, brought against Trenton Malleable Iron Company at the suit of Joseph Faley in The Workmen's Compensation Bureau of the State of New Jersey, in which, as appears, a judgment was rendered against the said Trenton Malleable Iron Company, and which determination of facts and rule for judgment of the Workmen's Compensation Bureau of the State of New Jersey, was affirmed by the Mercer County Court of Com- 20

mon Pleas on the nineteenth day of October, nineteen hundred and thirty-four:

10 We do command that the judgment, order and all proceedings in the aforesaid action brought in the Workmen's Compensation Bureau, and subsequently appealed to the Court of Common Pleas of the County of Mercer, holden before you, the said Mercer County Court of Common Pleas, against the said Trenton Malleable Iron Company, prosecutor, by the said Joseph Faley, together with
20 all papers and things touching and concerning the same, as fully and entirely before you they remain, to our Justices of our Supreme Court of Judicature at Trenton on the twenty-eighth day of November next, you certify and send, together with this writ that therein may be done what of right and according to the laws of this State should be done.

Witness, THOMAS J. BROGAN, Esquire, Chief
20 Justice of our Supreme Court at Trenton, this eighth day of November, in the year of our Lord, one thousand nine hundred and thirty-four.

FRED L. BLOODGOOD,
Clerk.

GEORGE E. MEREDITH,
HENRY M. HARTMANN,
Attorney for Prosecutor.

30 I allow this writ. Let it be sealed this eighth day of November, 1934.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

MERCER COUNTY COURT OF COMMON PLEAS.

TRENTON MALLEABLE IRON
COMPANY,*Prosecutor-Respondent,**vs.*

JOSEPH FALEY,

*Petitioner-Defendant.*On Petition
for Compensa-
tion, etc.

RETURN

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of New Jersey:

The determination and statement of facts and
judgment, together with all papers and things
touching and concerning the same, as fully and
entirely as before us they remain, or are in our
possession or control whereof mention is within
made, we certify and send under our seal in the
schedule hereto annexed, as within we are com-
manded.

10

A. O. ROBBINS,

*Acting Judge of the Mercer County
Court of Common Pleas.*

20

[SEAL]

CHARLES P. HUTCHINSON,

*Clerk of the Mercer County
Court of Common Pleas.*

4 *Employee's Claim Petition for Compensation*

2075-184

(COPY)

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
10 COMPANY,

Respondent.

Claim
Petition
No.

**EMPLOYEE'S CLAIM PETITION FOR
COMPENSATION**

(Filed April 10, 1934.)

Received at Trenton, June 27, 1933.

Date of Accident, August 9, 1932.

20 If known, state name of insurance company,
N. J. Manufacturers Casualty Ins. Co.

Attorney for Petitioner, IRVING H. LEWIS, 316
Amer. Mech. Bldg., Trenton, N. J. (address).

To the Workmen's Compensation Bureau of New
Jersey:

The claimant respectfully alleges the following
facts:

1. What is your name? Joseph Faley.

2. Where do you live? 172 Sherman Avenue
30 (street address), Trenton, N. J. (city or town).

3. Sex. Male. 4. Age. 52. 5. Married. Yes.

6. By whom were you employed at the time of
the accident? (Give name and business address.)
Trenton Malleable Iron Company (name), New

Employee's Claim Petition for Compensation 5

York Avenue (street address), Trenton, N. J. (city or town).

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

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

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

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

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

12. If so, on what date? August 9, 1932.

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

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Iron molder: placing molds.

15. When did the accident happen? August 9, 1932 (state month, day, year and hour). 20

16. Where did the accident happen? In shop of respondent, Trenton, N. J.

17. What was the nature of the accident, and how did it happen? Petitioner was making molds, and while placing molds, sustained injury to his back.

18. On what date were you compelled to stop work because of the injury? August 9, 1932.

19. On what date were you well enough to work again? Unable to work. 30

20. If still disabled, on what date do you think you will be able to work? Unknown.

21. Give nature of any injury from which you will recover. Unknown.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. Petitioner has suffered total and permanent disablement in his back.

6 *Employee's Claim Petition for Compensation*

23. Were your wages fixed by piece-work? Yes.

24. If so, what was your average weekly wage? \$20.00-\$24.00 per week.

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

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

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

10 28. State the amount of weekly wages.

29. How much money have you received from your employer as compensation (not medical aid) since your accident? \$543.27.

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

31. If so, how much?

32. Was medical aid required? Yes.

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

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

35. Were they furnished? No.

36. If so, between what dates?

37. If not, what sum did you expend for medical, surgical or hospital services? \$47.75.

38. Give name and address of physician and hospital. Dr. Barney D. Lavine, N. Clinton Ave., Trenton, N. J., Dr. Finegan, Greenwood Ave., Trenton, N. J.

30 39. What other facts are there which you believe important?

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

41. If you are unwilling, state reasons.

Your petitioner therefore prays that your honorable bureau will determine the amount of compensation due to your petitioner from the said

Employee's Claim Petition for Compensation 7

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 4, 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 pray, etc. 10

JOSEPH FALEY,
(Petitioner)
172 Sherman Avenue, Trenton, N. J.
(Address)

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.

JOSEPH FALEY of full age, being duly sworn according to law, on his oath deposes and says: that he is the petitioner named in the foregoing petition and that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief. 20

JOSEPH FALEY,
(Petitioner.)

Subscribed and sworn to before me, this nineteenth day of June, 1933, at Trenton, N. J. 30

SADIE R. ADAMS,
Notary Public of N. J.

(This affidavit may be sworn to before a deputy commissioner or a compensation referee, or any other person authorized to administer an oath.)

To the Respondent:

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation

8 *Employee's Claim Petition for Compensation*

Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

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

WORKMEN'S COMPENSATION BUREAU,
W. E. STUBBS,
Secretary.

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

W. E. STUBBS.

20 Endorsed: "Filed April 10, 1934, Charles P. Hutchinson, County Clerk".

2075-184

(COPY)

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

Claim
Petition
No. 26195.

10

**RESPONDENT'S ANSWER TO EMPLOYEE'S
CLAIM PETITION**

(Filed April 10, 1934.)

July 14, 1933.

July 13, 1933.

Attorney for Respondent, RICHARD W. BAKER,
175 W. State Street, Trenton, N. J. (address).

In answer to claim petition filed in this cause:

1. What is the petitioner's name? 20
2. Where does he reside? (street address) (city or town).
6. Was the petitioner in your employ at the time of the accident? Yes.
7. State your business. Iron.
8. Did you receive written notice from the petitioner at the time of hiring, or later, that the compensation law was not to apply to him? No.
9. Did you give such notice to him? No.
10. When did you first have knowledge of this accident? 8/9/32. 30

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? Yes.

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

10 15. When did the accident happen? 8/9/32 (state month, day, year and hour).

16. Where did the accident happen? Company's plant.

17. What was the nature of the accident, and how did it happen? Sprained back.

18. On what date was the petitioner compelled to stop work because of injury? 8/9/32.

19. On what day was the injured well enough to work again? 2/18/33.

20 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. Some slight permanent disability.

23. Were the wages fixed by piece-work?

30 24. If so, what was the average weekly wage of the injured?

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

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

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

28. State the amount of weekly wages. \$20.90.

29. How much money have you paid the injured as compensation (not including medical aid) since the accident? \$593.02.

30. Have you promised to pay compensation?
undetermined.

31. If so, how much?

32. Was medical aid required? Yes.

34. Were you requested to supply the necessary
medical service required by law? Yes.

35. Did you furnish this service? Yes.

36. If so, between what dates?

37. If not, give reason for failure to do so.

38. Give name of physician and hospital render- 10
ing service at your direction. N. J. Mfgs. As-
sociation Hospitals, Inc.

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

Trenton Malleable Iron Company.

By: N. J. Mfgs. Casualty Insurance Co.

Per: Richard W. Baker (Respondent), General 20
Attorney.

175 W. State St., Trenton, N. J. (Address).

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.

RICHARD W. BAKER of full age, being duly sworn
according to law, on his oath deposes and says:
that he is the attorney for the respondent named
in the foregoing answer to claim petition; that he
has read the same and is familiar with the contents 30
thereof; and that the matters and things therein
set forth are true according to the best of his
knowledge and belief.

RICHARD W. BAKER,
(Respondent.)

Subscribed and sworn to before me, this 13th day
of July, 1933, at Trenton, N. J.

M. M. MEREDITH,
Notary Public of New Jersey.

(This affidavit may be sworn to before a deputy commissioner or a compensation referee, or any other person authorized to administer an oath.)

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

W. E. STUBBS.

10 Endorsed: "Filed April 10, 1934, Charles P. Hutchinson, County Clerk".

2075-184

(COPY)

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

JOSEPH FALEY,

Petitioner,

vs.

20 TRENTON MALLEABLE IRON
COMPANY,

Respondent.

On Petition
for Com-
pensation.

Claim
Petition
No 26195.

**DETERMINATION OF FACTS AND RULE
FOR JUDGMENT**

(Filed April 10, 1934.)

This is a case coming on for determination under the provisions of the N. J. Workmen's Compensation Act in which a petition was filed on June 27, and answer filed on July 14, 1933. The case came on for hearing in Trenton on October 14, and

November 19, 1933, and on January 26, 1934, the petitioner being represented by I. H. Lewis, Esq., and the respondent by G. E. Meredith, Esq.

The record as presented at the hearings shows that the petitioner was in the employ of the respondent on August 9, 1932, and that on that date he met with an accident for which he received compensation in the amount of \$384.07 covering 27-4/7 weeks temporary disability, together with \$208.95 on account of an estimated 3% total disability covering a period of 15 weeks. 10

The petitioner contends that this payment of compensation does not adequately cover his injury, and testimony was presented by a number of doctors for the purpose of establishing the nature and degree of his disability, from the record, it would appear that the petitioner must have had an arthritic condition of the back prior to the accident of August 9, 1932. On that day he was making and placing moulds and sustained an injury to his back. Various estimates are given by doctors appearing for the respondent and the petitioner indicating a percentage of total disability ranging from 5% to 60%. 20

A study of the testimony as given by the various doctors leads me to conclude that the petitioner is suffering 30% total disability as the result of lighting up or rendering active this pre-existing arthritic condition.

The wages were \$20.90 a week which calls for compensation at the rate of \$13.93 a week. Three per cent of total disability having been paid, this leaves a balance due of 27% equivalent to 135 weeks. This compensation is to be paid beginning as of June 4, 1933. 30

It is, therefore, on this 28th day of February, 1934, ordered, that the respondent pay to the petitioner beginning as of June 4, 1933, \$13.93 a week for 135 weeks. The amount which has accrued to date of first payment will be paid in one lump sum.

The respondent will also pay \$20 to Dr. J. A. Holland and the sum of \$30 to Dr. Paul J. Finnegan for their expert testimony in court.

A counsel fee of \$250 will be allowed the petitioner's attorney to be paid by the respondent. The respondent will also pay the petitioner's costs in the amount of \$15.

(Signed) W. E. STUBBS,
*Deputy Commissioner
of Compensation.*

10

I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the determination filed in this cause.

W. E. STUBBS.

Endorsed: "C. P. Min. 1933-PG. 234, Filed April 10, 1934, Charles P. Hutchinson, County Clerk".

20

2075-184

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

30

Respondent.

Claim
Petition
No. 26195.

PETITION TO REOPEN

(Filed April 10, 1934.)

To the Honorable William E. Stubbs, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau of the State of New Jersey:

The petition of Trenton Malleable Iron Company, a corporation of the State of New Jersey whose place of business is located in the city of Trenton, county of Mercer, respectfully shows that;

1. The above entitled matter was heard by Your Honor on October 14, 1933, November 19, 1933 and January 26, 1934.

2. During the course of these hearings the petitioner by his agent, and/or attorney, by word of mouth or by actions, communicated directly or indirectly to Your Honor, the fact that certain testimony adduced by the respondent, more specifically an X-ray proven to be taken a considerable length of time prior to the accident for which compensation was claimed, was not in fact taken at that time and it was insinuated that the X-rays were fraudulently rearranged or tampered with. 10

3. During the course of the trial, either on or off the record, the petitioner by his attorney, stated on several occasions that he would produce testimony to show that the petitioner was at work on the date that the first X-ray was taken and so disprove the fact of taking the X-ray at that time. 20

4. A notice of hearing was sent to the parties scheduling this matter for further hearing on Friday, February 23, 1934, the purpose of this final hearing presumably being to permit the petitioner to produce testimony to rebut proof already established by the respondent that an X-ray showing the same condition had been taken long prior to this accident. 30

5. The final hearing was called off and instead of presenting this rebuttal evidence by sworn testimony, the petitioner and/or his daughter, and/or his attorney, related certain information to your honor in chambers without the respondent being present and without any knowledge on the part of the respondent of the conference.

6. At the close of the case after both sides had rested the respondent by its attorney, asked that it be permitted to file a brief setting forth its view of the evidence adduced. This request was granted by the court but no time limit was set for filing the brief.

7. On the 28th day of February, 1934, a determination and rule for judgment was entered in this cause without the benefit of the briefs already referred to.

10

8. The respondent is reliably informed and in fact was advised by Your Honor that it was represented to the court in ex parte proceedings, that the X-ray marked in evidence and proven to be taken on or about March 17, 1930, was not in fact taken at that time and Your Honor has indicated that although this matter was presented to you as a fraud on the part of the respondent, your reaction to the statement was that, "some mistake must have been made—the X-rays must have been mixed up—that there must have been some mix-up about the X-rays and an innocent substitution made," or words to that effect, clearly indicating that the ex parte evidence had some weight in the mind of Your Honor and influenced Your Honor in your decision at least to the point where the strongest evidence in the respondent's defense was given no consideration.

20

Because the respondent feels that all of the foregoing facts and circumstances must of necessity have had some influence upon Your Honor's judgment in deciding this matter and because the respondent feels that its substantial rights have been prejudiced by this unsworn statement of the petitioner and/or his daughter, and/or his attorney, the respondent therefore prays:

30

1. That this proceeding may be reopened for the purpose of having the petitioner produce sworn testimony covering the facts related to Your Honor in chambers or elsewhere, directly or indirectly.

2. That in the alternative, and in the event of the petitioner's failure to produce the testimony set forth in the first prayer of this petition, the respondent be permitted to produce further sworn testimony before Your Honor at a time to be designated, for the purpose of establishing conclusively and beyond all doubt the prior existence of an X-ray taken on or about March 17, 1930 and marked in evidence.

3. That after hearing such evidence this matter have Your Honor's further consideration to the end that the case may be decided on the testimony already adduced and the testimony to be produced as set forth in the first and second prayer above and not upon any ex parte testimony. 10

4. That the respondent be permitted to present any further medical testimony which may be indicated to clear up any doubt in the mind of Your Honor as to the existence of a condition producing a disability prior to the time of the alleged accident for which compensation is claimed. 20

5. That the order signed by Your Honor under date of February 28, 1934, be withdrawn pending the filing of a final determination and rule for judgment after additional testimony is taken.

6. That an order be entered permitting a reopening of this matter for the reasons set forth above.

7. That the case be scheduled for hearing for the purpose of taking further testimony within ten days time so that the rights of the parties on appeal may not be prejudiced. 30

Respectfully,

TRENTON MALLEABLE IRON COMPANY,

By Its Attorney, GEORGE E. MEREDITH.

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.

10 GEORGE E. MEREDITH of full age, being duly sworn according to law, on his oath deposes and says: that he is the attorney for the respondent named in the foregoing petition to reopen; 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 E. MEREDITH,
Attorney for Respondent.

Subscribed and sworn to before me, this 23rd day of March, 1934.

[SEAL] LORETTA M. WECKERLE,
Notary Public of New Jersey.

20 I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the petition to reopen filed in this cause.

W. E. STUBBS.

Endorsed: "Filed April 10, 1934, Charles P. Hutchinson, County Clerk".

2075-184

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

Claim
Petition
No. 26195.

10

ORDER TO DISMISS PETITION TO REOPEN

(Filed April 26, 1934.)

On March 23, 1934, the attorney for the respondent in the above claim handed me in open court a petition to reopen the judgment which was rendered on February 28, 1934, awarding compensation to this petitioner. There was no opportunity for me to read this typed petition. Instead, verbal statements were made by the respondent's counsel, and a verbal ruling was made in this motion. However, a reading of the typed petition to reopen this claim calls for an analysis of said petition and a formal ruling.

20

Referring to paragraph No. 2 on page 1 of the petition to reopen, I hold the statements as to fraudulent manipulation of X-ray pictures a presumptuous assumption. Referring to paragraph No. 5 on page 1, it is a fact that the petitioner's daughter came to my office and requested me to advise her how she could prove that no previous X-rays had ever been taken. She was informed by me that I could tell her nothing regarding this, and that she would have to rely on her attorney.

30

With regard to paragraph No. 8 on page 2, I stated to Mr. Meredith, the respondent's attorney, that the only way I could harmonize the conflicting testimony was on the ground that some one had made a mistake. It is inconceivable how any one could have enlarged that remark so as to make the following quotations taken from the respondent's petition.

- 10 "Some mistake must have been made—the X-rays must have been mixed up—that there must have been some mix-up about the X-rays and an innocent substitution made." No such statements were made by me, no ex parte evidence was presented to me, no claim was mentioned that had not been presented in court. Nothing was said, therefore, to influence me in any way in the rendering of my decision. Further, an understanding reading of the decision would show that consideration was given the respondent's evidence regarding the
- 20 original X-rays.

- Counsel for the respondent has filed a signed affidavit that all of the first eight clauses in his petition are facts. Some of them are matters of record. Others, are assumptions. His contention that I must have been influenced by additional evidence is unwarranted because there was no additional evidence. No intimation that there was any fraudulent manipulation of any X-ray pictures ever originated with me. I never even thought of
- 30 such a thing, and, therefore, could not have given expression to such a sentiment. Personally, I resent the attorney's intimating that I could give credence to any such insinuation.

Reviewing this entire situation, I find no ground for reopening this claim.

It is, therefore, on this 26th day of April, 1934, Ordered, that this determination be made a part of the record as a ruling on the respondent's formal petition to reopen this claim.

It Is Further Ordered, that this petition to reopen the claim be dismissed.

W. E. STUBBS,
Deputy Commissioner of Compensation.

I hereby certify this to be a true copy of the order to dismiss the petition to reopen this claim.

W. E. STUBBS.

April 26, 1934.

Endorsed: "C. P. Min. 1933-PG. 249. Filed April 26, 1934, Charles P. Hutchinson, County Clerk" 10

MERCER COUNTY COURT OF COMMON PLEAS
STATE OF NEW JERSEY

I, GODFREY W. SCHROTH, President Judge of the Court of Common Pleas in and for the county of Mercer, being unable to promptly dispose of the accumulated business now pending and to come before the Court of Common Pleas, Court of Quarter Sessions, Court of Special Sessions and Orphans' Court in and for the county of Mercer; therefore, by virtue and authority of the statute in such case made and provided. 20

I, do hereby request and designate the Honorable A. O. Robbins, President Judge of the Court of Common Pleas of the county of Hunterdon, in order to assist in disposing of the accumulated business of said courts, to sit and hold a Court of Common Pleas, Court of Quarter Sessions, Court of Special Sessions and Orphans' Court in and for the county of Mercer, on the twenty-seventh day of July, A. D. 1934, on the second, third, sixteenth and seventeenth days of August, A. D., 1934; on the twenty-second, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh days of September, A. D., 1934 and on the tenth and eleventh days of October, A. D., 1934, for the purpose of trying issues in said courts and of hearing and determin- 30

ing such other matters as said courts, or any judge thereof, may be empowered by law to hear, try and determine.

Made and directed to be entered in the minutes of this court, this twenty-seventh day of July, A. D., one thousand nine hundred and thirty-four.

GODFREY W. SCHROTH,

*President Judge of the Mercer
County Court of Common Pleas.*

- 10 Endorsed and filed July 27, 1934, and entered in Common Pleas Minutes of 1933, page&c. Charles P. Hutchinson, County Clerk.

MERCER COUNTY COURT OF COMMON PLEAS
STATE OF NEW JERSEY

- 20 I, GODFREY W. SCHROTH, President Judge of the Court of Common Pleas in and for the county of Mercer, being unable to promptly dispose of the accumulated business now pending and to come before the Court of Common Pleas, Court of Quarter Sessions, Court of Special Sessions and Orphans' Court in and for the county of Mercer; by virtue and authority of the statute in such case made and provided,

- 30 I do hereby request and designate the Honorable A. O. Robbins, President Judge of the Court of Common Pleas of the county of Hunterdon, in order to assist in disposing of the accumulated business of said courts, to sit and hold a Court of Common Pleas, Court of Quarter Sessions, Court of Special Sessions and Orphans' Court in and for the county of Mercer, on the fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth days of October, A. D., 1934 and the second and ninth days of November, A. D., 1934, for the purpose of trying issues in said courts and of hearing and determining such other matters as said

courts, or any judge thereof may be empowered by law to hear, try and determine.

Made and directed to be entered in the minutes of this court, this fifteenth day of October, A. D., one thousand nine hundred and thirty-four.

GODFREY W. SCHROTH,
*President Judge of the Mercer
County Court of Common Pleas.*

Endorsed "Filed October 15, 1934 and entered in Common Pleas Minutes 1933, pages ...&. Charles P. Hutchinson, County Clerk" 10

Mercer County Court of Common Pleas met on Tuesday, October 16, 1934, at 10:00 o'clock A. M.

Present: Hon. A. O. Robbins, Acting Judge of the Court of Common Pleas, presiding.

2075-184

COURT OF COMMON PLEAS OF MERCER COUNTY.

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

Claim
Petition
No. 26195.

20

NOTICE OF APPEAL

(Filed March 27, 1934.)

To Irving H. Lewis, Attorney for Petitioner, the Secretary of the Workmen's Compensation Bureau, the County Clerk of the County of Mercer, or to whom it may concern:

Please take notice that the respondent hereby appeals to the Court of Common Pleas in and for the county of Mercer, from the determination of the Workmen's Compensation Bureau made in the above entitled matter on the 28th day of February, 1934, awarding the petitioner compensation and costs as follows:

10 One hundred and thirty-five (135) weeks' permanent compensation at the rate of thirteen dollars and ninety-three (\$13.93) cents per week.

Twenty (\$20.00) dollars to Dr. J. A. Holland and thirty (\$30.00) dollars to Dr. Paul J. Finegan, payable by the respondent.

Two hundred and fifty (\$250.00) dollars counsel fee, payable by the respondent.

Petitioner's costs in the amount of fifteen (\$15.00) dollars, payable by the respondent.

Respectfully,

20 GEORGE E. MEREDITH,
Attorney for Respondent-Appellant.

Endorsed: "Filed Mar. 27, 1934, Charles P. Hutchinson, County Clerk."

Order Extending Time for Filing Transcript 25

2075-184

COURT OF COMMON PLEAS OF MERCER COUNTY.

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

On Appeal.

**ORDER EXTENDING TIME FOR FILING
TRANSCRIPT**

(Filed April 10, 1934.)

10

It appearing to the court that the official court stenographer who took the testimony at the hearing before the deputy commissioner in the above-entitled matter has been unable to complete the transcript of testimony within the time provided by Chapter 25, Laws of 1932, and the respective parties by their attorneys having agreed to an extension of time for the filing of the aforesaid transcript to April 25, 1934, and counsel for the respective parties having subscribed their consent thereto.

20

It is, on this 10th day of April, 1934, Ordered that the time for filing the transcript of testimony be and the same is hereby extended to April 25, 1934.

GODFREY W. SCHROTH,
Judge.

We hereby consent to the foregoing order, as to form.

30

IRVING H. LEWIS,
*Attorney for Petitioner-
Appellee.*

GEORGE E. MEREDITH,
*Attorney for Respondent-
Appellant.*

Endorsed: "C. P. Min. 1933-PG. 235 Filed April 10, 1934, Charles P. Hutchinson, County Clerk".

MERCER COUNTY COURT OF COMMON PLEAS.

JOSEPH FALEY,

Petitioner-Appellee,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent-Appellant.

On Appeal.

**DETERMINATION AND JUDGMENT OF
AFFIRMANCE**

10

(Filed October 19, 1934.)

This matter comes up on appeal by the Trenton Malleable Iron Company, respondent-appellant, from a determination of the Workmen's Compensation Bureau, as evidenced by an order of the bureau dated February 28, 1934, and a supplemental order dated April 26, 1934, in favor of Joseph Faley, petitioner-appellee.

20

The appeal was heard by me on July 27, 1934, in the presence of George E. Meredith, Esquire, attorney for the Trenton Malleable Iron Company, respondent-appellant, and Irving H. Lewis, Esquire, attorney for Joseph Faley, petitioner-appellee.

The action is brought for compensation for injuries sustained in an accident which occurred at the plant of the respondent-appellant on August 9, 1932. On the last day aforesaid the petitioner was making and placing molds and sustained an injury to his back. The respondent-appellant at first admitted the occurrence of the accident, knowledge of the accident and that the injury was sustained in and during the course of his employment,

but later denied all of these allegations. The petitioner sustained the burden imposed by law upon him in proving that he sustained an accident which arose out of and in the course of his employment, and that knowledge of this accident was communicated to his employer.

Petitioner claims compensation for disability because of the injury to his back. Petitioner produced medical testimony to support his claim and the petitioner's physicians testified that the petitioner's disability ranged from fifty to sixty per cent total disability. The respondent's physicians testified that the petitioner sustained a total disability of his back ranging from five to ten per cent. 10

I have carefully considered the evidence in the case and the briefs submitted by the respective attorneys and have come to the conclusion that the findings and the determination of the Workmen's Compensation Bureau in this case should be sustained. 20

Wherefore, it is, on this 19th day of October, 1934, adjudged, that the appeal of the Trenton Malleable Iron Company, be dismissed; that the determination of the Workmen's Compensation Bureau in the above matter, dated February 28, 1934, together with the supplemental determination, dated April 26, 1934, and the judgment thereon, be affirmed; that judgment be now entered in favor of Joseph Faley, petitioner-appellee, and against Trenton Malleable Iron Company, respondent-appellant, which compensation began as of June 4, 1933, at the rate of \$13.93 per week for 135 weeks, the amount which has accrued to date to be paid in one lump sum; further, that the Trenton Malleable Iron Company, respondent-appellant, pay to Dr. J. A. Holland \$20.00; to Dr. Paul J. Finnegan \$30.00 for their testimony; further, that the respondent-appellant pay to Irving H. Lewis, attorney for the petitioner-appellee, the 30

28 *Determination and Judgment of Affirmance*

sum of \$250.00 as counsel fee for his services before the Workmen's Compensation Bureau; further, that the respondent-appellant pay the petitioner's costs at the hearing before the Workmen's Compensation Bureau, in the amount of \$15.00; further, that the petitioner-appellee is entitled to reimbursement of \$127.00 as costs incurred for stenographic transcript of the original hearing before the Workmen's Compensation Bureau, which
10 transcript was necessary for the defense of this appeal, which sum is to be paid by the respondent-appellant; finally, that respondent-appellant pay to Irving H. Lewis, attorney for petitioner-appellee, the sum of two hundred and fifty dollars, for his services in this appeal, together with taxed costs. One half to be paid by petitioner-appellee and one half by respondent-appellant.

A. O. ROBBINS,
Acting Judge.

20 Endorsed: "Filed October 19, 1934, Charles P. Hutchinson, County Clerk".

MERCER COUNTY COURT OF COMMON PLEAS.

JOSEPH FALEY,

Petitioner-Appellee,

vs.

30

TRENTON MALLEABLE IRON
COMPANY,

Respondent-Appellant.

} On Appeal.

**DETERMINATION AND JUDGMENT OF
AFFIRMANCE**

IRVING H. LEWIS, *Attorney.*

Wherefore, it is, on this 19th day of October, 1934, adjudged that the appeal of the Trenton

Malleable Iron Company, be dismissed: that the determination of the Workmen's Compensation Bureau in the above matter, dated February 28, 1934, together with the supplemental determination, dated April 26, 1934, and the judgment thereon, be affirmed; that judgment be now entered in favor of Joseph Faley, petitioner-appellee, and against Trenton Malleable Iron Company, respondent-appellant, which compensation began as of June 4, 1933, at the rate of \$13.93 per week for 135 weeks, the amount which has accrued to date to be paid in one lump sum; further that the Trenton Malleable Iron Company, respondent-appellant, pay to Dr. J. A. Holland, \$20.00; to Dr. Paul J. Finnegan \$30.00 for their testimony; further, that the respondent-appellant pay to Irving H. Lewis, attorney for the petitioner-appellee, the sum of \$250.00 as counsel fee for his services before the Workmen's Compensation Bureau; further, that the respondent-appellant pay the petitioner's costs at the hearing before the Workmen's Compensation Bureau, in the amount of \$15.00; further that the petitioner-appellee is entitled to reimbursement of \$127.00 as costs incurred for stenographic transcript of the original hearing before the Workmen's Compensation Bureau which transcript was necessary for the defense of this appeal, which sum is to be paid by the respondent-appellant; finally, that respondent-appellant pay to Irving H. Lewis, attorney for petitioner-appellee, the sum of two hundred and fifty dollars, for his services in this appeal, together with taxed costs at \$45.10; one-half to be paid by petitioner-appellee and one-half by respondent-appellant.

Judgment signed and entered this 19th day of October, A. D. nineteen hundred and thirty-four.

A. O. ROBBINS,
Acting Judge.

JOSEPH FALEY,

Petitioner-Appellee,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent-Appellant.

On Appeal.

On
Determination
and Judgment
of Affirmance.

ON APPLICATION TO FIX COUNSEL FEES.

IRVING H. LEWIS, *Attorney of Petitioner-Appellee.*

10 GEORGE E. MEREDITH, *Attorney of Respondent-Appellant.*

Argument by counsel.

Motion held by the court.

NEW JERSEY SUPREME COURT.

JOSEPH FALEY,

Petitioner-Defendant,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent-Prosecutor.

On Certiorari.

20

REASONS

(Filed December 4, 1934.)

The said prosecutor, by its attorney, comes and prays that the action of the Workmen's Compensation Bureau of the State of New Jersey, holden

by William E. Stubbs, Esquire, Deputy Commissioner of Labor, and the judgment of the Mercer County Court of Common Pleas affirming the same may be set aside, reversed and for nothing holden for the following reasons:

1. That there was no evidence or proof that the petitioner suffered as the result of an accident arising out of and in the course of his employment, as defined by the Workmen's Compensation Act, Chapter 95, Laws of 1911, and the supplements and amendments thereto. 10

2. That there is no evidence to support the finding that the petitioner suffered a 30% total permanent disability.

3. That the said Deputy Commissioner, in his consideration of the case, disregarded X-rays which were legally admitted in evidence by him.

4. That the Deputy Commissioner erred in giving no consideration to a previous accident suffered by the petitioner. 20

5. That the proofs before the Deputy Commissioner did not furnish a rational basis for the judgment entered in this case.

6. Respondent moved for the dismissal of the petition on two grounds: (1) that no proof appeared in the petitioner's case of an accident arising out of and in the course of his employment, and (2) that no competent evidence was adduced to show that the petitioner's condition was due to trauma. The said Deputy Commissioner erroneously denied the motion. 30

7. That the cost of a copy of the transcript obtained by the petitioner for his own uses in the amount of \$127.00 was improperly assessed against the respondent on appeal.

8. That the Deputy Commissioner willfully failed to consider all the testimony submitted.

9. That the decision of the Workmen's Compensation Bureau and the judgment of the Court of

Common Pleas affirming the same is in divers other respects unjustifiable, illegal, null and void.

HENRY M. HARTMANN,
Attorney for Respondent-Prosecutor.

NEW JERSEY SUPREME COURT.

JOSEPH FALEY,

Petitioner-Defendant,

vs.

10 TRENTON MALLEABLE IRON
COMPANY,

Respondent-Prosecutor.

} On Certiorari.

STIPULATION OF COUNSEL

(Filed December 7, 1934.)

20 The writ of certiorari allowed in this cause having been made returnable for the 28th day of November, 1934, and the Clerk of the Court of Common Pleas of Mercer County having filed the same out of time, to wit: on December 6, 1934, it is hereby stipulated by the respective counsel for the parties hereto that consent be and the same is hereby given to the filing of the return as of time.

IRVING H. LEWIS,
Attorney for Petitioner-Defendant.

30 HENRY M. HARTMANN,
Counsel for Respondent-Prosecutor.

Dated: December 6, 1934.

NEW JERSEY DEPARTMENT OF LABOR,
WORKMEN'S COMPENSATION BUREAU.
C. P. 2075—184-3.

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

TRANSCRIPT OF TESTIMONY

10

(Filed April 21, 1934.)

Transcript of testimony taken in the above entitled matter before HON. WILLIAM E. STUBBS, Deputy Commissioner of the Department of Labor, at Trenton, New Jersey, on Friday, October 14th, 1933, at 9:15 A. M.

Appearances:

Irving H. Lewis, Esq., for the Petitioner.

George Meredith, Esq., for the Respondent.

John F. Trainor, Court Reporter.

20

Mr. Meredith—On this case, I have a request to make and that is this, that the Respondent be permitted to amend its answer to deny the accident. There is a very good reason for it, Judge. I might say this from the outset we have taken this man's word at its face value; everything he has told us we have believed and given him the benefit of every doubt that existed and went ahead and paid him on the strength of his statements to us and our doctors.

30

We have just been led to believe, in the last 24 hours, that some of his statements were not entirely

true and our position is now that we very seriously doubt the happening of an accident in this case to account for the disability, if any, that he is now suffering from.

10 For that reason, we ask that we be permitted to amend our answer to deny an accident. I don't feel the Petitioner is being put in any particularly unfair position, because if he met with an accident he can prove it in the same way that he attempted to prove it with us by his own testimony. I don't think it is a case if he had a witness that would help, so I say, I would like that permission and as far as stipulations are concerned we have already agreed to the wage rate as being \$20.90, and——

Mr. Lewis—What else did we agree to, Mr. Meredith?

20 Mr. Meredith—And the Respondent can also admit that this man was in its employ on the dates stated.

Mr. Lewis—What else did we agree to?

Mr. Meredith—What is that?

Mr. Lewis—We agreed to the wage rate and we agreed to the fact that he was injured while in the employ of the Respondent. We agreed to everything but the amount of disability. That was our stipulation the other day.

30 Mr. Meredith—I have already explained that by saying information came to me last evening at 4:30 which changes the picture here entirely and I am not in a position to agree to the happening of an accident.

The Commissioner—Of course, what you gentlemen agreed to is not a part of the record.

Mr. Lewis—That was part of the stipulation we had the other day.

The Commissioner—You may have had that understanding between you, but it can't be made

a part of the record, unless it is agreed to by both of you gentlemen; but certainly the amending of this answer at this time is hardly according to Hoyle.

Mr. Meredith—Judge, I am sorry about the late advice to everyone concerned, but I could not possibly advise everyone until after the normal working hours last night. That is when I first learned of the situation.

The Commissioner—There has been no occasion, according to this answer for the Petitioner, to prepare any testimony or interview witnesses or prepare the case in any way whatsoever by proving an accident. 10

Mr. Meredith—I am willing, Judge—I don't want to appear to be unfair in this matter—I am willing to pay the stenographer's costs this morning and agree to an adjournment, in case counsel feels he should have one. As I have already suggested, I don't think it places him in any different position than he was before, because if there was an accident, the Petitioner can tell us about it and he is here. 20

Mr. Lewis—You will accept everything the Petitioner says, is that it?

Mr. Meredith—No, I would like to hear him tell his story. We did once, unfortunately.

Mr. Lewis—I hate to believe your client is so terribly lax. Your company wouldn't give a dime up. It is hard for me to understand how the New Jersey Manufacturer's— 30

The Commissioner—Never mind about that. I don't see on what ground I have authority to permit the amendment of this answer. You see, you know something I don't know and on the ground of what you know, you want this thing swept off the record. How can I judge the merit of it?

Mr. Meredith—We are entitled to have the issue defined before we start. As the pleadings now

stand, it looks like the only question involved is the amount of disability.

The Commissioner—I can't judge whether that information is meritorious or not. Everything an insurance company presents isn't meritorious.

10 Mr. Meredith—I suggest we will present our evidence and if it is not found to be meritorious it can be taken care of in connection with the question of costs at the end of the case, but I feel we are entitled to proceed on some clear-cut issue and that is the one we must proceed on.

Mr. Lewis—Isn't it rather significant, and at the same time it is rather unusual, that we find out suddenly this man wasn't injured in the course of his employment?

Mr. Meredith—I grant it is unusual.

20 Mr. Lewis—It seems a bit unusual. After all this thing has been on for some time. This accident happened in August, 1932, if I remember correctly, August 9, 1932; 16 months ago, and now the Respondent first finds out that the man wasn't injured in the course of his employment. While we have nothing to conceal; nothing to be afraid of; my client just tells me they even sent one down to finish the job he was working on.

The Commissioner—The only thing I am concerned about is the inconvenience of all parties concerned who are here today.

30 Mr. Meredith—That can be all taken care of in the final award, if you prevail.

Mr. Lewis—Let me understand that.

Mr. Meredith—We deny that he met with an accident arising out of and in the course of his employment and deny he has any disability resulting from trauma.

The Commissioner—I want to say right now, in the presence of all, is it purely a matter that a strained back is not an accident. It is no use of putting off these proceedings on that score. A

strained back is an accident and there is no doubt about that. If that is the only excuse——

Mr. Meredith—Oh, no; we feel we have a very valid defense.

Mr. Lewis—If you will stipulate with me, that the Petitioner told Mr. Carter he was hurt and that Mr. Carter sent another man to do his work at the very time he complained of this injury, I will go ahead now. How can you overcome that?

Mr. Meredith—It is use of language. As far as I can go on a stipulation for present purposes, if you want to go on this morning, is that he complained of pain to his foreman. I will admit he probably did that, but if we are going to adjourn it is a matter of proof anyway. I know of nothing at the moment to indicate that he told his foreman he was hurt, which is an entirely different situation. 10

Mr. Lewis—As Mr. Stubbs indicated a few moments ago, you come in and on some deep, dark secret you want the answer amended. 20

Mr. Meredith—In other words, we are going to put you to your proof. If you can prove he had an accident well and good. Our feeling at the moment is that that cannot be established.

Mr. Lewis—O. K. All expenses of the adjournment are to be paid by the Respondent?

Mr. Meredith—I have already agreed to pay the stenographer's costs.

Mr. Lewis—Why should we pay these doctors? We are here and ready and they are certainly entitled to be compensated. 30

Mr. Meredith—That is a matter of costs to be assessed at the end of the case, if you prevail. Isn't that correct, Judge?

The Commissioner—Ordinarily that is the case, but here you come into court after they are called and then ask that this gentleman or some of these people shall pay them when it is a matter entirely

within your hands. I have heard of such a thing as dismissing a case and assessing costs.

Mr. Meredith—It seems to me that that can be readily held over.

10 The Commissioner—I have never found that the New Jersey Manufacturer's reneges in matters of that kind; they have always been entirely fair within my direction, so far as I know, so I am not worried about that part of it. This young lady came here and wanted this thing finished up this morning. It is a matter of concern and just how this information should come in at the last minute, it is like going into heaven and finding the gates shut. Be careful you don't find that in your experience. I don't believe under the circumstances we can do anything this morning, so I will set the matter down again for further hearing and you will receive proper notice and I will take care of the matter of costs later.

20 The hearing then adjourned.

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

JOSEPH FALEY,

Petitioner,

vs.

30 TRENTON MALLEABLE IRON
COMPANY,

Respondent.

TRANSCRIPT OF TESTIMONY

Transcript of testimony taken in the above entitled matter before HON. WILLIAM E. STUBBS, Deputy Commissioner of the Department of Labor at Trenton, New Jersey, on Thursday, November 9, 1933.

Appearances:

Irving H. Lewis, Esq., for the Petitioner.

George Meredith, Esq., for the Respondent.

John F. Trainor, Court Reporter.

Mr. Lewis—Would your Honor have any objection if I called some of my witnesses out of turn?

The Commissioner—No, I have no objection.

Mr. Lewis—Some of the employees of the Respondent.

The Commissioner—All right.

10

ORE CARTER, sworn for the Petitioner.

Direct Examination—By Mr. Lewis.

Q. By whom are you employed, Mr. Carter?

A. Trenton Malleable Iron.

Q. Company? A. Yes, sir.

Q. Of this city? A. Yes, sir.

Q. How long have you been so employed?

A. Well, I have been there about four years.

Q. In what capacity? A. Foreman.

Q. Do you know Mr. Joseph Faley?

A. Yes, sir.

Q. Was he employed by the Trenton Malleable Iron Company? A. Yes, sir.

Q. Is he employed under your immediate supervision? A. Yes, sir.

Q. Do you recall August, 1932?

A. I recall the time he got hurt; yes, sir.

Q. Was he employed by the Trenton Malleable Iron Company on August 9, 1932? A. Yes, sir.

Q. Did you see him on August 9, 1932?

A. Yes, sir.

Q. Do you know how long he had been employed prior to this accident?

A. I couldn't tell you that. He has been there ever since I have been there. I understand he has been there a good many years.

20

30

Q. What was the nature of the work Mr. Faley was employed to do? A. He is a moulder.

Q. Just explain that, will you please?

A. That is pretty hard to explain. It is an operation doing casting and making moulds out of sand and it is pretty heavy work.

Q. He is an iron moulder, is he not?

A. Yes, sir.

10 Q. On the date of the accident he was doing that work which he had been doing for a number of years? A. Yes, sir.

Q. And you say it is heavy work?

A. Yes, sir.

Q. Did you see this accident? A. Yes, sir.

Q. Just tell us what happened?

20 Mr. Meredith—Just a moment, please; I ask that both that question and answer be stricken out, inasmuch as it is a conclusion of counsel. That is exactly why we are here, to establish whether or not the man had an accident. It is also a conclusion of the witness to answer it as he did. He can describe what he saw, if he saw something; but his conclusion that it was an accident, I object to that.

Mr. Lewis—I thought I had laid the ground work for that question by showing he had done this work for a number of years. I intend to connect this up with the medical testimony.

30 The Commissioner—Let's avoid the use of the word accident, if we can, and ask what occurred on August 9, 1932.

Q. What happened?

A. Well, sir, I was standing on the gangway around 3 o'clock and I happened to be looking over to the side of the foundry he was working in and he started to set a mould down right next to his

bench and he went to go down like this and he went right down on his knees. He took hold of his bench like this and I said, "What's the matter Joe," and he said, "I got a pain in my side, he said; maybe I will be all right in a few minutes." After a few minutes I came back and said, "Joe, can you go on," and he said, "No, sir, I have got to go home." I said, "Do you want me to send you home," and he said, "No, I am going to try and walk." I said, "Joe, if you are not able to walk I will get a car and send you home," and I had to get a man to finish his day's work and that is the last time I saw him. 10

Q. You reported this to your employer?

A. I didn't report it that afternoon. The next morning it was reported.

Q. Had Mr. Faley been working under your supervision prior to this? A. Yes, sir.

Q. Had he ever made any complaint of any pain or inability to work before? A. No, sir. 20

Q. Had you noticed him working before?

A. Yes, sir.

Q. Would you say in the times he had been working prior to this happening he was handicapped in any way?

A. He was not. He could do any kind of a job.

Q. He was able to do all the work you required him to do without any impairment? A. Yes, sir.

Mr. Lewis—Your witness.

30

Cross Examination—By Mr. Meredith.

Q. This mould you saw him lifting, have you any idea how heavy it was?

A. Yes, sir; we weighed it this morning.

Q. How much did it weigh?

A. Seventy-three pounds.

Q. That was about the usual run of the moulds he was working on that particular time?

A. We have some lighter, but we never have them under 35 or 40 pounds; but we have them up to 100 pounds.

Q. He had prior to that time occasion to lift and move moulds weighing as much as 100 pounds?

A. I wouldn't say that; but he has handled moulds that size before, yes.

Q. That was part of his regular work?

A. Yes, sir.

10 Q. And about how frequently in the course of a day would this particular man have to lift or move a mould?

A. This one day he put up, I think, I don't remember how many moulds; the timekeeper will know. I think, 81 or 71.

Q. Would you say prior to the time he stopped his work on that day he had lifted about 71 moulds?

A. Yes, sir.

20 Q. And they all weighed approximately the same, around 70 or 73 pounds?

A. A mould may vary a couple of pounds.

Q. But we can safely say then, all these moulds were more or less uniform in weight and varied between 70 and 75 pounds each? A. Yes, sir.

Q. They were all the same type of moulds?

A. Yes, sir.

Q. What time of the day was this?

30 A. Around three o'clock. I can't remember the exact time. Just the head of the heat; the head of the pouring; yes.

Q. And that you say was day in and day out work and had been so for the four years you were in charge of his work?

A. He was not on this one particular job. He would get one order out and then I would give him another. Sometimes the moulds varied in different sizes.

Q. On this particular job we are speaking about, had he lifted moulds of the same weight the day before?

A. No, that was a new mould he was working on that day. If I had his time sheet I could tell exactly what he did.

Q. Now, as I understand you, Mr. Carter, you stated prior to the time he stopped work around 3 o'clock on this day he had lifted or handled, we will say, approximately 71 or 72 moulds?

10

A. I don't know for sure whether he worked that particular job. He was working that job, but I can't say if he worked that job all day. I might have changed him that morning. I can't remember that far back. We have his time slip here.

Q. Assuming he did lift that many, as you say, he would have to handle or lift that mould more than once during each operation?

A. Not the complete mould; yes, sir.

Q. Describe this job of moulding he was doing at the time, just where he would get the materials?

20

A. From the start of the mould to the finish?

Q. Yes.

A. We have to line up what we call a drag; that is the bottom half of the mould.

Q. What do you do when you ram up a drag?

A. We throw sand in it and ram it solid.

Q. Where would Mr. Faley get it?

A. If you have never been in a foundry, it is mighty hard to explain, if you never saw any casting. We mould on a pattern, the top half we call a coat and the bottom half the drag. The drag we ram first. We put our drag flask on and fill that full of sand and put our bottom board on and turn it over and take what we call a match. We take that off and put our top half of our coat on and then we draw our pattern off and put the top half back on and take our flask off and set our mould out on the floor.

30

Q. All during this operation the man would have to lift these various parts?

A. He would have to shovel his sand up on his bench and put it in his mould.

Q. About how much sand would you put in a drag; how many shovels full?

A. I imagine this particular job you would probably put three or four.

10 Q. So, that in that operation the ram would be already set up on the bench, is that right, or would he have to set it up there?

A. He would have to set it up.

Q. How much would the ram weigh?

A. The ram is a mallet. The match runs around 35 pounds.

Q. He would lift the drag from the floor and put it on the bench?

20 A. No, we have a shelf here and he takes his match off and puts his match on his shovel and then he puts his top half on and then when he draws his pattern and lays it right over on the match and then he slips it over on his bench and gets the lower half of his flask and fills it full of sand.

Q. Maybe we can shorten this——

The Commissioner—You are asking a lot of questions that won't help a whole lot.

30 Mr. Lewis—As I understood it, there was going to be some amendment to the defendant's answer the last time. Just what is the amendment?

Mr. Meredith—A general denial stated on the accident at the time.

Mr. Lewis—That the accident happened and you didn't receive notice and all that sort of stuff, if that is a general denial, we can go all through this thing; but I think it is wasting a

lot of time, because here is the foreman of the Respondent that say the accident happen.

Mr. Meredith—I object to that statement of counsel and ask that it be stricken out, that an accident happened. It is subject to proof.

The Commissioner—I don't see the use of all these questions about how many shovels full of sand it took to fill the thing. It seems we have a tiff every time we get together about your asking useless questions. If you don't discriminate between what is a useful question and a useless question—— 10

Mr. Meredith—I feel I am entitled to put in our defense of this matter. We feel we have got a good one. It may be material in questioning the doctors later on.

The Commissioner—In what?

Mr. Meredith—In questioning the doctors later on. I sat through a hearing here this morning and it seemed to me a whole lot more time was wasted. 20

The Commissioner—I agree with you, but you notice there weren't a lot of objections made; they allowed things to get through and get done.

Mr. Meredith—For that reason the hearing lasted quite a long time and a lot of time was wasted because immaterial things went in.

The Commissioner—I am glad you were able to see they were immaterial. 30

Q. Mr. Carter, I merely want to get this idea. I think, it is your idea that in assembling a mould, in order to get this completed product of a 72-pound weight, the moulder would have to in various steps lift these various parts, put them together, assemble them into one part and in the operation he shovels three or four shovels full of

sand and when that is all accomplished you have a 72-pound weight, is that it? A. Yes, sir.

Q. And in order to get those various parts he must necessarily have to do some bending and stooping? A. Oh, surely, it is all bending.

Q. It is all there on the bench before him?

A. No, he has to bend over to get his sand.

Q. The sand is on the floor and the parts are on the floor? A. Right alongside of his bench, yes.

10 Q. This sand, you say, three or four shovels full would fill a mould of that size? A. The drag.

Q. Have you any idea how much the sand would weigh to fill a mould of that size?

A. It is almost a guess, because I don't know.

Mr. Lewis—That is your answer.

Q. At least, the greatest part of the mould is the sand?

20 A. I would say this three or four shovels of sand in the drag and the coke and the outcome, we weighed it this morning, was 73 pounds.

Mr. Meredith—That is all.

Re-direct Examination—By Mr. Lewis.

Q. Have you done any of this work yourself?

A. Yes, sir.

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

Q. And in your opinion would a man with any physical handicap be able to do that work?

Mr. Meredith—I object.

A. No, sir.

30 Mr. Meredith—I object to that; just a minute. I object to the question on the ground it is a conclusion of this witness and I doubt

if he is competent to answer the question. It seems to me it involves a lot of matters relating to anatomy that only a physician could answer.

The Commissioner—He is better able to judge than I am; he has done it and I never have.

Mr. Lewis—That is why I asked him. After all each doctor's testimony is a conclusion. This man specialized in that work.

10

The Commissioner—In his work he is better able to judge than anybody in this room, unless there are other workers here. Go ahead, anything further?

Mr. Lewis—I didn't get his answer.

Answer repeated by the Court Reporter.

Mr. Lewis—That is all.

20

Re-cross Examination—By Mr. Meredith.

Q. You reported what you saw to whom? You say you made a report the next morning. Who did you report to? A. To the timekeeper.

Q. What is his name?

A. Just a minute before I answer that. Joe Faley's daughter came the next morning and I went in the office with her and the report was made out and mailed.

Q. Who did you make your report to? The timekeeper? 30

A. The timekeeper, the next morning.

Q. What is his name?

A. Warren. The two of us reported it the next morning. I don't know what he said, but I stood right there and heard it reported.

Q. Did you report it or did Mr. Faley's daughter report it?

A. I don't remember. It is so far back. I reported, yes. I told Mr. Warren just how he got hurt and what happened and he wrote it down.

Mr. Meredith—That is all.

Re-direct Examination—By Mr. Lewis.

Q. You really should have reported it the day before? A. I should have, but I was busy.

Q. You saw it and you knew it happened?

A. Yes, sir.

10 Q. And you were the foreman? A. Yes, sir.

Mr. Lewis—That is all.

Mr. Meredith—That is all.

H. L. WARREN, sworn for the Petitioner.

Direct Examination—By Mr. Lewis.

Q. By whom are you employed, Mr. Warren?

A. Trenton Malleable Iron Company.

Q. How long have you been so employed?

A. 27 or 28 years.

Q. In what capacity? A. Timekeeper.

20 Q. Do you know Mr. Faley? A. Do I know him?

Q. Yes. A. I do.

Q. On August 9, 1932, was he employed by the Trenton Malleable Iron Company? A. He was.

Q. And was he working on August 9, 1932?

A. 1932, he was.

Q. And do you have a report of his time on that day and the work he was doing?

A. I have; yes, sir.

30 Q. Just tell us what he was doing from your report, if you need it to refresh your recollection?

A. He made 47 moulds.

Q. On the day of August 9, 1932?

A. August 9, 1932.

Q. Was that a complete day's work?

A. That was his day's work. It was counted off, and he turned in 47 moulds.

Q. At what time did he check out?

A. He checked out, I think it was about 4 or 4:30. I wouldn't say for certain, because this sheet doesn't show the time; but his time cards will. This is just the department record that he is paid from, the account of his work turned in from this sheet.

Q. Do you know who his foreman is?

10

A. Yes, sir.

Q. Who is his foreman? A. Ore C. Carter.

Q. The gentleman who just testified?

A. Yes, sir.

Q. He works under the supervision of Mr. Carter? A. He did, yes, sir.

Q. Do you have his earnings there for the week prior to August 9, 1932? A. No.

Q. Do you know of your own knowledge how much time Mr. Faley lost due to sickness or illness prior to this happening?

20

A. I have never known him to be off—

Mr. Meredith—Just a moment please, I object to that judge, unless the time is more specifically fixed and I wonder too, if this gentleman is in a position to know from memory why a man was off on a particular occasion.

30

Q. You say you know Mr. Faley? A. I do.

Q. And you have charge of these records and have had for the last 27 or 28 years?

A. Well, not exactly. No, I wouldn't say that. I started that 27 years, but I have been advanced and when things became slack I was put back on the job again.

Q. Do you know in the past three or four years whether or not Mr. Faley lost any time from work?

A. I couldn't say. I know he hasn't been off any period, but I did notice he had a day off for something, maybe like a cold. Lots of the men are off a day and then come on. Not so far as I know he hasn't lost any time.

Q. This accident was reported to you?

A. It was.

Q. When? A. On Wednesday morning.

Q. The day following the happening?

10 A. The day following the happening.

Q. By Mr. Carter?

A. Mr. Carter brought this lady in, Mr. Faley's daughter, in to me and he said, "Joe has been hurt," and I asked what it was and he said, "He went home last night and he had to go to Dr. Lavine," and I made out the report and sent it to the Manufacturer's Casualty Company within the time limit.

Q. And Mr. Carter was there?

20 A. He brought the lady in to me.

Q. He was the one that told you about it?

A. He did.

Mr. Lewis—Your witness, Mr. Meredith.

Cross Examination—By Mr. Meredith.

Q. Did you say he checked out at 4:30 P. M. on that day? A. When the heat was over.

Q. In other words when he had completed these
30 47 moulds he had completed his day's work?

A. He had completed his day's work?

Q. Yes.

A. Outside of pouring which he could not do. He could not complete his day's work; he had to have a man to help him.

Q. Do you know that to be a fact from what you saw? A. I didn't see any of this.

Mr. Meredith—I ask that that be stricken, it is something that is not within the witness's knowledge.

Mr. Lewis—It is responsive to your question.

The Commissioner—Does that record show whether or not he completed his day's work?

The Witness—This record shows where he had made up to this day's work. May I explain something to you. As Mr. Carter told you, that man moulded his moulds. We consider a man's moulding is finished when he pours his heat. He has to make these moulds and it takes him a day to make the moulds and when the iron is ready to pour he pours the iron; but this man could not pour his iron. 19

The Commissioner—He did not pour it?

The Witness—No.

The Commissioner—And you know that as a fact? 20

The Witness—Yes, sir.

Mr. Meredith—That is what I object to. He is telling us something from what somebody told him. He has already stated he was not there and did not see the man on that afternoon to know what he did.

The Commissioner—What time did this occurrence take place?

Mr. Lewis—Three o'clock.

The Commissioner—What time do you usually close your plant? 30

The Witness—Five o'clock.

The Commissioner—And the witness testified he went home about four o'clock?

The Witness—Yes, that is when we pour our heat. The foundry don't shut down. When we are through the heat. When the iron is poured. That is as far as the moulders are done, but he would have gone home about half-

past four. It takes us about an hour to pour the iron.

Re-direct Examination—By Mr. Lewis.

Q. Can you tell from your records whether he poured any iron? A. No.

Q. That wouldn't be on the record?

A. No, it just shows the amount of work put out by this man and was paid for to this man.

10 The Commissioner—I think we will allow the objection and have the foreman testify as to that.

Re-cross Examination—By Mr. Meredith.

Q. The sheet you have before you there, does that show what the man was paid for that particular day's work? A. Yes, sir.

Q. What was he paid for that day's work?

20 A. Forty-seven moulds at 4 cents—I beg your pardon, $39\frac{1}{2}$ at 4 cents, 32 at $2\frac{1}{2}$ cents. You see this is the number and this is what the man poured and the difference goes to the clearing house and is passed and inspected and what is good the moulder is paid for. From that 47 moulds he got $39\frac{1}{2}$ good moulds which he will get paid for at 4 cents.

Q. He was paid, how much in money?

A. $39\frac{1}{2}$ times 4.

Q. Does this represent the total wage he got?

A. This is for the whole week on that one item.

30 He put up a total of $39\frac{1}{2}$ and 8, which is $47\frac{1}{2}$, and he gets paid for 48 moulds that week.

Q. And this job he gets paid—

Mr. Lewis—If you are trying to prove his earnings by this witness, I will object because it is not proper cross-examination.

The Commissioner—We agreed on the earnings the last time we were together, \$20.90 per week.

Mr. Meredith—No, I wasn't aiming at that, Mr. Lewis. The witness previously stated he was paid for a complete day's work and I wanted to verify that.

Q. Does the record you have there show he was paid for that complete day's work? A. Yes.

Q. This man was a piece worker, was he not?

10

A. Yes, sir.

Q. And piece workers are not confined to hours, as far as quitting time is concerned; they stop when they are through?

A. All of them stop when they are through.

Q. Regardless of the time of day? In other words, they don't work up to five o'clock and quit when the whistle blows. If their work is through at ten minutes to five they are free to go home?

A. Yes, sir.

20

The Commissioner—How about if they complete the day's work at half-past four or half-past three?

The Witness—When that iron is out there is a bell that rings, that shows the iron is out and they can go home.

The Commissioner—Is there any set time for that bell to ring?

The Witness—When that iron is poured we try to get out about the same time.

30

The Commissioner—What time is that?

The Witness—Well, at the present time eight hours it would be about four o'clock, but on this day here, this was in 1932, we were running one heat a day and that would be about four to five o'clock.

Mr. Meredith—That is all.

Mr. Lewis—I will recall Mr. Carter.

ORE CARTER, recalled by the Petitioner.

Re-direct Examination—By Mr. Lewis.

Q. Was Mr. Faley able to complete his day's work? A. No, sir.

Mr. Meredith—Just a minute, I object to that.

Mr. Lewis—On what ground?

10

Mr. Meredith—As a conclusion of the witness. I object to the competency of the witness. I don't know how any layman can look at a man and say he is or is not able to do something.

The Commissioner—I think, we had better ask the witness if he did complete his day's work; if he did what he should have done that day.

20

The Witness—No, sir, he did not. The man is here as a witness that finished pouring off. When a man can't hold a hand ladle he isn't able to pick up 60 pounds of iron and walk down the walk.

Mr. Lewis—Your witness.

Re-cross Examination—By Mr. Meredith.

Q. You previously testified this man went home about 4:30?

30

A. I couldn't say right to the minute. I think, he went home before that. I went over and asked him, —I wanted to take him home in the car and he said "no."

Mr. Lewis—Just a minute. Please answer Mr. Meredith's questions.

Q. You stated that you observed him at 3 o'clock, and what I would like to know is what did the man do between 3 o'clock and 4 o'clock or 4:30, whenever he went home, if you saw him. Did you stay there to observe his work. A. No.

Q. You weren't there?

A. I don't know whether it was four or three. I said around 3 o'clock when I saw the man go down on his knees and pull himself up on the bench. I asked Joe what was the matter and he said, "I got a pain in my back." 10

Q. You, I assume, stayed there with him a few minutes? A. Yes.

Q. This conversation you had took that long and then where did you go?

A. I went down the gangway.

Q. You left him? A. Yes, sir.

Q. Then you don't know what he did for the next hour or so, do you?

A. Yes, sir, I was back again in ten minutes time. That is when I asked him to take him home. 20

Q. During that ten minutes interval, you don't know what he did, do you?

A. No, sir, I can't be there and be in another place too.

Q. He might have done some other work after that?

A. No, I am satisfied there were no more moulds made.

Q. If you weren't there, you don't know; at least the possibility is that you don't? 30

A. I couldn't swear he didn't, but I know when I see a man in a shape like that, I am not going to have him do any work.

Mr. Meredith—That is all.

Mr. Lewis—That is all.

CHARLES OZZA, sworn for the Petitioner.

Direct Examination—By Mr. Lewis.

Q. Where are you employed, Mr. Ozza?

A. I don't say much.

Q. Where do you work. A. Trenton Malleable.

Q. Do you know Mr. Faley? A. Yes, sir.

Q. Do you remember when something happened to him last summer?

A. I know that. I poured the iron.

10 Q. You poured the iron that Mr. Faley was supposed to pour? A. Yes, sir.

Q. Who told you to pour that iron?

A. The foreman.

Q. Mr. Carter? A. Yes, sir.

Q. Did you see Mr. Faley there?

A. No, I don't see him at that time.

Q. Did you see him before?

A. I see him in the morning, but I don't see how he got hurt.

20 Q. In the morning was he working? A. Yes, sir.

Q. What kind of work do you do?

A. The same as Mr. Faley, but a different job.

Q. What kind of work? A. Moulder.

Q. Iron moulder? A. Yes, sir.

Q. And you were working on another job?

A. Yes.

Q. Then Mr. Carter came over and told you to finish the job Mr. Faley was working on?

A. Yes, sir.

30 Q. Where was Mr. Faley then?

A. He got home, I never seen him at that time.

Mr. Lewis—Your witness, Mr. Meredith.

Cross Examination—By Mr. Meredith.

Q. He went home at what time?

A. I don't know, but I think after three o'clock.

Q. You are sure he didn't help you? A. What?

Q. He didn't help you to do this pouring?

A. No.

Q. Did you help him? A. Yes.

Q. Did he work with you?

A. Yes, he worked in the same place.

Q. When you were doing this pouring I asked you if he helped you and you said, no. I asked you did you help him do his pouring and did he work with you on the pouring?

A. No, he no help me. I pour for him.

10

Q. You had some pouring of your own to do, didn't you? A. What?

Q. You had some of your own moulds to pour?

A. Yes.

Q. Did you pour them? A. Yes, sir.

Q. You have already stated you poured Mr. Faley's moulds too? A. Yes, sir.

Q. What time did you quit work that night?

A. After the heat.

Q. What time?

20

A. I can't say what time, after 4 o'clock anyhow.

Q. After 4? A. Yes.

Q. How long does it take you to pour 47 moulds?

A. About half an hour, or more than that.

Q. You say longer than that? A. What?

Q. Longer than that? A. Yes.

Q. How long does it take you to pour 47 moulds?

A. A half hour or over.

Q. Do you recall what time you started pouring those moulds that day? A. I can't tell that.

30

Q. How do you remember it was 3 o'clock that the boss told you to pour moulds?

A. After 3 o'clock. I don't know what time we finished. Sometimes a half hour it takes and sometimes an hour and sometimes three-quarters of an hour. I don't know how long it takes me at that time.

Q. How many of your own moulds did you pour that day?

Mr. Lewis—If Your Honor pleases, is this very important how many moulds Mr. Ozza poured that day?

The Commissioner—It might be, if he had 100 moulds left, he wouldn't have had a minute left to pour the other fellow's.

Q. How many of your moulds did you pour that day, the ones you had fixed first? A. Me?

Q. Yes.

10 A. I no finish any, because the foreman told me to go over and do Joe Faley's.

Q. Before you said you did your own and you also did his. Did you or didn't you? A. Yes.

Q. Did you pour your own moulds?

A. I no understand.

Q. You made moulds early in the day didn't you?

A. Yes, sir.

Q. How many did you make, about?

A. That same day?

20 Q. Yes. A. I forget that.

Q. What? A. I forget how many I made.

Q. Did you make five or ten or fifty?

A. I made about 45, something like that.

O. You then made probably about 45 moulds that day and when you finished making your moulds you poured the iron into those moulds that you made, didn't you? A. Yes, sir.

Q. Did you finish pouring your moulds?

A. Yes, sir.

30 Q. And then you went ahead and poured Joe Faley's moulds, did you?

A. Yes, sir.

Q. You finished both jobs?

A. Not mine, I no pour all.

Q. Who poured the others?

Mr. Lewis—Objected to. If Your Honor pleases, this witness has repeatedly said while

he was working on his job, the boss called him over to finish Faley's. After all, these are employees of the Respondent and I am taking a chance in calling these people.

The Commissioner—Sit down and we will take the chance.

Q. Who finished pouring your moulds that day?

A. I finished after awhile Joe Faley's moulds.

Q. Then you did finish pouring his and yours, 10
didn't you? A. Yes.

Q. Did anybody help you on either batch of moulds? A. No.

Q. Can you place the hour that you started pouring the moulds? A. What?

Q. Can you state the time as closely as you can when you started to pour moulds, either yours or Faley's? A. I tell you before three o'clock.

Q. How much after, that is what I want to know?

A. About twenty minutes after three, half-past 20
three, I can't tell you for sure. That is a long time ago.

Q. Your best recollection is it was twenty minutes after three or half-past three that you started? A. Yes, something like that.

Q. Did the foreman ever before ask you to pour moulds for anybody else?

Mr. Lewis—Objected to. Is that very material? 30

The Commissioner—Don't talk when he is talking, because he talks so loud I can't hear you.

Mr. Lewis—Is that material?

The Commissioner—It might be or might not be.

Mr. Lewis—Whether the foreman ever asked this man to pour iron for some other man.

The Commissioner—I don't mind hearing the truth.

Mr. Lewis—Me either.

The Commissioner—Go ahead and answer the question. Do you know what the question is?

The Witness—No.

10 The Commissioner—Did the foreman ever tell you to do any other man's work before, after you poured your moulds?

The Witness—The foreman told me to go and pour and I have to go.

The Commissioner—Did he ever tell you before this time to go and do it?

The Witness—No.

The Commissioner—Never any other time?

The Witness—No.

20 Q. Were these moulds separated, the ones you made and the ones Faley made?

The Commissioner—What do you mean separated?

Mr. Meredith—Into different piles, different places in the room?

A. I don't understand that.

Q. You made some moulds that day, didn't you?

30 The Commissioner—Mr. Meredith, I don't see what difference that makes whether they were altogether or separated. We can go on and ask questions for a month.

Mr. Meredith—I am wondering how these matters stand out so clearly in this man's mind for four years.

The Commissioner—It hasn't. Things have been sort of hazy right along. Why do you

say that? He keeps saying it is too long to remember and yet you say the matter stands out so clearly in his mind. What difference does it make whether they were close together or far apart?

Mr. Meredith—I think it makes this difference, I can conceive this possible situation that the moulds are altogether and the foreman figures them up and he don't know whether they are his or Faley's or whose.

The Commissioner—All of which don't help the case one way or another. 10

Mr. Meredith—It helps to this extent, that the way the case has been presented so far it appears this man was assigned to do something this other man couldn't do. I can conceive that is quite a common occurrence for a man to be pulled off his job to do something else. I would like to know if that is a possibility.

The Commissioner—I don't get your point, but go ahead. It don't make sense to me, but go ahead. 20

Q. Were these moulds in different piles, the ones you made and the ones Faley made?

A. You mean make the moulds?

Q. Yes.

A. I can tell you the different way like the foreman say before. I can say this way. Anybody do just the same, take the drag and put it on a bench. 30

Q. No, what did the foreman say to you when he told you to pour? What did he say?

A. Nothing, he told me to go on that floor and pour off the moulds, Joe's.

Q. And you found some moulds there and you poured them, is that right? A. Yes, sir.

Mr. Meredith—That is all.

Re-direct Examination—By Mr. Lewis.

Q. Did he tell you Joe had been hurt?

Mr. Meredith—I object.

Mr. Lewis—If Your Honor pleases, Mr. Meredith opens the door by asking this witness what a preceding witness had told him and I certainly can follow it up by asking what the witness said. I am simply going one step further than him.

10 Mr. Meredith—I object to it. It is leading and this witness has already said, the foreman told him to go down and pour the moulds.

Q. Did he say anything about Joe being hurt.

Mr. Meredith—I object.

Mr. Lewis—That is all.

Mr. Meredith—That is all.

DR. PAUL J. FINEGAN, sworn for the Petitioner.

Direct Examination—By Mr. Lewis.

20 Mr. Lewis—I suppose you will admit the doctor's qualifications?

Mr. Meredith—Let's have them stated on the record and then we will have them.

Mr. Lewis—Won't you admit the doctor's qualifications?

Mr. Meredith—I prefer that you establish them.

Q. Doctor, you are a practicing physician?

30 A. Yes, sir.

Q. And a graduate of what school?

A. University of Pennsylvania.

Q. How long have you been practicing?

A. Between 2 and 2½ years.

Q. And you have appeared frequently in this Court? A. Occasionally.

Q. And where do you maintain your offices?

A. In Trenton, Greenwood Avenue and Chambers Street.

Q. Do you specialize in any particular branch of medicine? A. Yes, bone and joint surgery.

Q. And you have been specializing in that how long? A. Since I began to practice.

Mr. Lewis—Is the doctor qualified, if your Honor pleases? 10

The Commissioner—He is satisfactory to me.

Q. Have you known Mr. Faley. A. Yes, sir.

Q. Did you have him under your professional care? A. I have.

Q. Will you please tell the Court just exactly what you found when you first examined him and your treatment right up to the present time? 20

A. I first saw Mr. Faley on the 27th of March of this year. At that time I was not treating him, but he was referred to me by Dr. Lavine for examination and estimation of his present condition at that time. I did examine him and found that he had pain and tenderness over the region of his right sacro iliac joint and over the lumbo sacro joint, the lower spine. His forward bending, the various tests he goes through were limited; standing 60 degrees forward, sitting and lying about the same. I noticed in the patient's dressing and undressing he seemed to be unable to remove or put on his right shoe and I questioned him about that inability and found that on examination he was unable to bend his right leg more than 65 degrees when the knee was straight and about 95 degrees when the knee was bent. That was accompanied by a great deal of pain at that point. He had pain 30

on lateral motion of the lower spine and also attempt at rotary motion. The Gaenslen's sign, which is a test which we perform to try and discover the actual point of pain in his back and it was found to be positive over the right sacro iliac joint.

Q. What do you mean positive?

10 A. That is eliciting pain on motion. It consists of putting the patient on the edge of the table and hyperextending one leg while flexing the other and if the patient has some pathology, or irritation, or source of pain in one or the other of those two joints that pain will manifest itself in that joint whether you flex or extend that one leg. What I mean is this, whether it is this way or this way, the pain will be on the same side. I decided at that time—I looked at the X-rays at the Manufacturer's Hospital—and found some suggestion of genuine osteoarthritis in the lower lumbar spine. I suggested at that time that Mr. Faley had a disability of approximately 25 per cent. of total and suggested treatment which was to consist of a back brace and physiotherapy.

20 Q. Were those treatments furnished by you, doctor?

A. No, I wasn't treating him at that time.

Q. I mean afterwards?

30 A. No, not for some time. I next saw the patient on June 13th, less than three months later and thought at that time that his status was approximately the same. At that time he was wearing a brace that had been furnished him, but he told me he had no treatment; that is the suggested physiotherapy. I suggested that he get that treatment, if possible, at the Rehabilitation Clinic, because his income was such he couldn't get it privately, but that didn't seem to work out; they couldn't make the arrangements, so he said he would undertake to pay me for the treatment, if I would extend him credit, which I did.

Q. You treated him?

A. Yes, I treated him. I began giving him diathermy to his lower back and I think the first treatment was about the beginning of August or the beginning of July, and about the second treatment this patient complained of pain on one side of his back; that was on the left side, but not on the right side, when the heat from the diathermy seemed to reach a certain point. If you, in giving diathermy open your spark gap, beyond a certain point of endurance, the patient will experience pain of the skin. A very significant thing was pointed out by him, that he had pain on one side and not on the other, which was a point that hadn't manifested itself to me before, so I went over him rather carefully to test out his sensation and found he had a hypo-anesthesia of his lower back which on careful tracing corresponded rather closely to the distribution of the superior gluteal nerve on that side. That was very interesting and we then referred him to Dr. Holland. As I said previously I had considered his main difficulty was this osteoarthritis and low back strain. I referred him to Dr. Holland at that time to see if there was any permanent nerve damage that might better be treated by him.

10

20

Q. Did this hypo-anesthesia come as a result of his injury?

A. I don't know whether it was there previously or not, because I had never noticed it prior to his complaining of pain on one side and not on the other.

30

Q. You mean on your first examination that was not indicated? A. No.

Q. If that condition had been present, would you have been able to find it by examination?

A. I wouldn't be likely to examine him for that unless he had some symptoms. In other words, it was a neurological thing and he had no symptoms

of it, so I had never discovered it. I didn't even believe it was present.

Q. Doctor, just what do you mean by this hypoesthesia?

A. It is a lowering of sensitivity of the skin to pressure, pain or any external influence that might be brought upon it.

10 Q. In other words, while you were applying heat and he was able to feel it, then there is no hypoesthesia? A. No.

Q. When you applied the heat and he wasn't able to experience that sensation of heat—

A. The hypoesthesia was present. I could say that. Of course, the patient doesn't speak very good English and it is sometimes hard for him to get his idea across and he might not think to mention that the heat was not equal on two sides. As I said, when you stepped up the spark gap then he would feel a burning sensation on the normal side and it would not be felt on the hypo-aesthetic side. Looking over the x-rays again—

20

Q. Do you have those x-rays here, doctor?

A. With that thought in mind; that is, the distribution of the superior gluteal nerve—that is, each nerve has a certain part of the skin to supply and I find on the right side—

Mr. Meredith—Just a minute, your Honor, it seems to me these x-rays, if the doctor is going to testify from them, ought to be proven in some way.

30

A. These x-rays were taken on June 13th at my suggestion by Dr. Davidson, of Mr. Faley.

Mr. Lewis—Do you want me to bring Dr. Davidson here?

Mr. Meredith—In just a minute I will be able to tell you. I have no objection to their being offered, Judge, without formal proof.

Mr. Lewis—Thank you, sir.

The Commissioner—Doctor, I have had a little trouble in hearing what you are saying, you are speaking so low. If you can help me out by speaking just a little louder, I will appreciate it.

The Witness—I re-examined this man—

Mr. Lewis—Pardon me, doctor, suppose we have these x-rays marked?

(X-rays marked Exhibits P-1, P-2, P-3 and P-4.) 10

A. These x-rays which I have here, taken by Dr. Davidson, P-1 and P-4 being pairs of stereoscopic x-ray plates taken of this man's lower lumbar spine and pelvis. In examining these pictures on a stereoscopic machine which throws your objects into three dimensions there is seen to be some lessening of the intervertebral foramen between the fifth lumbar and the sacrum which is the point of exit of the nerve corresponding to the area of hypoaesthesia. 20

Q. What do the other x-rays indicate?

A. The other x-rays are lateral views and there shows there a certain amount of new bone formation, which I believe is a part of this osteoarthritis process that has been visible in previous films.

Q. Were any subsequent x-rays taken, doctor?

A. To these? Not that I know of.

Q. And did you continue treating him?

A. Yes, I suggested to this patient that diathermy, as such, was merely palliative, and would not cure his condition as it was apparent there was an excess of bone at that point which caused pressure on his nerve and every time he moved there would likely be pain, and it was my suggestion that he have an operation performed, which would be in the nature of a fusion of his lumbo-sacro joint, 30

which I hoped would alleviate his pain. He has not been willing to have that done, because he felt that it would be too much of a risk.

Q. You are still treating him? A. Yes.

Q. Now, doctor, is Mr. Faley able to go to work?

A. No, sir.

Q. How much of a functional permanent disability does he have?

10 A. At the present time I would say he has at least 50 per cent. permanent disability in the light of what we know of his condition.

Q. Doctor, is this condition apt to be progressive and grow worse?

Mr. Meredith—I object, your Honor; it is a matter of speculation. I think, the future will take care of itself.

The Commissioner—I fear I didn't catch the question.

20

(Question repeated.)

A. Yes.

The Commissioner—You can't tell whether it will or will not.

The Witness—It is likely.

30 The Commissioner—In a compensation case, if it does grow worse within a reasonable time, he has his redress. I think, we will just leave that out, because we can't use it.

Mr. Meredith—May I have the witness' answer stricken. We had them in two different forms.

The Commissioner—We had better strike them both out. Maybe they contradict each other.

Q. One more question, what is your bill, doctor, for services rendered?

A. I don't have a bill to date. I usually bill people at the end of each month.

Mr. Meredith—May I object to the proof of this witness' bill as part of this record. I don't think, it is at all material.

Mr. Lewis—It is very material.

Mr. Meredith—And for that reason I object to it.

The Commissioner—What has been your charge against that man for treatment up to date? 10

The Witness—I charged this man \$2.00 for each treatment.

The Commissioner—Have you any idea how many treatments you gave him?

The Witness—I have, very definitely, up to the present time; it is \$60.

Q. Has anything been paid on account of that? 20

A. Yes, that is the balance. Mr. Faley has paid me sums from time to time from March until the present amounting to \$30.

Q. Therefore, your bill was \$90 of which \$60 is still remaining unpaid?

A. Yes, sir, there is an unpaid balance of \$60.

Mr. Lewis—Cross-examine.

Cross Examination—By Mr. Meredith.

30

Q. Doctor, I understood you to say that the treatments you have given him were merely palliative and have not helped his condition, is that correct?

A. Yes.

Q. Would you say the man's condition today is the same as it was when you first started to treat him? A. Yes.

Q. Did I understand you to say when you first saw the man and first suggested treatment, it was then your opinion that the man had 25 per cent. of permanent disability? A. That is right.

The Commissioner—What was the answer, I can't hear you.

(Answer repeated by the Stenographer.)

10 Q. May I ask you, doctor, if you will either point out for the benefit of the Court or describe the exact point where this bony formation is that you state is at the bottom of this man's trouble, insofar as that nerve is concerned?

A. Whom shall I point it out to, you?

The Commissioner:—Maybe I can understand it.

20 The Witness—You see there are several points of bony outgrowth in this particular spine, which is the result, in my opinion, of an osteoarthritis that has been present for some time. But he has in these pictures, if you—can you see?—you will note that there is a definite area here that is clear, that you can see through, and on this side there is not. You can notice these little spurs and spicules. They are not normal like the fourth or third. If these were viewed under the stereoscopic machine, in three dimensions, you can see that this bone formation tends to occlude the space which corresponds to this space over here. You can see quite a suggestion of it in a flat place. 30 It stands out much clearer in the other. That is the point of exit of the superior gluteal nerve.

Q. Doctor, during that explanation you necessarily, as you pointed, had occasion to indicate here and there, could you now in other words tell us exactly where that point of disorder is, where the superior gluteal nerve makes its exit from the spinal column?

A. There is a definite anatomical space called the intervertebral foramen where you have an exit for the various spinal nerves corresponding to the different segments of the cord and the spine.

10

Q. At what particular spot in the spinal column does that point of disorder appear?

A. That is at the right fifth intervertebral—

Q. Right fifth?

A. Right fifth lumbar intervertebral foramen.

Q. That occlusion that you note in the x-ray, you say is the result of some arthritic process, is that right?

A. That is my opinion, yes, sir.

Mr. Meredith—That is all.

20

Re-direct Examination—By Mr. Lewis.

Q. Doctor, at the time you first examined Mr. Faley, was there any evidence of a neurological disorder?

A. None was brought to my attention at that time.

Q. You said when you first examined him back in March, he was only 25 per cent. permanently and totally disabled? A. Yes, sir.

Q. And now you say he is 50 per cent.?

30

Mr. Meredith—May I object? Are you finished with the question?

Mr. Lewis—50 per cent. disabled.

A. Yes sir.

Mr. Meredith—May I object, your Honor, to that question. That question has been asked and answered by this witness. You will recall in his line of testimony he said the man's condition has remained unchanged since the first date when he established that 25 per cent. The natural inference, if it became no better or no worse it is still 25 per cent., and from that standpoint I object to the matter as repetition.

10

Mr. Lewis—I know the questions and the form in which you asked he had to give the answers that he did.

The Commissioner—I am very anxious to give the doctor the opportunity to clarify it, because it looks to me like a contradiction.

Mr. Lewis—I want to clear it up for the Court.

The Witness—May I proceed?

The Commissioner—Yes.

20

The Witness—As I said when I first examined this man in March, I obtained access to and examined X-rays which were at the Manufacturer's Hospital. Dr. Charnock very carefully went over them with me, and I went over them and examined them with a view to establishing some opinion as to this man's condition. Now, those X-rays did not show to me the condition which exists in these X-rays. That is, this tendency toward an occlusion of this intervertebral foramen and it was the point of clarifying my own mind with this new evidence we had on the subsequent examination that I suggested that these X-rays be taken.

30

The Commissioner—How long a time elapsed between these two taking of the X-rays?

The Witness—These X-rays were taken on June 13th, 1933. The other X-rays I can't tell

you the date. They apparently were taken last year.

Mr. Meredith—May I object to the doctor's answer and ask that that part be stricken which referred to other X-rays? They are not in evidence, as yet and we have no means of getting behind the doctor's answer as to what he saw on them there.

Mr. Lewis—That would be very simple. You could do it by producing the X-rays that are in your possession. 10

Mr. Meredith. We intend to put them in evidence, but I think it would be interesting for the doctor to point out to the Court what was missing there and what is shown here.

Mr. Lewis—He is simply clarifying his opinion as to why he said 25 per cent. then and 50 per cent. now.

The Commissioner—The doctor has answered it as best he can. 20

Mr. Meredith—My ground for the objection was it was based on information not before the Court.

The Commissioner—We are going to have it.

The Witness—You asked me how I got my opinion.

The Commissioner—Is there anything further from this witness.

Q. Taking the x-rays into consideration plus your examination of Mr. Faley on the various times you examined him, you say his disability is now permanent and total and the disability amounts to how much? 30

A. Approximately 50 per cent.

The Commissioner—That is just repetition. It was not necessary to ask that.

Mr. Lewis—That is all.

Re-cross Examination—By Mr. Meredith.

Q. Do you mean by that you are allowing this man 25 per cent. of total permanent disability just because he has a lowering of the sensitivity of the skin around a certain subscribed area?

A. No, sir.

Q. Why?

A. Because I feel this process may continue and may become worse.

10 Q. Regardless of what may happen how about it today?

The Commissioner—We must confine our statements to the present situation.

Q. Considering the man as you find him today, and leaving out any consideration for the future, what then would you say his permanent functional disability is as he stands today?

20 A. I believe, in my own opinion, it is about 50 per cent.

The Commissioner—What is that?

Answer repeated.

Q. Doctor, you have already stated in arriving at that estimate of 50 per cent. you took into consideration some things which may occur in the future?

30

Mr. Lewis—He didn't say that.

A. I didn't mean to.

The Commissioner—That is the impression I got. That is my impression of your statement, Doctor.

The Witness—I don't mean to infer that.

The Commissioner—What was your intention, Doctor, let me have it straightened out.

The Witness—I believe by virtue of this inability to bend his leg and put his shoes on, he is definitely restricted in certain motions that are required in doing various types of work, and I believe his work is definitely circumscribed and limited and I believe that the man is therefore limited in his choice of work, and not only that, by the virtue of the fact he is not able to dress himself. 10

The Commissioner—You mean he can't dress himself and he can't do these ordinary things?

The Witness—He can't do them. This man cannot put on his own shoes or stockings.

The Commissioner—Regardless of pain.

The Witness—That is my understanding. I have watched him.

The Commissioner—He can't bend his body sufficient to reach his feet? 20

The Witness—Not the right foot. He can the left. Every time he has come into my office his daughter has taken off his shoes and put them on.

The Commissioner—Unless there is something further, that is all, Doctor.

Q. When did you reach this conclusion that the man has 50 per cent. total disability?

A. That has been my opinion since the second examination. 30

Q. And that date was when?

A. June 13, 1933.

Q. On June 13, 1933, it was your opinion that the man had 50 per cent. total disability? Is that right? A. Yes, sir.

Q. Do you recall appearing down at the hearing at the Compensation Board here on a certain date?

A. I appeared down there on the 31st of March and also the 16th of June.

Q. And isn't it also true, Doctor, that on June 16th, when you appeared at the informal hearing, you expressed your opinion properly there public to the extent at least of one or two other people heard it, that this man then was 25 per cent. totally disabled in your opinion?

10 A. I didn't say that. What I said was, I examined this man in conjunction with Dr. Ernest there and it was at his suggestion that this man be given 25 per cent. disability and he had to go somewhere and he sent me in to give that suggestion to Mr. Monroe.

Q. And you agreed with the suggestion that that represented the disability present, did you not?

20 A. Yes, it was pointed out to me that it is the practice in informal hearings at times to give the man less disability than he actually would get, if the thing were finally settled.

The Commissioner—What was that?

Mr. Meredith—Just a minute.

Mr. Lewis—Your Honor, Mr. Meredith asked him for an explanation and I insisted the doctor give him his explanation.

30 Mr. Meredith—My request to Your Honor is that this last statement of the doctor be stricken from the record as purely a voluntary statement. If you will refer back to the question I asked, it was answered after awhile and then after some little hesitation, the doctor volunteered this other matter with which we are not concerned, telling us what somebody told him, so I say, it is both a volunteer statement and it is hearsay. I am not interested in what somebody told him. My only question was did you agree to the disability as then fixed.

The Commissioner—Strike out the rest of that answer. Don't have so much talk between you. If you can't stop having altercations between you, we are going to postpone this until you calm down. Have you any other questions you want to ask the doctor?

Mr. Lewis—As soon as Mr. Meredith is through.

The Commissioner—I thought he was through. If he isn't we will let him finish.

10

Mr. Meredith—That is all.

Re-direct Examination—By Mr. Lewis.

Q. Did I understand you to say it was suggested to you by Dr. Ernest, that a disability of 25 per cent. be put on this Petitioner?

Mr. Meredith—I object to that, your Honor.

Q. At the informal hearing referred to by Mr. Meredith.

20

Mr. Meredith—I object.

Mr. Lewis—You brought this out on cross-examination, Mr. Meredith.

The Commissioner—Now wait until he gets through and then object. Sit down, Mr. Meredith or do something and get out of sight.

Mr. Lewis—I have asked the doctor a question.

30

The Commissioner—Did you finish it?

Mr. Lewis—Yes, sir.

Mr. Meredith—I started to object when I was interrupted.

The Commissioner—What is your objection?

Mr. Meredith—I object to the question, Judge, inasmuch as it is going to call for the

opinion or advice or thought of some other doctor and it is hearsay.

The Commissioner—Do you mean Dr. Ernest?

Mr. Lewis—It is an attempt to get into this record the testimony of a man without submitting him to cross-examination.

10 The Commissioner—We can't sustain your objection for this reason, that you asked him why he gave a 25 per cent. estimate.

Mr. Meredith—Your Honor, if you will recall, I asked him if he previously didn't express a different estimate of disability than he now gives and the witness answered the question and said, yes. That is my only question. I didn't ask him how he arrived at it, or anything of the sort. I asked him if on a certain day he didn't feel this man was 25 per cent. disabled and he said yes; but I didn't ask him
20 how he arrived at it or who gave him that thought.

The Witness—I beg your pardon, will you repeat the question?

Mr. Meredith—I am addressing the Court, if you don't mind.

The Commissioner—We will have to go back and get that straight.

(The record was then read by the Court Reporter.)

30 The Commissioner—Now, we have that record straight. Will you cut out what the doctor said after saying yes, and if there is anything Mr. Lewis wants to bring out, he may.

The Witness—May I ask that that question be repeated.

Question repeated.

Mr. Meredith—That is what I object to, what Dr. Ernest may have said, as being immaterial and irrelevant and it is hearsay. I don't think that this witness can delve into the processes of Dr. Ernest's mind and relate them here.

The Commissioner—No, but if it be a fact that Dr. Ernest sent him in to carry a message about this case— 10

Mr. Meredith—That I don't care about, Judge. My only question to this witness and the only thing I was interested in, is what this witness' opinion was on that date, and he has given it to us.

The Commissioner—Strike out that other part and if Mr. Lewis wants to get that in, go to it.

Mr. Meredith—May I have my objection noted. 20

The Commissioner—We have stricken that out.

Mr. Meredith—I am objecting to this question of Mr. Lewis, the one that is now before the witness.

The Commissioner—You are objecting to what?

Mr. Lewis—Mr. Trainor, will you please repeat the question? 30

Question repeated.

The Commissioner—That has been stricken from the record.

Q. Were you requested by Dr. Ernest to submit the 25 per cent. disability to Mr. Monroe?

Mr. Meredith—I object to that on the very ground I previously stated, it is immaterial, irrelevant and it is a hearsay statement and an attempt to get into the record the testimony of another doctor, without my right to cross-examine that other doctor as to how he reached that conclusion.

10 The Commissioner—You have put into this record that estimate given at that informal hearing.

Mr. Meredith—I have just asked this witness for his opinion. That is all I asked of him and that is all I was interested in.

The Witness—Your Honor—

Q. Go ahead, doctor.

20 Mr. Meredith—I object to any volunteer suggestion by the doctor.

Mr. Lewis—Mr. Meredith is so deathly afraid to get this in, I don't know what it is all about.

The Commissioner—This doctor has stated 50 per cent.

Mr. Lewis—Yes.

The Commissioner—That is big enough for me.

30 Mr. Lewis—There is some testimony that he said 25 per cent. in June and I want to clarify it to the Court as to why he said 25 per cent. in June.

The Commissioner—I think, that is your privilege.

Mr. Lewis—That is what Mr. Meredith don't want me to bring in.

Mr. Meredith—I have no objection to any explanation the doctor cares to make of his statement, if he will confine it into his own mental processes and leave out other doctors.

The Commissioner—If that is not a fact, he can't do it that way. If he was sent to give a message to Mr. Monroe by Dr. Ernest—

Mr. Meredith—I am afraid, I haven't yet made clear my point. I have not asked this witness what anyone did down there.

The Commissioner—Why hasn't he got a right to tell you the story?

Mr. Meredith—Because it is getting into this record someone else's opinion. I would be glad to have Dr. Ernest come here and give us his thoughts on the matter, but I don't feel this witness is entitled to speak for Dr. Ernest. 10

Mr. Lewis—Mr. Meredith brought it out on cross-examination.

Mr. Meredith—I did not bring it out.

Mr. Lewis—I will do it this way.

Q. You estimate this man's permanent functional disability now as 50 per cent.? A. Yes. 20

Q. And you estimated it in June at 25 per cent.?

A. No, that is why I asked to have that question read again in which Mr. Meredith said, "Did you publicly state on such and such a day at the informal hearing that this man had 25 per cent. disability." I so stated, but that was not my opinion, and that is why I wanted to qualify my answer or change it.

Q. Qualify your answer, if you will. 30

The Commissioner—There is no qualification needed.

The Witness—May I ask that that question be read again that Mr. Meredith asked me?

The Commissioner—I think that is all straightened out.

The Witness—It isn't straightened out.

Mr. Meredith—Just a minute, please.

Mr. Lewis—Let him finish. He and Mr. Stubbs are carrying on a conversation.

Mr. Meredith—I have no objection to anything being brought in the question and answer form, but volunteer statements by the doctor are certainly objectionable.

The Commissioner—Have you any further questions of this witness?

Mr. Meredith—No.

10 The Commissioner—Have you any further questions?

Mr. Lewis—Yes.

The Commissioner—What is it?

Q. Did you state his disability was 25 per cent. in June, 1933?

A. I stated that to Mr. Monroe, yes.

Q. Was your estimate of disability positive in June, 1933? A. No, sir.

20

Mr. Meredith—I object to that, your Honor, he made the statement and it speaks for itself.

The Commissioner—Now, let me ask, was that your own private judgment?

The Witness—No, sir.

The Commissioner—Is there anything further on this?

Mr. Lewis—That is all.

30

The Commissioner—He was simply stating what somebody told him to state.

Mr. Meredith—I would like to go into that, Judge, if I may.

The Commissioner—Anything further?

Mr. Meredith—Yes, sir.

The Commissioner—What is it?

Re-cross Examination—By Mr. Meredith.

Q. Now, I ask you again, doctor, on what date did you reach the conclusion that there was 50 and not 25 per cent. total disability?

A. At the time of my second examination; that was in June.

Q. June 13th?

A. It may not have been that date. It was after I had examined him and after the x-rays had been taken. 10

Q. You first saw the man on March, what date?

A. March 27th.

Q. Will you give us the dates you saw the man thereafter, please, doctor?

A. I next saw the man on June 13th or 14th, I am not sure which. I beg your pardon. I saw him four days later, on the 31st of March, at the informal hearing, but I didn't examine him.

Q. Now, I ask you, doctor, did you express your opinion on March 31, as to what his disability was? 20

A. Yes, sir.

Q. What did you state then?

A. I stated then, I believe, that the man had a total permanent disability of 25 per cent.

Q. And you have already stated on the record twice today I believe, doctor, that the man's condition has not changed in any respect since the first time you saw him; he is no better or no worse, is that right? Answer that question yes or no. 30

Mr. Lewis—If you can.

A. I stated that in my opinion his status was the same.

Mr. Meredith—That is all.

The Commissioner—That is all doctor.

Re-direct Examination—By Mr. Lewis.

Q. Doctor, in your original estimate of 25 per cent. were you correct or were you mistaken?

Mr. Meredith—I object.

A. I was mistaken.

10 The Commissioner—We have had all the talk about that we are going to have. I will allow no more questions about the 25 per cent. estimate or the 50 per cent. estimate. Have you any witness you want to call?

Mr. Lewis—Yes. Dr. Holland.

DR. JOHN A. HOLLAND, sworn for the Petitioner.

Direct Examination—By Mr. Lewis.

20

Mr. Lewis—Will you admit Dr. Holland's qualifications, Mr. Meredith?

Mr. Meredith—I will be glad to.

Mr. Lewis—Dr. Holland's qualifications are admitted.

Q. Doctor, did you examine Joseph Faley?

A. I did.

Q. When? A. July 24th of this year.

30 Q. At whose request.

A. At the request of Dr. Finegan.

Q. What did your examination disclose?

A. He was sent to me, of course, with all the history that has been brought out, but my examination was solely to corroborate the neurological findings that have been brought out here today. I am trying to shorten this, so we can all get out—and corroborate Dr. Finegan's findings as far as

the neurological findings were concerned. There is some involvement of the nerve which comes out of the fifth lumbar foramen on the right side which is causing a permanent disturbance of the nerve function in that area. It starts at the mid-spinal section; that is, a line drawn down the middle of the spine, and it is about an inch and a half or two inches wide and there is an area of anaesthesia or hypoesthesia causing a loss of sensation. In other words, he can't feel any pin sticking him; he can't differentiate between heat and cold and he only has a partial sense of deep muscle pressure. But that one nerve is involved and I believe as a result of pressure by bone. I have seen the x-rays this morning for the first time. Pardon me. I have seen them before that, but went into them very carefully and find that this bony proliferation could be and is the result or is the cause of this nerve involvement. The nerve involvement that I spoke about is the anaesthesia which goes around his back and takes in the upper right hand of his buttocks, the inner part of the thigh and the upper part of his scrotum.

Q. Is there any pain over the sacro iliac joint?

Mr. Meredith—Just a minute, Judge, I am sorry to have to object, but I would prefer that counsel let the doctor or the witness bring these matters out. It seems to me it is leading.

The Commissioner—I think the doctor is capable of telling us what he knows without such a leading question as that.

Mr. Lewis—Sometimes doctors forget.

The Witness—That is true. I don't recall any pain over that part. That doesn't mean it isn't there. My examination was strictly a neurological one and that was all I was asked to do. It can only be caused by some nerve impingement or nerve injury.

Q. Doctor, can you tell what was the cause of this neurological disorder that you have described?

A. Yes, the x-rays are quite clear, the proliferation of that bone in that foramen in not giving room enough for this nerve to go through with pressure on the nerve with natural nerve destruction.

Q. Doctor, this man in his present condition, is he able to go to work?

A. No, certainly not.

10 Q. How much of a functional permanent disability would you say there is?

A. I should say 60 per cent.

The Commissioner—How much?

The Witness—Sixty per cent. That is my own personal opinion. It may be 50 or it may be 60, but it is between the two.

Mr. Lewis—Cross-examine.

20 *Cross Examination*—By Mr. Meredith.

Q. You gave him that disability, Doctor, because of this nerve disorder that you discovered?

A. Yes, it has been my custom in these cases if the bone is only involved perhaps to estimate about 50 per cent, but when you have a nerve injury in addition to that I usually add about 10 per cent. on that.

Q. In other words, you have given about 10 per cent. for the nerve disorder?

30 A. Yes, about 50 per cent. for the bone disorder. That is merely my opinion; and, of course, we have nothing definite to go by.

Mr. Meredith—That is all.

Mr. Lewis—That is all. I just want to recall Dr. Finegan for one question.

DR. PAUL J. FINEGAN, recalled by the Petitioner.

Redirect Examination—By Mr. Lewis:

Q. Doctor, is there anything you omitted in referring to Mr. Faley's condition? A. Yes.

Mr. Lewis—Do you want me to ask him a leading question as to what it is? He told me about this. I didn't make it up.

The Commissioner—I don't want anything left out that is important.

The Witness—This is merely corroborative. 10

The Commissioner—What did you leave out, Doctor?

The Witness—I left out the fact that this man has pain over the area of the right sacro iliac joint and the right side of the lumbo sacro joint.

The Commissioner—I think you said that.

The Witness—I thought I might have forgotten it.

The Commissioner—Somebody said it. 20

Mr. Lewis—That is all.

Re-cross Examination—By Mr. Meredith.

Q. Doctor, is that pain due to this nerve derangement? A. Yes, sir.

Q. That particular nerve?

A. The superior gluteal nerve.

Mr. Meredith—That is all.

Mr. Lewis—That is all.

The Commissioner—I don't see anything here developed which warranted your asking that day for a postponement. I don't for a fact. I told you that day if it was a question of a strained back being considered an accident there was no use of postponing it. 30

Mr. Meredith—Judge, I would ask you to reserve your opinion in that connection, until the case is completed.

The Commissioner—Do you want to put your doctor on now?

Mr. Meredith—I would prefer, if there is no serious objection, that they finish their case at this time.

Mr. Lewis—I would rather have Mr. Meredith put the doctor on while my doctors are here.

Mr. Meredith—I would rather not do that, Your Honor.

The Commissioner—We are deprived of this room anyway, so we are through for the day.

10 The hearing then adjourned.

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

20

TRANSCRIPT OF TESTIMONY

Transcript of testimony taken in the above entitled matter before HON. WILLIAM E. STUBBS, a Deputy Commissioner of the Department of Labor, at the State House, Trenton, New Jersey, on Friday, December 1st, 1933, at 2 P. M.

Appearances:

Irving Lewis, Esq., for the Petitioner.

George Meredith, Esq., for the Respondent.

John F. Trainor, Court Reporter.

JOSEPH FALEY, the Petitioner, sworn.

Direct Examination—By Mr. Lewis.

Q. You are Joseph Faley, the Petitioner in this case? A. Yes.

10

Q. And on August 9, 1932, where were you employed? A. Malleable Iron Company.

Q. Trenton Malleable Iron Company?

A. Yes, sir; Trenton Malleable Iron Company.

Q. How long were you employed there before August 9, 1932?

A. I am starting here to work in 1906. I was there over 25 years already.

Q. Last year, in 1932, or a few years before that, what kind of work were you doing?

20

A. Moulder.

Q. You are a moulder? A. Yes.

Q. On August 9, 1932, when you went to work on that morning, what kind of work were you doing, lifting iron moulds? A. Yes.

Q. Were you working all morning? A. Yes.

Q. What happened?

A. That afternoon I am getting moulds ready and I am working on a bench—

Q. Keep your voice up, go ahead.

30

A. And when the moulds are ready we put them on the floor. I can't tell how far below the floor and I drop on the first knee.

Q. You mean, you fell down on your knee?

A. Yes.

Q. What else happened?

A. And something snapped me right in the right side and the mould dropped and I can't get it up.

Q. Did you fall down? A. The mould broke.

Q. Did you fall to the ground?

A. Yes. The bench is close to here and I tried to catch the bench and the boss passed and the boss see me.

Q. The boss saw you laying on the floor?

A. Yes.

Q. The boss saw you sitting on the ground?

10 A. Yes, and he come right away over to me and asked me, "Joe, what's the matter with you?" and I said, "I hurt my side," and then he said, "The heat is ready," and he said, "After the heat I will send you home in the truck." I said, "I will try to walk myself," and he says, "You be careful, you wait for the heat." He wants to send me home in a truck. I live not far from the shop and I tried to walk myself and close to the door was a man that had a stick.

Q. How did you get home?

20 A. Home I be around 4 o'clock or after 4 o'clock, I don't know.

Q. Did you walk home?

A. Yes, and my side hurt me.

Q. What was hurting you, your side, and what else? A. My side.

Q. Did you call a doctor?

A. Right away I call a doctor in the morning.

Q. Did you go back to work? A. What?

Q. Did you go back to work?

30 A. No, sir, I couldn't go back to work, I can work nothing.

Q. You are not able to go to work yet? A. No.

Q. Have you tried to work? A. No.

Q. Have you tried to work; did you try to do any work? A. No, what can I try?

Q. Can you dress yourself?

A. I can't put my shoes on on the right side. This one I put on myself, but it takes lots of time.

Q. Were you treated by Dr. Finegan? A. Yes.

Q. And did Dr. Holland look you over too?

A. Yes.

Q. Are you able to do any work now? A. No.

Q. What hurts you?

A. The same place, not much hurt when I keep the belt tight, but I can't bend over.

Q. Do you have a brace?

A. Yes, sir, all the time.

Q. Just show the Court where you have this pain.

The Commissioner—Stand up.

10

Q. Stand up and show the Judge where it hurts you? A. Right here.

Mr. Lewis—Indicating the right back.

Mr. Meredith—Can we have that place he is pointing to, described for the record.

The Commissioner—Where is it, doctor?

Mr. Lewis—Don't you know what it is without feeling it?

20

Dr. Charnock—It is right above the pelvic bone in the axillary line.

Mr. Lewis—Isn't it over the region of the right sacro iliac.

Dr. Charnock—No, sir.

The Commissioner—I think not. That is why I asked the doctor to point it out. It is too far to the right, is it not, doctor?

Dr. Charnock—Yes, sir.

30

Q. Are you able to put on your right shoe or stocking? Can you put on your right shoe and stocking? A. Yes.

Q. The stocking and shoe on your right foot?

A. Yes.

Q. Which shoe can you put on?

A. Right, I can't.

Q. You can't?

A. No, somebody else put it on all the time.

Q. You can't? A. No.

Q. How much were you getting a week?

A. When?

Q. At the time of the accident?

A. I work piece work.

10 Mr. Meredith—Didn't we agree to that the last time, \$20.90. It was stipulated, Judge.
Mr. Lewis—Cross examine.

Cross Examination—By Mr. Meredith.

Q. Mr. Faley, you said you were lifting a mould from a bench to put on the floor and you went down on one knee, is that right? Make sure you understand what I say first before you answer?

A. I am sorry, you want to explain everything, but you don't understand.

20 Q. I want to understand and that is why I ask you again.

A. We got the place where we make moulds. When I make moulds, I make moulds on a bench like this table and when a mould is ready to put on the floor and I fill them up on the floor, then melt the iron and start to pour off.

Q. Now wait a minute, all I want to know is you said sometime during that day you got this pain. What were you doing when you got the pain?

30 A. What do you mean?

Q. You say you got a pain, you say you hurt your side, what were you doing when you got that pain?

A. You mean the last day when I work?

Q. When you got the pain, just exactly what were you doing?

A. I feel all the time some pain.

Q. You feel all the time some pain?

A. Yes, pain different in different places, inside, in the skin and everything is numb. I don't feel touch the finger on something.

Mr. Lewis—He is talking about something else entirely.

Mr. Meredith—I appreciate that.

Q. Let's go back to this day when you say you got hurt. Do you understand that? A. Yes.

Q. While you were working there you got a pain, it hurt right here in your back, where you pointed? 10

A. I dropped on this first knee, this left knee.

Q. You went down on your left knee, is that right. I want to get it straight.

A. You don't want to listen. I can't tell different.

Q. We want to go slow. A. I can't—

Mr. Lewis—Do you want to use his daughter as an interpreter?

Mr. Meredith—That is rather an unusual request. 20

Mr. Lewis—The request in itself doesn't mean anything.

Mr. Meredith—You say, it doesn't mean anything, but that don't make it so.

Q. You say you went down on your left knee, is that right? 2

A. Snapped something inside, and dropped first on this knee and the mould is dropped. 30

Q. First you felt something snap inside and you are pointing to your back? A. Yes.

Mr. Meredith—Can we have that described, where he points?

The Commissioner—The top of the ilium, isn't it, doctor?

Mr. Meredith—He puts his arm behind to the right side of his back.

The Commissioner—He puts his hand to the crest of the right ilium.

Q. You felt a snap and went down on your right knee, is that right?

Mr. Lewis—Left knee, he said.

10 Q. This afternoon since you have been here, Mr. Faley, you have been saying or have said on two or three points in your testimony that you had the pain on this last day that you worked in your side, but every time that you say side, you point here. Is that where you had the pain that day?

A. I am no doctor. Ask me in the Russian language and I will tell you.

Q. All I want to get clear is this, when you say side you mean back here?

A. I best think, I show you with my hand. You got the name, you got the doctor here.

20 Q. That is where you had the pain, is it?

Mr. Lewis—Where your thumb is pointing?

Mr. Meredith—His whole hand is there.

Mr. Lewis—I don't know what it is all about, George. He has his thumbs and his fingers. Why not let him point exactly to the place where he has this pain?

The Commissioner—He has and I have it definitely in my mind.

30 Mr. Meredith—All I want to straighten out, Judge, is the apparent conflict, he calls it the side, when it is not the side.

The Commissioner—Don't worry about that.

Q. This pain in what you call your side, as you say, and as I would say your lower back, that is not the first time you had any pain there, was it?

A. What do you mean?

Q. Did you ever have pain in your back before this day that you tell us about?

Mr. Lewis—Tell him yes or no.

A. No.

Q. You are certain you never had any pain back here in your back at any time prior to that date?

A. No.

Q. And you never had any treatment for any trouble with your back, did you, before that?

A. No.

Mr. Meredith—That is all.

Mr. Lewis—That is all. The Petitioner rests.

Mr. Meredith—Your Honor, I would like at this time to move for a dismissal of this petition on two grounds; one, that as far as the testimony has gone, I don't feel that the Petitioner has established, either the workman himself or through his witnesses, that he met with an accident arising out of and in the course of his employment. All that there is before the Court is the bare statement of two or three facts; one, that the man was well on a certain day and that while in the act of lifting a mould, a thing he had done frequently often, and not for days or months, but for years, he went down on his knee and simultaneously, or about the same time, he had a pain in his back. I can't see from that statement of the fact or those statements of facts that the Petitioner has come within the ruling or definition of an accident as laid down in the decisions. There must be something unusual, as I understand an untoward event, neither

10

20

30

expected or designed. I don't know yet what happened to this man yet, except that he was doing his regular work in his regular way, except that he had a pain and went down on his knee. That is my one ground of fact, that an accident has not been established.

10 The second ground is, whether or not an accident has been established there is not a single bit of competent evidence before Your Honor to the effect that the disability this man has or claims to have, which has been variously estimated at 50 or 60 per cent. of total, has any relation to this happening, if you can call it such. Two doctors came in, one Dr. Finegan, and said briefly, Your Honor, that this man has a certain percentage of total disability due to a bone disorder and due to a nerve disorder arising from the bone disorder. What caused the bone disorder or where it came from, we are still in the dark, and Dr. Holland's testimony was even briefer, if possible. Certainly, there was no attempt on the part of the other doctor, either from the standpoint of a hypothetical question put to them or a volunteer statement of their own, that this man's condition has any relation whatsoever to this act of lifting on August 9 and Your Honor will recall that the examination of these witnesses was rather brief and it was for that very reason our examination was very short.

20 Neither one of them said that the trouble had any relation, remote or otherwise, to this act of lifting. So, I say on those two grounds, first, no accident has been proven and, secondly, that there is no proof before Your Honor this man's disability is due to a trauma, I feel that the petition should be dismissed and I so move you.

30

Mr. Lewis—Does Your Honor want me to move that?

The Commissioner—Yes, I would like to know what you know about it.

Mr. Lewis—If Your Honor pleases, if an accident was ever proven in any case, it was proven in this case. Here is a man doing his work and on the day of the accident was lifting moulds weighing seventy some pounds and while lifting these moulds he felt something snap in his back. He said this afternoon he went to the ground and couldn't get up, clearly indicating this man was injured during and while in the scope of his employment. If that isn't an accident, then an accident couldn't happen. I don't know what case could be more conclusively proven to Your Honor. As I recall Dr. Finegan's testimony, he testified that the injury that this man now has is disabling him and he traces it directly back to his accident in August and he went on to testify, Your Honor, about an examination he made in April, and Mr. Meredith is overlooking some of those points of testimony. Dr. Finegan testified that the man's present condition is directly due to this accident. As I understand the only point in controversy at the time was the amount of disablement this man had and the very point of fixing a small amount of disability at the time of the informal hearing was for that reason and Dr. Finegan so testified.

Mr. Meredith—Judge, I feel I must except to counsel's remark to the effect that Dr. Finegan traced this disability back to the accident in August. That is the very point and reason for making my motion. He did no such thing. He just comes in and makes a bald statement and it is left hanging in the air. What caused this

bone disorder or nerve disorder, I don't know, as far as either doctor is concerned and when counsel states the only thing in controversy—

Mr. Lewis—It was that way until the first day of the hearing.

The Commissioner—Everything has been in dispute, as far as that goes.

10 Mr. Lewis—I have been in this case since February of this year and before that. Of course, I concede with Mr. Meredith that at the first formal hearing, the status did change.

The Commissioner—Anything further?

Mr. Lewis—I feel that the petition certainly shouldn't be dismissed.

The Commissioner—I want to consider the matter seriously. I can't imagine Mr. Meredith would make a motion like that without sincerely believing it is meritorious.

20 Mr. Meredith—I will say this to Your Honor, if it isn't in the record—

30 The Commissioner—You sit down. If I am to consider a dismissal of this petition I shall not do so without going over with the Court Reporter all the testimony. This thing has been up at least three times and testimony has been taken twice, October 14th and November 9th, and I can't recall these little details you are speaking of. My impression is that this man had something that occurred to him. He was working before that, and he couldn't work afterwards. Something happened and it was in connection with his work. If you want this motion seriously considered for a dismissal then I shall have to ask Mr. Trainor to go over the entire record with me and see if I can find backing for your feelings. Meanwhile, if you have doctors here who can testify, let's take their testimony, because they are here, and not

inconvenience them by coming back again. If you have no other testimony I will go over it with the Reporter and do the best I can to see if I can see some sense in what has been said.

Mr. Lewis—In view of the fact, or if there wasn't any statement by Dr. Finegan, contributing this disability to the accident, then I would ask your Honor to permit me to call Dr. Finegan, because I don't think we can finish today anyway. The questions I asked Dr. Finegan were predicated on a report he gave me on October 10, 1933. If Mr. Meredith will waive any formality, I will simply call Dr. Finegan. I may have overlooked that particular question, but I thought I had it in. 10

The Commissioner—Let's not argue about that now. Did you have any testimony you wanted to put in?

Mr. Meredith—Do I understand your suggestion is that the motion will be held open for your later decision and we shall proceed with our case? 20

The Commissioner—Yes.

Mr. Meredith—Before I start my case, I would like to request what I have already requested informally and that is an examination of the Petitioner. I don't know whether Your Honor appreciates the difficulty I am in, from what I have already stated. I have just asked Dr. Chapman when he last saw this man and his best memory was quite early in the year, and Dr. Charnock is in the same position and Dr. Kessler, all three have not seen this man since April. If you will recall, it was Dr. Finegan's statement only as a result of a very, very recent examination that he discovered this hypothesia or condition of anaesthesia. I say, 30

10 if that thing has developed, I feel our doctors ought to be given an opportunity to satisfy themselves that it is or is not rare. I don't feel that the man's position is any way jeopardized by this request, admittedly made late for the reason that if the condition is there, it will manifest itself to our doctors and unquestionably they will testify to its presence, so I would like, if I may, the opportunity—it will be a matter of a very few minutes, five or ten, for the doctors to go over this man briefly in the adjoining room to check up on that one fact, which we have not had the opportunity of checking as yet.

20 Mr. Lewis—I don't know this doctor's name, but he was here three weeks ago and he heard Dr. Finegan testify and he heard Dr. Holland testify. I, myself, am at quite a disadvantage. All Mr. Meredith had to do when he heard the testimony of Dr. Finegan and Dr. Holland was to lean over and say, "Irving, or Mr. Lewis, how about having an examination of the man after the hearing." Why a month later he wants to do this, when I am at a disadvantage, I don't know.

30 The Commissioner—I can't understand, Mr. Meredith, from October 14th there is six weeks and you come in within two minutes of starting the case and you want to do something that should have been done during that six weeks. I can't condone that.

Mr. Meredith—I tried to explain that, by not trying to discommode three busy men, two of them from a distance—

The Commissioner—I must ask you not to put that excuse in, because you don't have to get doctors from a distance.

Mr. Meredith—We try to get doctors who are competent and able.

The Commissioner—There are competent and able doctors in this town. There is one of them sitting right there, and you didn't have him examine him. I see no excuse for your delay. If you have any testimony you would like to put in, put it in now.

Mr. Meredith—It is provided for in the act at any reasonable time or reasonable place.

The Commissioner—Have you had no reasonable time or reasonable place?

10

Mr. Meredith—My answer is it is reasonable to do it at this time.

The Commissioner—And my answer is that it is not.

Mr. Meredith—May I have an exception, Your Honor?

The Commissioner—I am opposed to doing that the day of the hearing. It isn't fair to the doctor or fair to the man. They may have to put him in the hospital for three or four days.

20

Mr. Meredith—The doctors assure me they can check up this one simple little fact without hospitalization.

The Commissioner—If counsel will waive having his doctor present, all right.

Mr. Lewis—As I understand it, these doctors are on the payroll of New Jersey Manufacturers and testify for them frequently.

The Commissioner—Wait a minute, don't say things that are not true. They are not on the payroll. I don't believe one is on the payroll.

30

Mr. Lewis—On the staff, put it that way.

The Commissioner—No, they are not on the staff.

Mr. Lewis—I am afraid my client would be considerably prejudiced and embarrassed by an examination now.

Mr. Meredith—That is a terrible admission to make, his client would be embarrassed. The only thing I can conceive of is that my doctors won't find these things he is claiming.

Mr. Lewis—It was a question of economy first, but I won't go into that. They had the x-rays and Dr. Charnock was here and all he had to do was call me up and tell me about it. I don't know what it is all about.

10 The Commissioner—Have you any witnesses you wish to put on the stand? If you have you are at liberty to call them.

Mr. Meredith—We are not to be permitted these examinations then, Judge?

The Commissioner—No, sir.

Mr. Meredith—I would like an exception. I feel we are somewhat handicapped.

The Commissioner—The handicap is not of our making.

20 Mr. Meredith—We will get it in in an indirect way, but it may take us a little longer. May I make this further request, Your Honor, and that is this: due to the late start here, I don't know what time it is now, but it seems to me there is a fair chance that we may not complete the case; we may have to come back at some future time. If that possibility takes place, I would like to the remaining doctors who have not had the opportunity to testify to-day be given a chance to take a look at this man sometime between now and the next hearing day and at any reasonable place and time that counsel may suggest. I may be anticipating, it is possible, we will get through with all of these doctors. I believe, I stated to you off the record, one doctor finds it impossible to be here today, because of a previous engagement down in Baltimore. Assuming, that these three doctors are heard today, I would like to have Dr.

30

Griffith, the missing medical witness, have an opportunity sometime between now and the next hearing day to examine the man.

The Commissioner—This case was set for a hearing today. It was supposed to be finished and concluded today.

Mr. Meredith—In case we don't conclude—

The Commissioner—I shall not commit myself about it at all. I am not in harmony with it. I said, if you have any more witnesses put them on and go to it, you are just killing time. If you propose to ask a lot of questions to fill in time between now and five o'clock— 10

Mr. Meredith—Don't misunderstand me, there is no attempt to kill time. However, I feel I am being deprived of something that the Respondent earnestly desires and should have for the presentation of its defense, a check-up by our doctors.

The Commissioner—That is not the Petitioner's fault. Go to it with your witness. 20

Mr. Meredith—I ask an exception.

DR. MAURICE L. CHARNOCK, sworn for the Respondent.

Direct Examination—By Mr. Meredith.

Q. Dr. Charnock, you are a physician licensed to practice in the State of New Jersey?

A. Yes, sir.

Mr. Lewis—I will admit the doctor's qualifications. 30

Mr. Meredith—If you don't mind I would like to get them on the record.

Q. How long have you been practicing, doctor?

A. 8 years.

Q. Have you practiced a specialty, doctor?

A. Most of my work has been confined to traumatic surgery.

Q. Does your specialty, traumatic surgery, include diagnosis and treatment of injuries, arising from trauma and estimating disability resulting from those injuries? A. Yes, sir.

Q. Have you had considerable experience, doctor, in estimating disabilities under the Workmen's Compensation Act of this State? A. Yes, sir.

Q. For how long have you had such experience? A. Eight years.

Q. During that eight years how frequently have you been called upon to determine disability resulting from a traumatic condition?

A. Well, very frequently, a number of times each week.

Q. Will you advise the Court, Doctor, when your first contact with the Petitioner in this case took place? A. On August 19, 1932.

Q. Before August 19, 1932, Doctor, did you ever see the patient and in that connection I would ask you to refer——

Mr. Lewis—What is it?

Q. Might I ask you, Doctor, where you practice?

A. I am the physician in charge of the Manufacturer's Hospital, the Manufacturer's Association Hospital No. 3, in Trenton.

Q. As the physician in charge of the hospital, do you have with you a record of any treatment or examination of this Petitioner, Joe Faley, prior to August 9, 1932? A. Yes, sir.

Q. When was that record made?

A. March 17, 1930.

Q. March 17, 1930? A. Yes, sir.

Q. I take it that the Petitioner came to the hospital of which you are in charge on that date, complaining about something, was he?

A. Yes, sir.

Q. What was his complaint on March 17th, 1930?

A. He complained of pain in the back; in the lower back in the region of the sacro iliac joints, especially on the right side.

Q. As a result of that complaint and his reporting there, did you take an x-ray of him at that time? A. Yes, sir. 10

Q. Do you have with you the x-ray? A. Yes, sir.

Q. And is that the x-ray which was taken of the Petitioner Joe Faley on March 17, 1930?

A. Yes, sir.

Mr. Meredith—I offer these in evidence, Your Honor.

Mr. Lewis—May I see them, Your Honor? How do you know these are the x-rays of Joseph Faley? 20

The Witness—The number of the x-ray corresponds to the number which was assigned to him at the time, Mr. Lewis.

Mr. Meredith—If there is any doubt about it, Judge, I would like to offer in evidence this card which the doctor identified and the envelope which encloses the x-rays.

Mr. Lewis—Of course, this is Joseph Foley and this is Joseph Faley. 30

Q. May I ask you who was this man——

Mr. Lewis—Will you pardon me, just a moment?

Mr. Meredith—Judge, I would like to be permitted without this interruption to prove these are x-rays of the man.

Q. Now, Doctor, when this man came to see you on March 17, 1932, I take it you took a history?

A. Yes.

Q. As part of his history, did you ask him where he lived? A. Yes, sir.

Q. Can you by reference to the record made at that time advise the Court where the Petitioner then lived? A. 172 Sherman Avenue.

10 Q. The man came in to you again on August 9, did he not? A. August 19th, yes, sir.

Q. Did he tell you at that time where he lived?

A. Yes, sir.

Q. When I say August 19th, I mean August 19th, 1932? A. Yes, sir.

Q. What address did he give you on his visit in August? A. 172 Sherman Avenue.

Mr. Lewis—He says he was there, but he wasn't treated for any back injury.

20 Mr. Meredith—I haven't said he was treated yet, Mr. Lewis.

Q. Is there any question in your mind, doctor, but that the x-rays I have offered are the x-rays of this Petitioner?

A. They exactly correspond both in the formation of the vertebrae and also in the position, which are there, to the other two sets of x-rays.

30 Mr. Meredith—If there is no objection I would like to have these marked in evidence. If counsel is satisfied.

Mr. Lewis—The only thing I can go by, my client says there was no x-rays taken.

Mr. Meredith—I object to that.

Mr. Lewis—I am telling you what my client tells me.

Mr. Meredith—It is not sworn testimony.

The Commissioner—He is not on the stand. We should have it in testimony form.

Mr. Meredith—May I have that remark of counsel's stricken from the record.

The Commissioner—I can see no possible error in this proposition.

Mr. Lewis—Do you want them to be marked for identification.

Mr. Meredith—Marked in evidence.

Mr. Lewis—Do you say no?

10

The Commissioner—The doctor has positively identified them as being x-rays of this man.

Mr. Lewis—All right.

(X-rays marked Exhibits R-1, R-2 and R-3.)

Q. Going back to this incident in 1928, doctor, aside from the man's address, did you ask him his age? A. Yes, sir.

20

Q. And what age did he give you?

A. 1930 he gives the age of 48.

Q. Was a history secured from him at that time?

A. Yes, sir.

Q. And will you advise the Court what history you got in March, 1930?

A. Today when shoveling sand he felt sudden pain in his lower back.

Q. Did you go into his history prior to that date? A. Yes, sir.

30

Q. And did you learn anything of interest to you? A. Yes, sir.

Q. What was it?

A. He stated that he had lumbago in November, 1928, that lasted about nine weeks and he said, "It was from a cold."

Q. That is in 1930 he gave you a history of having had lumbago? A. Yes.

Q. Where was the lumbago situated, doctor?

A. I had no indication of that. Lumbago means or is taken to mean pain in the lower back.

Q. Is the term lumbago applied to a pain in any other part of the body?

A. I never heard of it, no, sir.

Q. Then, in 1930 you got a history of when he came complaining of pain in his back due to shoveling sand. And then you got a history of his having had lumbago prior to that time, the lumbago disappearing after it had been with him after 8 or 9 weeks? A. Yes, sir.

Mr. Lewis—Was that the doctor's direct testimony a few minutes ago?

Mr. Meredith—Yes.

Mr. Lewis—I didn't so understand it.

The Commissioner—That is what the record shows.

Mr. Lewis—I don't remember the doctor testifying to that, Mr. Meredith did but not Dr. Dr. Charnock, that he was disabled nine weeks.

Q. Did you so state, doctor?

A. I think, he asked me the question and I think I read off the sheet about nine weeks.

Mr. Lewis—Anything about being disabled from work?

The Witness—No, I didn't say anything about being disabled from work.

Mr. Lewis—I ask that the last question and answer be stricken out. It is not in accordance with the testimony.

The Commissioner—We must strike that out.

Mr. Lewis—Your Honor just heard Dr. Charnock testify that he didn't say it.

Mr. Meredith—I grant there is that confusion of terms, Mr. Lewis.

Q. As far as his past history on that date is concerned, he said what?

A. He said he had lumbago in 1928; its duration was nine weeks.

Q. Will you advise the Court what these x-rays show which were taken at that time; and may I ask you first, if you will confine yourself to the area of the fifth lumbar vertebrae?

A. These x-rays are stereoscopic anterior posterior views of the lower spine and pelvis and one lateral taken also of the lower pelvis. The A.P. views show on the right side a distinct fuzziness around the fifth lumbar vertebrae, around this area here (indicating), as compared with that side. It also shows a spur from the lower border of the third, the upper border of the third and also a hypertrophic condition on the edges of the body of the second and the first. The lateral shows a condensation or a thickening on the upper edge of these vertebrae; also especially there— 10

Q. When you say there, what do you mean, doctor? 20

A. The 11th and 12th dorsal vertebrae.

Q. You say generally, then, that the x-rays which you then took show a condition of arthritis of the spine? A. That is true.

Q. You spoke of fuzziness in the area of the 5th lumbar vertebrae? A. Yes.

Q. And that fuzziness is due to what, in your opinion?

A. Is due to hypertrophic changes. 30

Q. By fuzziness, do you mean an excess growth of bone around that area? A. Yes.

Q. And that you say was present at that time in 1930, as shown by the x-rays? A. Yes, sir.

Q. When was your next contact with the patient, doctor, after March 17, 1930. A. August 19, 1932.

Q. I take it that you secured a history from the patient at that time regarding any previous illnesses, did you? A. Yes, sir.

Q. What history did you get in that connection?

A. He told me on the occasion he never had been hurt before. He had lumbago in 1928, six weeks, no pain since and no other illnesses.

10 Q. Did the fact of his statement to you, doctor, that he had had no injury or trouble except this lumbago in 1928 influence you in your diagnosis and treatment of his condition? A. Yes.

Q. And at that time were you aware of the presence of this x-ray taken in 1930? A. No, sir.

Q. And when did you discover the fact of your hospital taking this x-ray in 1930?

A. I discovered it late in the afternoon, I think it was about a quarter of five, before the date set for the hearing over on the other side. I don't recall when that was, but that was early in—

20 Mr. Lewis—September?

The Witness—It was the time before that, the time it was postponed.

Q. The first appearance when we requested an adjournment?

Mr. Lewis—September 27th.

30 A. I think, that is probably when it was. The first time it was set.

The Commissioner—That is the first time it was set.

Q. August 17th, that is right?

A. Whenever that was, it was over in this room here.

Q. After making that discovery, doctor, the discovery that you had in your hospital some x-rays

of this Petitioner in 1930, did you compare them with x-rays which you took as a result of his complaints on August 19, 1932? A. Yes, sir.

Q. Do you have with you the x-rays which you took on or about that date? A. Yes, sir.

Mr. Meredith—I would like to have them marked in evidence, your Honor.

Mr. Lewis—May I ask are they the same x-rays that Dr. Finegan saw?

The Witness—Yes, sir.

Mr. Meredith—I don't think Dr. Finegan has seen one of these others, because they weren't discovered until a late date.

(X-rays marked Exhibits R-4, R-5 and R-6.)

Q. Now, doctor, have you compared the x-rays marked Exhibits R-1, R-2 and R-3 taken in 1930 with the x-rays taken in August of 1932 and marked in evidence Exhibits R-4, R-5 and R-6?

A. Yes, sir.

Q. With respect to this fuzziness of bony growth, which you find in the region of the 5th lumbar vertebrae, what have you to say as a result of comparing the two sets of x-rays?

A. I see no difference. Here, can you see, sir, there is again that appearance which you saw in the other picture of the hypertrophic change there around the fifth lumbar. There is that spur which was evident off the third lumbar.

Mr. Lewis—Are you answering Mr. Meredith's question or going beyond a little bit?

Mr. Meredith—I asked him about a comparison and the doctor is apparently doing it one at a time.

Mr. Lewis—You asked the doctor one specific question and the doctor has gone on off.

The Commissioner—I am afraid we will not be able to complete our work today. There is no need for that remark.

Mr. Lewis—Didn't Mr. Meredith ask the doctor one question.

The Commissioner—He asked him to compare the pictures.

Mr. Lewis—With respect to fuzziness.

10 The Commissioner—It is purely a matter of continuing the work. What harm does it do? He has to go on. There was no need for that kind of a remark that you made then, and it doesn't help any. Go ahead. Do you want the pictures compared throughout?

Mr. Meredith—Yes, with particular reference to that area around the fifth lumbar.

20 A. As I have stated, the fifth lumbar is the same, this fuzzy hypertrophic area remains the same, in my opinion, as we have it in these previous films. Here is the spur which corresponds there and there is also the hypertrophic change in the upper lumbar vertebrae which we saw in the other; the other being a similar stereoscopic view. This is the lateral and again we see these increased condensated areas over the tips of the lumbar vertebrae.

Q. Doctor, I show you also a group of x-rays marked Exhibits P-1, P-2, P-3 and P-4 and ask you if you have seen those x-rays? A. Yes, I have.

30 Q. Will you advise the Court whether or not you find any difference in the condition as it exists in that group of x-rays as compared with the two which you have already described, with particular reference to that area around the fifth lumbar vertebrae?

A. Here again is the area around the fifth lumbar vertebrae and the spur is there from the third lumbar and I do not see any difference between

these and the other two sets which we have already looked at.

Q. Is it your opinion, doctor, that any abnormal conditions that may exist in this man's spine existed back in 1930 when the first x-rays were taken and have continued up to the time of the taking of the last x-rays without any change? A. Yes, sir.

Q. You treated this man, did you not, doctor?

A. Yes, sir.

Q. Did there arrive a point in your treatment when you considered this man able to work? 10

A. Yes, sir.

Q. When was that?

A. Well, I fixed a date about March 1st, 1933, when I felt he was able to work, as much as he will be able to work with a belt, in other words—

The Commissioner—What?

The Witness—The date he will be able to work with this condition. 20

The Commissioner—What date was it?

The Witness—March 1st, 1933.

Q. You gave him no treatment after that date, did you, doctor?

A. No, I measured him and fitted him for a different kind of a belt after that.

Q. You state this man has an arthritis. Were you from any facts given you in the history or from your examination of the man, his mouth or other parts of his body, able to determine the probable cause of this arthritic condition and the changes which have been wrought by it? 30

A. To be able to make a definite and positive statement as to the cause of arthritis of the spine, I can't. There are various theories, one of which is, the infectious theory. Today we have a rising theory that it is a—at least a portion of these cases—is due to a metabolic, general metabolism per-

haps comprehended with or perhaps helped on by some focus of infection.

Q. Did you find any focus of infection in this case, doctor?

A. Yes, he has some very badly pyorrheated teeth. It is possible that may have been the source of focal infection.

Q. In the light of what you said, is the pyorrheatic condition of his teeth a probable cause of the
10 arthritic condition which exists there?

A. It is a possible cause. I wouldn't care to say probable. It is a possible cause.

Q. Doctor, having in mind—I will withdraw that for the moment. You suggested a moment ago, doctor, that this man had a disability? A. Yes.

Q. Did you arrive at an estimate of disability?

A. Yes, sir.

Q. What is that, sir?

A. When I last saw him, I thought he had a dis-
20 ability of between 15 and 20 per cent.

Q. And what in your opinion, doctor, has created that disability of 15 to 20 per cent.?

A. Well, I know he had from the evidence in the x-rays and now from the history which we discovered, that he had, in my opinion, a pre-existing arthritis. I think, that this disability which he now has is due to his arthritis. The pain which he has is typical of an arthritic condition and I think that is what his present pain is due to.

Q. Is it possible, doctor, to have an arthritic condition existing and without external cause have the
30 arthritic condition develop into a painful condition? A. Oh, yes.

Q. Is that an unusual circumstance?

A. I would say it was, by far, the usual circumstance.

Q. Doctor, having in mind that this man was employed as a moulder, which job involved the lifting of moulds varying in weight up to possibly 75 or

80 pounds, and that he had done this work and work of a similar laborious character, including the shoveling of sand, for a number of years, and that on August 9, 1932, while engaged in this work of, particularly of lifting a mould from the table to the floor, he stated he felt, as he described it, a snap in his back, pointing to the crest of the ilium, whereupon he went down on one knee and stated he was unable to continue work and walked home and thereafter sought treatment; what have you to say as to the possible connection between that happening and the arthritic condition, which you have already described and which you say disables him from the standpoint of causation?

10

A. In my opinion, in cases where you have an arthritis, you have some agent which, unfortunately, so far we are unable definitely to define, which is causing and which originally started and which adds to the progress of this disorder. I think, that the tissues in general in such a condition are not in a state of a normal person and I think that sooner or later a time is inevitable when symptoms are about to manifest themselves. It is a question of time.

20

Mr. Lewis—If Your Honor pleases, pardon me, doctor, is this an answer to Mr. Meredith's question about Joseph Faley?

The Witness—I am giving my reasons, yes, sir.

30

Mr. Lewis—I am sorry.

The Witness—It is a question of time when your symptoms will arise. They may arise when the patient is doing his usual work; they may arise, as I have known them to arise, when the patient is getting up from the table, and I think that the lifting which he did here would not be sufficient to aggravate or light up a condition which he has previously

had. Now, he did have tenderness and symptoms which may have come on exactly at that moment. I didn't see him until 10 days afterwards, and for which I am perfectly willing to give him a reasonable part of that disability, say between 5 and 10 per cent.

10 Q. When you say you are willing to give it, doctor, do you mean to say in your sound, honest judgment, that the act of lifting contributed to an extent to the disability which he now presents, or is there a doubt in your mind?

A. There is a doubt in my mind which I am willing to give him the benefit of.

Q. However, doctor, the x-rays themselves show no progression of the condition from 1930 up to the last group that were taken this year, do they?

A. I don't think they do.

20 Q. It has been testified here, doctor, that this man is suffering from a hypoesthesia of a certain circumscribed area in the lower part of the back. Did you find any such condition as a result of your treatment of this man over a period of five or six months? A. No, sir.

Q. Did the man complain to you of any such condition? A. I don't remember that he did.

Q. If he complained you would have it in your record, would you not? A. I probably would.

Q. Do you have any such notation in your records? A. No, I don't believe I do.

30 Q. Doctor, is it probable or possible that a man could have this hypoesthesia arising sometime toward the latter part of the year 1933 when it was not present or at least not complained of to you or not discovered by you from August 9, 1932, until you finally discharged him; and have that hypoesthesia bear any relation to the happening, if you can call it such, which took place on August 9, 1932? It other words, can it be absent and pop up without cause and still be related to the original happen-

ing? Can the thing pop up 10 months or a year later?

A. I don't think so. Of course, I don't know whether he has it or not.

Q. Did you examine the man in that area where it is asserted he has this hypo-asthesia; did you examine him for tenderness of any such condition?

A. Yes, of course, almost every time, or at least periodically, I examined his back for whatever I could find, any signs of disability. I didn't examine him for hypoasthesia particularly, because I had no indication of any such condition. 10

Mr. Meredith—That is all, I think.

Cross Examination—By Mr. Lewis.

Q. Did Mr. Faley complain to you about this lack of sensation he was experiencing?

A. I don't recall it, Mr. Lewis. If he did, I don't recall it, because I would have looked for it. I think, the average patient— 20

Q. You answered the question. Don't you recall him telling the nurse about it?

Mr. Meredith—I object to that.

Mr. Lewis—Let me cross-examine Dr. Charnock in my own humble way. The doctor says he doesn't remember and I am going to try to refresh his recollection.

Mr. Meredith—Do you mind my stating the grounds of my objection? Judge, the point of my objection is this, didn't the nurse or didn't you tell the nurse so and so. There are only three or four nurses up there. If that is going to be set up, I must know in fairness what nurse they refer to. There are two nurses I know of, and two others I don't know. 30

The Commissioner—Why raise a hubbub, you know what he is going to say.

Mr. Lewis—I am just going to help the doctor recall it.

Q. You aren't positive, are you, doctor?

A. The only thing I can say is this, Mr. Lewis, I don't recall such an occurrence of lack of sensation. The average patient is apt to tell you he has peculiar sensations and so forth, if he has them.

Q. Isn't it possible he said something to you about it, and you didn't make a notation of it?

A. I don't recall it, if he did.

Q. My question is, is it possible?

10 A. If I don't recall it, how can I tell you.

Q. I am going to try and help you recall it, and that is what Mr. Meredith doesn't like?

A. All right.

Q. When did you first start treating Mr. Faley for his back? A. August 19, 1932.

Q. Along the first part of that treatment, do you recall Mr. Faley telling you he felt heat in one place and didn't feel it in another place?

20 A. Mr. Lewis, I don't recall it. I am sorry, but I don't recall it.

Q. Do you recall later on in his period of treatment when you would feel over Mr. Faley's back he would tell you he didn't feel pressure here and he did feel pressure there?

A. No, sir, I don't recall it, other than tenderness.

Q. You treat hundreds of patients?

A. Oh, yes, of course.

Q. And you are apt to slip up on one?

30 A. My memory is not infallible.

Q. You proved that when you found these plates two years later?

A. My memory is not infallible, I said.

Q. Then it is possible he did complain to you and you didn't remember?

A. I have said I can't remember. I have said I can't remember it, Mr. Lewis, and that is all.

Q. Did he complain to you about his leg being dragged, doctor? A. No, sir, I am sure of that.

Q. Do you recall that x-ray in 1930, that you first testified to? A. Yes.

Q. What percentage of disability would a man have with a back like that?

A. I don't know. We don't make it entirely from the x-ray, Mr. Lewis.

Q. When you saw him in 1930, you have the record and the x-rays, was he able to go to work then?

A. I only saw him once.

Q. You had the history of the case and you had the x-rays, you say, taken of this man in 1930? 10

A. Yes.

Q. The back as portrayed by these x-rays?

A. Yes.

Q. Is there any disability there portrayed there?

A. I can't tell disability by x-rays.

Q. Was there any? A. I don't know.

Q. How long was he under your treatment?

A. Once.

Q. Just once? A. He came once. 20

Q. And you took x-rays once?

A. They are always taken, an x-ray of each back case is taken immediately when they come in the door.

Q. What does this discharge report say, April 8th, 1930?

A. When they do not return for quite awhile the girl takes them out of the file and sends in a report to the insurance company stating the patient didn't return and we file it in our permanent file. 30

Q. That was a bad back, wasn't it?

A. It shows exactly the same thing we have here.

Mr. Lewis—I ask that the answer be stricken out. It isn't responsive.

Q. My question is clear, isn't it, doctor?

A. Well, I told you, I did not estimate disability—

Q. My question is this, the x-rays taken in 1930, do they show a bad back?

A. Well, I would like you to define what you mean by a bad back. Would a back like that give symptoms, do you mean?

Q. No. What amount of disability is there to the back as shown in those x-rays of 1930?

A. I made no estimate of disability.

Q. Is it a normal back? A. No, sir.

Q. Abnormal? A. It is, pathologically.

10 Q. Would it handicap a man in his work of shoveling sand and making moulds?

A. If he had symptoms it would.

Q. What symptoms does that indicate, those x-rays taken in 1930?

A. You can't tell symptoms by x-ray.

Q. It shows a fuzziness, does it not? A. Yes.

Q. And a back like that would handicap a man, wouldn't it, doctor?

20 A. Not necessarily. You are talking about the x-rays—

Q. Of 1930?

A. That as you look at it there—

Q. There is nothing wrong with the man's back?

A. There is certainly something wrong with his back.

Q. There is something wrong with it; and he would be handicapped in his daily work?

A. Not necessarily.

30 Q. Could a man do heavy laborious work with a back like that? A. Yes.

Q. Let's confine ourselves to this x-ray?

A. He most certainly could, as far as the x-rays are concerned.

Q. You saw the x-rays in 1932, didn't you?

A. Yes.

Q. And, in your opinion, there is no change?

A. That is right.

Q. Could that man work in August, 1932, when you saw him?

A. Are you talking about x-rays again?

Q. Yes. A. I can't tell you from x-rays alone.

Q. You saw him, did you not? A. Yes.

Q. Was there any difference in his physical condition in August, 1932, than there was in March, 1930?

A. You are talking about the whole man now?

Q. I am taking both x-rays, taken at both periods of times and the condition of the man. 10

A. No, the man could not work on August 19, 1932.

Q. What was wrong with him?

A. He had arthritis of the spine at that time.

Q. He had it in 1930, didn't he? A. Yes.

Q. What was the difference between the two conditions, the 1930 condition and the 1932 condition?

A. In 1932 he had an active arthritis and in 1930 he also had an active arthritis which apparently did not last long, at that time, symptomatically. 20

Q. Do you mean arthritis could last for a half hour and quit?

A. Yes, also last for half a year and then quit and also last 35 years and then quit.

Q. You don't know whether or not the arthritis was active in 1930, do you; from the x-rays you can't tell? A. You can't tell from the x-rays.

Q. You can't tell from the x-rays taken in 1932?

A. Yes, sir. 30

Q. The man was just as well from an x-ray viewpoint in 1932 as he was in 1930?

A. The x-rays, they are the same, yes.

Q. What made you determine he couldn't work in 1932, his own statement?

A. His symptoms which he expressed, yes, sir.

Q. What symptoms did he express to you in 1930?

A. At that time he complained of pain more than—

Q. This is 1930 you are reading?

A. Yes, he complained of tenderness and pain in the sacro iliac joints and also over the sacral vertebrae, the first and second, pain on motion in lower back.

Q. What were the symptoms in 1932 that he complained of?

10 A. He had tenderness over the sacro iliacs and he had pain on motion in the sacro iliac and also the lower lumbar spine.

Q. Practically the same? A. Yes.

Q. In one instance he was able to work and in the other instance he wasn't?

A. I wouldn't say that, because I only saw him once in 1930.

20 Q. With a man having a back such as the x-rays show in 1930, describing to you the symptoms that he had in 1930, would he be able to do heavy, laborious work?

A. Well, as I say, he came only once and I haven't a clear picture other than I have on the description on the record here and I probably allowed him a period of disability, if anybody would have asked me.

Q. Do you know what my question was, doctor? The man gave you symptoms that he had in 1930?

A. Yes.

30 Q. And you have his x-rays there? A. Yes.

Q. Would he be able to do heavy, laborious work?

A. On the date I saw him, probably not.

Q. Would he be able to do heavy-laborious work for some period after that?

A. I couldn't tell you that.

Q. Suppose that man kept on working day in and day out for two years, then what would you say about his symptoms and the x-ray pictures?

Mr. Meredith—I object to that, your Honor, I don't know of any testimony that he did work day in and day out during that interval.

Mr. Lewis—Excepting this, that the time-keeper said he didn't remember this man losing any time from work other than a day or so, for a cold. We are only going back now for two years before the accident.

Mr. Meredith—I have a note that he stated he was off for a cold or something. Obviously he didn't know the exact medical reason. 10

Mr. Lewis—It is quite apparent this hearing has got to go over again. We will have Mr. Warren back again.

Q. Will you answer my question, assuming that he lost no time, what would you then say as to the man's condition?

Mr. Meredith—I object, there is no testimony that he lost no time.

Mr. Lewis—If we don't tie it up, you can strike it out. 20

Mr. Meredith—There is definite testimony to the contrary. He did lose time for a cold or something.

Mr. Lewis—I will stipulate with Mr. Meredith, on the record, that if this man lost any time because of his back injury from March, 1930, on up until August, 1932, then the question and answer may be stricken out.

Mr. Meredith—I object to it. 30

Mr. Lewis—We don't have Mr. Warren here, now, but I think I recall his testimony. He said he lost a few days. I have no recollection that he said he lost any time or that he made any complaint about his back.

The Commissioner—My notes do not show he said anything about losing time.

Mr. Lewis—I think, Mr. Warren said he may have lost a day or two from a cold.

The Commissioner—I don't put that in the record. I made no note that he said anything about losing time.

10 Mr. Meredith—You see too, Judge, counsel loses sight of the fact that some men may attempt to work under difficulties. Maybe this man did have trouble with his back over week-ends and didn't complain to anybody. This question assumes this man was in perfect shape.

Mr. Lewis—I am taking Dr. Charnock's testimony exclusively plus the fact of his working at the factory and I am trying to develop what I think are the facts, whether they are harmful to the Petitioner or Respondent.

20 The Commissioner—There is no use in your asking this doctor to try and tell you something that he doesn't know anything about.

Mr. Lewis—The doctor has testified to a certain set of facts and I am asking the doctor whether or not, assuming this man lost no time from work and assuming he was doing heavy, laborious work, how could he account for it, when he says three x-rays at various times were all the same?

The Commissioner—I don't know that the doctor has to account for it.

30

Mr. Lewis—If he can.

The Commissioner—What say?

Mr. Lewis—If he can. What was that question that Mr. Meredith objected to?

(Question repeated.)

The Commissioner—I don't know what the question means.

Q. Assuming, doctor, this man did heavy, laborious work for two years, you testified he had a cer-

tain arthritis there and you testified to certain symptoms he had in 1930 which correspond to the symptoms of 1932. In 1932, you say, the man couldn't do any work. How do you now account for the fact that the man did work with the symptoms he described to you in 1930 and in 1932 the symptoms being practically the same and the x-ray plates being the same?

The Commissioner—Can you answer the question, doctor?

10

A. Well, I can say this, perhaps when I said they were the same I meant they were in the same location, not in the intensity apparently. I know this man had some very acute symptoms in 1932. I know because my mind is very fixed about this thing, however he made one visit before and after to go entirely on the notes that are on there then. I know he had the acute symptoms the last time. A man can work under tremendous difficulties and I have seen men with arthritis worse than this in x-rays and with physical findings which are very severe, working anyhow.

20

Q. Your notes don't indicate any intensity, do they? A. Yes, they do.

Q. I mean, in 1932?

A. Yes, sir, here we have two plus and I have three plus in 1932.

Q. In 1930 it is two plus? A. Yes.

Q. That one plus doesn't make much difference, does it? A. Not to you, but it does to me.

30

Q. Does it to you? A. Yes, sir.

Q. Three plus is a highly intensive pain and a two plus is what? A. Is less.

Q. A difference of one, that doesn't mean much, does it?

A. It is according to whether it is one in ten or one in four. I grade them from four down.

Q. Doctor, in 1932 when you saw him what percentage of disability do you say there was?

A. I didn't estimate any disability at that time.

Q. You didn't? A. No, sir.

Q. Well, doctor, these hypothetic zones don't always manifest themselves immediately after a causation, do they?

10 A. Hypo-asthetic zones are very uncommon and I can't—I don't think there is any rule about any such thing as that; at least, I wouldn't be able to say they would have to appear at that particular time.

Q. Referring to the 1932 x-rays, there is some suggestion of a beginning arthritis of the lumbo sacro joint, isn't there?

A. That is around the fifth lumbar vertebrae and the fifth lumbar vertebrae is next to the sacrum, you can call it that if you want to.

20 Q. When a man is unable to put on his right shoe and stocking because of limited flexion of the right thigh, you would say that is more than 15 or 20 per cent. disability, isn't it, doctor?

Mr. Meredith—I object to that, Judge, the man did make the statement that he can't put on his right shoe, but as to why there is no testimony.

30 Mr. Lewis—Except Dr. Finnegan and Dr. Holland and Mr. Faley, that is only three that testified to that point. Nobody else did. I believe Dr. Finnegan expressly testified to that.

Mr. Meredith—My objection goes, Judge, as to the matter of causation as counsel puts it in his question. There is testimony that he can't put on his right shoe, that he couldn't do it, because of a limitation in the thigh. I don't recall that and that is part of the question.

The Commissioner—I don't find mention of that in my notes.

Q. Now, doctor, isn't there also disclosed on the x-ray plates a narrowing of the intervertebral foramen between the fifth lumbar vertebrae and the sacrum on the right side? Don't the x-ray picture disclose that?

A. No, sir, there is this hypertrophic condition which is around there, but I don't think you can estimate any narrowing of that particular thing from the x-ray.

Q. You say the x-ray picture doesn't show that? 10

A. I don't think you can estimate that from the x-ray.

Q. Does the x-ray show a narrowing of the intervertebral foramen between the fifth lumbar vertebrae and the sacrum on the right side?

A. I said, I don't think you can estimate that from the x-ray.

Q. You say you are not sure or positive?

A. I said, I don't think you can estimate that from the x-ray.

Q. Suppose, the x-rays do disclose that there is a narrowing of the interverbral foramen between the fifth lumbar vertebrae and the sacrum on the right side— 20

The Commissioner—What do you mean counsel by narrowing, a process of getting smaller or thinner.

Mr. Lewis—I am reading the report of Dr. Finegan that was submitted to me.

The Commissioner—Shows a narrowing, I don't know what it means. 30

Mr. Lewis—I don't know either.

The Commissioner—I don't know either. A narrowing means a process of getting smaller or thinner. X-rays don't show motion. I may show a size, something might normally be expected to be there.

Mr. Lewis—I am going to have Dr. Finegan here at the next hearing.

The Commissioner—All right.

Q. How do you explain, doctor, the persistency of pain pressure on the fifth right spinal nerve root?

10 Mr. Meredith—That I object to, Your Honor, because the doctor said, he found no such condition. He can't explain something he didn't find.

Q. Did the x-ray indicate any reason for pain?

A. Well, the arthritis—

Q. Pardon me, doctor, will you answer my question? A. Arthritis.

Q. That is on the fifth right spinal nerve root, isn't it?

A. No, that is on the fifth lumbar vertebrae. You can't see arthritis of anything except bone or joint surfaces.

20 Q. You say the x-ray indicates an area of hypoesthesia corresponding closely with the distribution of the superior gluteal nerve?

Mr. Meredith—That I object to, this witness has testified to no such fact, Judge, and it is an improper question.

The Commissioner—You can't see that in an x-ray anyhow. Mr. Lewis knows that. He just asked that, because he has one more question.

30 Q. Now, doctor, you say your examination showed pain and tenderness of the lower back, is that right, in 1932? A. Yes, sir, well, yes.

Q. Centering over the region of the right iliac and the lumbo sacro joint?

A. A slight amount on the lumbo sacro joints, yes.

Q. And the pain radiated to the right over the region supplied by the superior gluteal nerve?

A. No, not when I saw him.

Q. How much limitation was there in Mr. Faley's ability to bend forward, stand, sit and lie?

A. Lying, well, he could lie down flat.

Q. How about forward bending and standing up and sitting.

10

A. When he was standing he was able to bend forward, when I last saw him, I would say about between 60 and 70 degrees, and on lateral motion he was good; backward motion was slightly impaired.

Q. His lateral motion was somewhat limited in both directions, wasn't it?

A. Slightly limited.

Q. You say slightly limited and you also said slightly impaired. Assuming, doctor, that the man is unable to put on his right shoe and stocking on account of limited flexion, what then would you say about his condition; would you say the man was only ten to twenty per cent. disabled?

20

A. I don't know anything about the facts—

Q. Assuming there are facts, that the man is unable to put on his right shoe and stocking and he has limited flexion, would you say that man is only ten to twenty per cent. disabled? A. Yes.

Q. That is all? A. Yes.

30

Q. He wouldn't be as much as 50 per cent. would he? A. No.

Q. Doctor, just by way of comparison, just how much disablement would there have to be for a man to be disabled fifty per cent. in the back where there was an arthritis around the fifth lumbar vertebrae?

Mr. Meredith—That I object to, Judge.

The Commissioner—I assume, he would have to be fifty per cent.

Mr. Lewis—The situation is this, the doctors testifying on behalf of Mr. Farley having diagnosed this man's condition as being fifty to sixty per cent. disabled, and go on and testify about pain and things like that. Dr. Charnock now says that it is ten to twenty per cent. and I want to find out what would make fifty or sixty per cent.

10 The Commissioner—You could name 100 things which might amount to 50 to 60 per cent.

Mr. Lewis—I am talking about a back, referring specifically to a back.

The Commissioner—That is not a proper question.

Q. Referring specifically, Doctor, to an arthritis around the fifth lumbar vertebrae?

20 Mr. Meredith—I object, Judge, on the same ground it is asking this witness a fact that he doesn't know. All he can do is describe the condition of this petitioner as he found it.

The Commissioner—If the Doctor can answer that, I would be glad for him to do so, but I don't think anybody can. I think, it is an improper question.

30 Q. I don't know whether I asked you this question or not, Doctor, the first symptom of a hypoaesthesia is when the patient first complains of difference in sensory values, isn't that true?

A. I am sorry, I don't comprehend that question.

Q. When a patient is receiving diathermy treatments, Doctor? A. Yes.

Q. And he is able to differentiate sensory values, you know what that means, don't you? A. Yes.

Q. That is the first sign, is it not, of a hypoaesthesia?

A. No, the question is trying to put down a first symptom for something. I never saw anything that always starts exactly with the same symptoms. I am sorry, but unfortunately it doesn't run that way. I don't know whether I can even say that—you sometimes in a nerve, I don't know, I am sorry I couldn't say that either. No, because such an anaesthesia of a nerve is not the common occurrence at all.

Q. Where there is a hypo-asthesia condition that could come from arthritis of the back, couldn't it? 10

A. Hypo-asthesia comes usually from pressure and that may be from many kinds of things, anything that will cause pressure.

Q. Could it come from arthritis?

A. If you had a proliferation of the bone directly over a nerve, it is entirely possible that you might get a hypo-asthesia, yes, by paralysis of the nerve.

Q. That could come from a condition, an arthritic condition of the back, couldn't it, where that arthritis has been aggravated or exaggerated by an accident? 20

A. If you happen to have pressure on a nerve where it can't escape, then you can get hypo-asthesia and anaesthesia, but that depends solely on the pressure.

Q. In 1932 there was arthritis? A. Yes.

Q. It is possible then, that the back x-rays show in 1932, to have a hypo-asthesia show a little later on? A. You said, possible? 30

Q. Yes.

A. That is the first time I have ever seen it occur in a back.

Q. It can?

A. It can, yes, if it happens to be in the right place, I suppose it can. I have never seen it before.

Q. One of the symptoms of this hypo-asthesia condition is where the patient fails to appreciate the sensory values on his back, is that right?

A. Yes, sir.

Q. That is the outstanding symptom?

A. It has to be, because hypo-aesthesia means ability to detect stimulæ below that of normal so obviously it would have to be.

Q. Wouldn't that condition of hypo-aesthesia increase the man's disability, permanent disability?

A. No.

10 Q. In other words, having a condition of hypo-aesthesia with a back like that wouldn't increase his permanent disability?

A. Not necessarily at all.

Q. It might, might it not, Doctor?

A. No, I don't think it would, unless it had some motor function.

Q. Inability to walk properly?

A. That is a motor symptom and has nothing to do with hypo-aesthesia. Hypo-aesthesia has only to do with sensation and has nothing to do with motor

20 symptoms.

Mr. Lewis—I find myself at a decided disadvantage in not having Dr. Finegan here. Probably he might be able to assist me in some of these questions.

The Commissioner—You knew this hearing was coming on and you had the privilege of having him here.

30 Mr. Lewis—That is all I have of Dr. Charnock for the present. I suppose he will be back, won't he?

The Commissioner—I don't know. You had the privilege of having your doctor here. You can't call this man back, because you haven't your doctor here. Any other questions, Mr. Meredith?

Re-direct Examination—By Mr. Meredith.

Q. I understood you to say, if there was pressure on that particular nerve in the region of the fifth lumbar, the pressure would be created by an increase or as you described it a proliferation of bone at that point, pressing on the nerve? A. Yes.

Q. Do you find any great proliferation of bone in comparing this group of three separate x-rays taken over a period of three years? A. No, sir.

Q. You find the condition as far as proliferation of bone is concerned stationary? A. Well, yes.

Q. As shown by the x-rays? A. Yes.

Mr. Meredith—That is all.

Re-cross Examination—By Mr. Lewis.

Q. The x-rays are the same, Doctor, is that right, no change at all?

The Commissioner—We have been over that enough. We are not going to repeat that.

Mr. Lewis—That is all.

Mr. Meredith—That is all. Could we hear one of these doctors, now, Judge? 20

The Commissioner—No, there will be a time assigned for another continuance.

Mr. Meredith—Can we work out this examination problem before that time?

The Commissioner—Yes, I suppose so.

The hearing then adjourned.

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

TRANSCRIPT OF TESTIMONY

10 Transcript of testimony taken in the above entitled matter before HON. WILLIAM E. STUBBS, a Deputy Commissioner of the New Jersey Department of Labor, at the State House, Trenton, New Jersey, on Friday, January 26th, 1934, at 2 P. M.

Appearances:

Irving Lewis, Esq., for the Petitioner.

George Meredith, Esq., for the Respondent.

John F. Trainor, Court Reporter.

20 Mr. Lewis—If Your Honor pleases, I don't recall whether or not there was a definite question asked by me of Dr. Finegan and with the Court's permission, and my adversary not consenting, I would like to reopen the Petitioner's case to permit me to ask that question. The Court probably recalls in the previous hearings both Mr. Meredith and myself were somewhat agitated, I suppose, and I may have in the course of all the excitement and continuous

30 Mr. Meredith—First of all, Your Honor, I will admit I have been agitated on these hear-

ings in the past. I do feel, however, it is improper of counsel to ask at this time to recall to the stand a witness to produce additional testimony after his case was closed and we have already began part of our case and our doctor has been examined on the basis of the testimony already adduced by the Petitioner. From the standpoint, I object to recalling the doctor at this time.

The Commissioner—You say to save time? 10

Mr. Meredith—No, I said at this time.

The Commissioner—I thought you said to save time. You should have been here on time.

Mr. Meredith—I am sorry, Judge, for being late.

Mr. Lewis—I can see no serious harm or prejudice to the Respondent's case.

The Commissioner—We will have the doctor tell us whatever it is. I have no objection to it. If you have an objection note your objection on the record. 20

Mr. Meredith—I would like an exception.

The Commissioner—If it seriously incommodes you, we will give you an opportunity to meet it.

DR. PAUL J. FINEGAN, recalled by the Petitioner.

Re-direct Examination—By Mr. Lewis.

Q. Doctor, in your previous examinations of Mr. Faley, you say the condition as you found him in at the time of your previous examinations was aggravated by this injury? 30

A. Yes, that was my belief.

Mr. Lewis—That is all.

Re-cross Examination—By Mr. Meredith.

Q. What condition was aggravated by the injury, doctor, in your opinion?

A. In my opinion, the Petitioner was suffering from a moderate hypertrophic osteoarthritis of the lumbar spine at the time of his alleged injury.

10 Q. Now, do I understand, doctor, that it is your opinion that this man is at the moment suffering from two conditions; namely, an arthritis which pre-existed the trauma and some part of his condition is attributable to the accident by way of aggravation; is that your testimony?

A. No, I feel that the present condition of his spine, as shown by the x-rays, is merely an aggravation of the pre-existing arthritis.

Q. Is it your opinion, doctor, that the arthritis is causing some disability?

20 A. Well, that is very hard to say, except inasmuch as the present condition of the patient shows to me that he does have considerable disability.

Q. The arthritis produces some conditions, does it not? A. Yes.

Q. What conditions does the arthritis produce in this case?

A. Arthritis usually results in a diminution of the normal motion in the parts affected.

Q. Diminution of motion? A. Yes.

Q. And what else would arthritis account for, that you found in this man?

30 A. Arthritis would account for pain.

Q. Would it account for any other conditions that you took into consideration in forming your conclusion as to the amount of disability?

A. Arthritis will account for a production in this type of arthritis—in the production of new bone formation.

Q. Am I correct in this, doctor, that from what you said, I gather that the arthritis per se, disregarding anything else for the moment, is in this

man at the moment creating some disability by way of pain and limitation of motion?

A. Do you mean the arthritis he has at present?

Q. Yes. A. Yes.

Q. And how much of this estimate which you have indicated would you attribute to the arthritis, doctor; half or a small part of it?

Mr. Lewis—If your Honor pleases, that has all been gone over before.

10

Mr. Meredith—It strictly has not been gone over. If you will recall, this witness was questioned not at all or very little on his previous examination, the last day we met, and for the very reason that the witness said nothing at that time to indicate what tie-up there might have been between the condition he found and the accident. This is my first opportunity to cross-examine this witness on that point.

The Commissioner—You started these wheels turning and I don't feel I can stop them for you.

20

Mr. Lewis—I feel there was some testimony by Dr. Finegan as to the disability of this Petitioner.

Mr. Meredith—The Court has no testimony to indicate whether all or part was due to this trauma.

A. May I ask you to repeat that question?

30

(Question repeated.)

A. How much of his present disability is due to arthritis?

Q. Yes, that is right, doctor? A. All of it.

Q. You say the entire disability is due to the arthritis? A. The arthritis as it now stands.

Q. Doctor, if it was shown this arthritic condition existed prior to this trauma, you would not then say that the condition you find is due to this accident, would you?

A. If it was shown that the arthritis pre-existed his accident had been present in the same status as at present, do you mean?

Q. Yes.

The Commissioner—Now, be careful. In the same status as at present? That wasn't your previous question.

Mr. Meredith—Read the question to the doctor?

10 (Question repeated.)

Mr. Lewis—If your Honor pleases, that is a rather unfair question to have the doctor answer. I think as the doctor amended his answer it is the proper thing for the doctor to answer. There is a big difference between this man's condition three years ago, when the alleged x-rays were taken, and the present time. I think, it proper for the doctor to see the x-rays that were taken. Mr. Meredith has them.
20 It seems unfair to have Dr. Finegan answer questions without having the benefit of the x-rays which the Respondent has.

Mr. Meredith—My answer to that is, as far as we have developed we put some x-rays in evidence and had a reading from them from the doctor who took the x-rays. His testimony was the x-rays showed an arthritic condition as a result of this old injury in 1930. It seems to me with that as a basis I am free to relay
30 to this witness a hypothetical question based on that testimony. If the doctor wants to see the pictures, I have no objection, but I think he can assume from my question an arthritic condition.

The Commissioner—Yes, but not the degree of it. To that extent it doesn't seem to me to be a fair question or a proper one.

Mr. Lewis—May I suggest that Dr. Finegan be given an opportunity to examine the pictures taken in 1930?

Mr. Meredith—I would be glad to, if the Court feels I should.

The Commissioner—As the matter stands now, as I understand the situation, it doesn't seem to me it is fair to compare the present condition with a condition about which he knew nothing. How can he compare something with nothing? He has said the condition was aggravated. 10

Q. Now, doctor, I show you three x-rays marked in evidence, Exhibits R-4, R-5 and R-6, and ask you if you will read those plates and advise the Court whether or not those x-rays show an arthritic condition in the back; and if so, where?

Mr. Lewis—Is it possible, if your Honor pleases, to fix the time when these x-rays were taken. 20

Mr. Meredith—The date is totally unimportant, the date when these x-rays were taken. I don't feel it is necessary. In any event the record shows what date they were taken, if any question develops later.

The Witness—All right.

Q. What do they show?

A. These plates are x-rays of a lumbar spine and sacrum in the lateral view, and the pelvis and lumbar spine in the A.P. view, and they show some lipping of the margins of several of the lumbar vertebrae, which in my opinion is evidence of an osteoarthritic condition. 30

Q. And where do you find that lipping, doctor?

A. I beg your pardon.

Q. In what area do you find that lipping?

A. I said, in the lumbar spine, several of the lumbar vertebrae. Do you want the individual vertebrae?

Q. If you don't mind, doctor.

A. I would say that the third, fourth and fifth vertebrae in the A.P. view and all of the lumbar vertebrae, the first, second, third, fourth and fifth, in the lateral view.

Q. Now, that lipping, doctor, is indicative of what?

A. It is, in my opinion, indicative of a beginning osteoarthritic process.

10 Q. Would you say from the appearance of those x-rays, which you are now interpreting, doctor, exhibits R-4, R-5 and R-6, that the arthritic process is in an active state? You used the term beginning and I assume that denotes a continuation of the condition thereafter?

A. Yes, that is my opinion.

20 Q. Assuming, doctor, that in addition to the x-ray findings which you have before you, that at that time, at the time those x-rays were made, the man was complaining of pain in that area in the lumbar region of his back, would that not confirm your opinion that the man then was going through the process of an active arthritic condition?

A. It might or might not; that would depend on the clinical examination.

Q. To you, the x-ray findings are conclusive, are they not?

A. No, they should be supplemented by your clinical examination.

30 Q. You have already stated, doctor, that those x-rays show a beginning arthritis, which to you means a process which is in the process of continuing? A. That is right.

Q. My question to you was this, in addition to that finding which you get from these plates, would not the fact that the presence of the arthritis as shown in the plates was accompanied with pain in that area the lumbar area of the back, would not the combination of those two make you feel more

clearly, or more certain rather, that the man was at that time, at the time the x-rays were taken bothered with an arthritic condition which was progressing?

A. I would have to qualify that word bothered.

Q. Suffering then, doctor?

A. Or suffering. In other words, the man was manifesting symptoms of arthritis?

Q. Yes, you have x-ray findings, plus symptoms?

A. Yes.

Q. Do not those two together indicate a condition of arthritis present on that date? 10

A. It might or might not.

Q. What else would you want, doctor?

A. I would want to examine the patient.

Q. To find out what?

A. To find out whether pain was attributable to any other cause.

Q. Isn't that cause enough, x-ray findings together with pain in the same area, without searching further? 20

A. No, if I may illustrate, I will prove it to you.

Q. What would a clinical examination of the parts reveal, doctor, other than a complaint of pain and possibly a restriction of motion?

A. It should help to indicate to the examiner whether or not the pain was attributable to some process in the bones in that area.

Q. How would you determine that from a clinical inspection?

A. Am I supposed to demonstrate just how I examined the patient? 30

Q. No, I want to find out, how you would find out by a clinical examination?

A. I would attempt to find other causes of pain in that area.

Q. How would you go about it?

A. The man might have a tumor for instance. The man might have some kidney condition. The

man might have some bowel condition that would have to be ruled out.

Q. Assuming, that none of those conditions were present or complained of, doctor, would you then have to say arthritis was at the bottom of the man's trouble?

10 A. I am afraid I can't give an opinion, unless I examine the patient. I feel that the clinical examination is necessary for me personally to form an opinion on the man's condition.

Q. I show you three other x-rays, doctor, marked Exhibits R-1, R-2 and R-3, and ask you if you will advise the Court whether or not they show a condition of arthritis; and if so, where the arthritic condition is located?

20 A. These x-rays marked Exhibits R-1, R-2 and R-3 show some lipping of the margins of the vertebrae in the lumbar spine in the A. P. view including the second, third, fourth and fifth vertebrae and in the lateral view, including all of the lumbar spine and the lower two dorsal vertebrae. They are the only ones visible.

Q. Now, from a close inspection of the two x-rays, doctor, can you say that this last group you have read, Exhibits R-1, 2 and 3, show a lesser condition of arthritis or about the same or more?

30 A. Allowing for differences in the films; that is, technical differences due to the manner in which they were taken, it is difficult for me to see a marked difference.

Q. You mean by that doctor, that there is no gross difference in the degree of arthritis present as indicated on those plates?

A. There doesn't seem to be enough for me to tell which is which or which was taken first, in chronological order.

Q. Regardless of which was taken first, my question was, is there any gross difference in the amount of arthritis shown in the two sets of x-rays?

A. There is a very slight difference and I would say that that difference would be to indicate progression of the process in R-6 over R-2.

Q. You say R-6 indicates a worse condition than R-1 or R-2?

A. These two. Yes, that is my opinion.

Q. Suppose, I were to tell you R-6 was taken back in 1930 and that R-1 was taken after this accident, would you not then say that the thing, at least, from x-ray findings, the condition was not at all aggravated, but in fact was better? 10

A. Am I to assume, these are taken of the same individual?

Q. Yes, sir. A. That would be hard to answer.

Q. That is your answer, except put in fewer words; Exhibit R-6 shows a lesser degree of arthritis than R-1 and R-2, is that it?

A. R-6 shows a slight increase in the progression of the condition over R-2.

Q. Now, doctor, having in mind those two x-rays were taken three years apart, one set in March, 1930— 20

Mr. Lewis—March what?

Mr. Meredith—March 17, 1930.

Q. March 17, 1930 and the other in August, 1932, are you now able to form an opinion, based on those x-rays, and your clinical inspection as to whether or not some of this man's disability antedated his injury for which he is now making a claim? 30

A. Am I to assume that Exhibits R-1, R-2 and R-3 were the earlier pictures, or R-4, R-5 and R-6 were the earlier pictures?

Q. You are to assume x-rays were taken three years ago— A. Which x-rays?

Q. Exhibits R-4, R-5 and R-6, and they show the condition which you have already described. Can

you not say from that, doctor, that some of this man's disability antedated this accident, when you also take into consideration the fact that he in 1930 was complaining of pain in the lumbar region?

A. I can only say that these pictures indicate to me, the presence of an osteoarthritic process which may or may not have been symptomless.

10 Q. I am telling you there were symptoms; there were complaints of pain, and that the man went to a doctor to have that pain relieved for him. Does not that fact, the fact of his complaint of pain, his search for treatment, plus his x-ray findings indicate to you an active arthritic condition, which was then disabling to some extent?

A. No, not necessarily.

Q. It does not? A. No.

Q. You say not necessarily, it could have been disabling couldn't it?

20 A. It could have been, yes, sir, if the arthritis was the cause of his symptoms.

Q. And then, to the extent it could have been, you would modify your statement that this man is fifty per cent. totally disabled as a result of this more recent trauma, would you not?

A. Pre-supposing that he was well previous to his accident.

30 Q. Now, I am telling you he was not well at all times previous to his accident in 1930, he had trouble with his back, sought treatment for a condition of pain in his back.

Mr. Lewis—There isn't testimony to that effect in the record, that this man was ill prior to the accident, in other words, if we take the respondent's contention he was so sick in 1930, plus the fact that the man did this heavy laborious work, that Your Honor heard described, it is quite improbable that the man was in the condition the respondent will have Your Honor believe he was in in 1930.

The Commissioner—I don't think it is wise to use the word, unwell. He had some pain in his back according to his statements.

Mr. Lewis—If true.

Mr. Meredith—The doctor has already stated he based his opinion that this man was fifty per cent. disabled due to this trauma alone on the hypothesis that the man was free from any disorder previously. I have forgotten his exact language, but I take it that was the thought the witness had in mind? 10

A. No.

Q. What do you have in mind, then, Doctor?

A. I have in mind, or it is my opinion that this man is 50 per cent. totally disabled at the present time.

Q. Right.

A. I didn't see the man from the time of his accident until, the first time I saw him was in March, 1933, and I don't know what took place, whether his condition was aggravated or subsided even from the accident to that time. 20

Q. Because you did not see him prior, and I am trying to help you by supplying additional facts which were not within your knowledge, I am asking you with those additional facts of pain in the back in 1930, arthritis in the entire lumbar area, as you yourself have read the condition from this group of x-rays, I say with those conditions present that you did not know of when you formed your opinion of 50 per cent. disability due to this trauma alone, would not those additional facts modify your opinion to some extent in stating all of that disability was due to this recent trauma? 30

A. That would, if true, but I have in my history the fact that the patient had no such complaint or symptom.

Mr. Meredith—May I object to that, in the form of a history from this witness who is an examining doctor.

The Witness—I beg your pardon, I am treating the man at the present time.

The Commissioner—You started it, Mr. Meredith.

Mr. Meredith—It is totally a volunteer statement.

10 The Commissioner—You started it. You got this thing going.

Mr. Meredith—I would like to have it stricken. If I may not I would like to have an exception to Your Honor's ruling.

The Commissioner—All right, note your exception.

The Witness—I have been treating this man since June, 1933.

20 Q. I am not asking you, Doctor, to decide this matter as to whether the history you got is correct, or the one I gave you is correct, I am asking for an answer on the set of facts I have given you.

A. I will answer it now. If the man had the pre-existing disability prior to my examination, my first examination which was due to the same condition, which is now operative, I would say the amount of total disability that he now has, which in my opinion is 50 per cent., is not solely due to the accident in question.

30 Q. That is fine. That is all I have been trying to get at. Are you in a position to separate the two things, so as to say how much is due to this trauma, and how much pre-existed?

A. No, sir.

Q. Having in mind the x-ray findings and my statement that the man complained of pain and sought treatment in 1930? A. No, sir.

Mr. Meredith—That is all.

Re-direct Examination—By Mr. Lewis.

Q. Now, Doctor, assuming there was the presence of some arthritis in 1930, would it be possible for a man to go on doing heavy laborious work day in and day out for a period of at least two years?

A. If he had the arthritis, did you say?

Q. Yes, such work as pouring moulds?

A. I will answer that by saying a man may do work with arthritis if the arthritis doesn't bother him.

10

Q. Could a man continue every working day, working a minimum of eight hours a day doing heavy laborious work with an arthritis that bothered him so much he couldn't work or that he complained of it?

Mr. Meredith—I object to the form of that question. It is one of those questions that answers itself.

The Commissioner—I thought you gave the answer and question all in one. 20

Mr. Lewis—I did.

The Commissioner—You said something about could he work if he did work. If he did, that is the answer in itself.

Mr. Lewis—If your Honor pleases, Mr. Meredith has gone quite far afield in his cross-examination and I didn't object. I do want to show the doctor some x-rays that were taken in January of this year and ask him to testify as to his findings, on these x-rays, January 13th, I believe is the date of these x-rays. 30

Mr. Meredith—There we are, counsel is seeking at this late date to introduce some testimony that we knew nothing of.

Mr. Lewis—You still have your case to present, Mr. Meredith. The situation is this, there are a set of facts, produced before Your Honor and my client tells me he was never

examined and those x-rays were never taken back in 1930, and the Respondent is trying to present a case to Your Honor, trying to show this man was sick in 1930 and he is just the same now as he was then. The doctor has the benefit of three x-rays and I want to give the Court the benefit of some more x-rays. I don't even know what they are.

10 The Witness—Are they the pictures I brought?

Mr. Lewis—Yes.

The Witness—They were taken in June, 1933.

Q. You have already testified from these x-rays, haven't you?

A. The previous part of the hearing.

Mr. Lewis—I want to apologize, I thought it was January, 1934. My questions are all out of order. That is all, Doctor.

20 The Commissioner—Do you rest, Mr. Lewis?
Mr. Lewis—Yes.

DR. ROY GRIFFITH, sworn for the Respondent.

Direct Examination—By Mr. Meredith.

Q. Dr. Griffith, you are a physician licensed to practice in the State of New Jersey? A. I am.

Q. And you have been practicing, how long?

A. Since 1918.

Q. What specialty, if any, have you practiced, Doctor? A. Orthopedics and traumatic surgery.

30 Q. Have you had considerable experience in estimating disabilities and diagnosing conditions resulting from trauma in matters arising under the Workmen's Compensation Act of New Jersey?

A. I have.

Q. Have you had much experience, Doctor, in treating injuries of the back? A. I have.

Q. Doctor, you have seen the various x-rays, the group of three x-rays in evidence, have you not, marked Exhibits P-2, P-3, P-4 and P-5 and R-1, R-2 and R-3 the other set and the other set marked Exhibits R-4, R-5 and R-6? A. I have.

Q. Can you advise the Court, Doctor, having in mind that those x-rays were taken at intervals, the first being taken in 1930, the second group in 1932 and the third group in 1933—can you advise the Court whether the x-rays show any gross difference in the condition which presents itself in the three x-rays? 10

A. They show essentially the same thing.

Q. What do they show, Doctor?

A. There is an increase in the deposit of calcium called lipping of some of the vertebræ and there is a slight lipping shown over the upper margin of the acetabulum, over the hip socket on each side, and I notice a calcareous deposit, probably a calcareous gland or calcareous in a vein or something in the pelvis. 20

Q. Those conditions which you have just recited, Doctor, do they appear in this whole group of three x-rays? A. They do.

Q. Is there any difference in the degree in which they present themselves in the three x-rays?

A. I can see no difference.

Q. Now, Doctor, I show you x-rays marked Exhibits P-2, P-3, P-4 and P-5 and ask you if you will direct your attention particular to the point where the fifth lumbar vertebræ meets the sacrum and ask you if you will advise the Court, whether any unusual condition presents itself at that point? 30

A. Where the fifth lumbar meets the sacrum?

Q. Yes, sir.

A. Well, on the right side of the fifth lumbar there is a larger deposit of calcium around the

foramen through which some of the nerves pass than there is on the left. There is evidence of more calcium in that region than is usually found.

Q. Now, directing your attention to the other two groups of x-rays, doctor, exhibits R-1, 2 and 3, and Exhibits R-4, 5 and 6, do you find the amount of calcium deposit greater or less or about the same, at that same point in the two sets of x-rays as compared to the one you just read, the P series?

10 A. It appears the same to me.

Q. You examined this man, did you not, doctor?

A. I did.

Q. Will you advise the Court what you found as a result of your examination?

20 A. I examined him April 17, 1933. He was a fairly well-nourished, fairly well-developed, white man of about 50 years. There was a marked tremor of the fingers; the deep reflexes were somewhat exaggerated; pupils were equal and reacted to light and accommodation; teeth were in fair condition; heart and lungs were negative; blood pressure was 140 systolic over 60 diastolic; pulse was somewhat accelerated. Patient refused to undress himself for examination and was assisted in doing so. He moved about very slowly and when requested to turn over complained of a great deal of pain. There was a great deal of resistance on his part offered to each effort to make passive motion of his spine or legs, or to move any part of his body. Straight
30 leg flexion of the right leg was made to an angle of 60 degrees. His left slightly more. He could lie prone on his back and raise either or both legs off the table without any apparent difficulty. He could do the same also while lying on his abdomen face down—

Q. May I interrupt you at this point, doctor? What do those maneuvers, the raising of the legs while lying on the back and raising them while lying on the abdomen, have to do with the man's

ability to bend or use his spine; does that indicate anything in that direction?

A. If he can raise both legs at the same time while lying on his abdomen, it indicates he has pretty good use of the lumbar muscles, and if he had much pain there, he wouldn't be able to do it.

Q. Could you determine from those maneuvers, doctor, whether or not this man has any loss of use or any loss in the range of motion in his back or spine?

10

A. Not from those tests. He could extend his spine without difficulty, that was demonstrated. That was the extent of the positive findings.

Q. Before I go on with that, doctor, may I ask you this, do the three groups of x-rays which you have before you appear to be x-rays of the same individual?

A. The variation in the size and shape of the transverse processes and the spinous processes and vertebrae themselves are the same in all pictures and I have never seen two individuals that compared to that extent.

20

Q. Is there any question in your mind, doctor, that any one of those groups are not x-rays of the same man that exposed himself for the other two groups of x-rays?

A. No, if those pictures were given to me and someone told me they were of different men, I wouldn't believe it.

Q. Did you reach any conclusion as a result of your examination, doctor, as to whether this man was able to work?

30

A. No, I thought that he had gotten about all the improvement that he could have gotten from a strain dating some months before, I don't recall how long.

Q. Did you consider that the man as you then observed him had any disability, doctor?

A. I thought his existing disability at that time was approximately 10 per cent. of total.

Q. Doctor, having in mind the reading of those x-rays, as you have given them, and your statement that they all show the same condition, and that the x-rays first taken were made in the year 1930, a considerable time before this accident, about two years before, and having in mind that the man at that time complained of pain in the lower back and sought the advice of a physician because of that pain in his back, and having in mind the entire group of x-rays and your examination of the man; what have you to say as to whether that 10 per cent. is due entirely or partially to the accident the man had in August, 1932, when he was lifting a mould from his bench to the floor and felt a pain in his back?

A. It would appear to me, that if a man had this condition of his spine in 1930 and had pain in his back, that he would at that time have some disability from that condition.

Q. Are you in a position, doctor, to say how much is due to this act of lifting in 1932 and how much pre-existed?

A. I don't know how much pain he had in 1930. I don't know whether he had—whether he was half as bad then as he is now or what, but his arthritis was essentially the same.

Q. Are you in a position to state, doctor, from your interpretation of these x-rays or from your clinical examination, whether or not this man's arthritic condition was aggravated by this act of lifting which has been described to you?

A. No, it is possible to aggravate it or cause an increase in pain, but I can't say whether it was or not.

Q. And would the aggravation take the form of a permanently disabling aggravation or a matter of a temporary nature wherein the pain would subside and the man be in status quo?

A. The aggravation should be temporary. If a man has an arthritic condition he is more susceptible to trauma and it takes less to hurt him, but when he has recovered from that strain or that trauma, essentially the same condition should remain as pre-existed there.

Mr. Meredith—That is all.

Cross Examination—By Mr. Lewis.

Q. Now, doctor, you examined this man, didn't you? A. Yes.

10

Q. Could he undress himself? A. No.

Q. Could he take his shoes off? A. No.

Q. Having these two factors in mind, you still say he is only 10 per cent. disabled, not considering the other factors which I will bring out in a minute or two, but those two factors by themselves, not being able to dress or put his shoes on, you would still say that man was only 10 per cent. totally disabled?

Mr. Meredith—I object to that from the standpoint the doctor did not testify he was not able to dress himself or put his shoes on. He said he did not do it. 20

Mr. Lewis—I just asked the question, was he able to put his shoes on, and the doctor said, no.

The Witness—You didn't ask that question. He asked me if he took his shoes off and if he undressed himself, and I said, no.

Q. Could he take his shoes off?

30

A. I think, he could.

Q. Could he take his trousers off?

A. I think he could.

Q. You are not sure about that, are you, doctor?

A. I am sure as I think I need be.

Q. Now, doctor, how much could he bend his back forward?

A. He resisted every effort to bend it and I don't know how far he could bend it, but there is nothing pathologically to prevent him from bending it practically normal.

Q. How many degrees did he bend forward, doctor, even though he was resisting?

A. I didn't measure the degrees.

Q. Approximately, doctor. In your vast experience, you should be able to judge, should you not?

10 A. In moving around he bent his back approximately half of the normal range.

Q. Doctor, you examined this man thoroughly?

A. As well as he would allow me.

Q. Well now, doctor, you told him who you were examining him for? A. Yes.

Q. And he knew all about that? A. Yes.

Q. Do you mean to infer he physically resisted you? A. Absolutely.

Q. How much could he bend laterally, doctor?

20 A. He bent laterally two-thirds of normal in spite of the resistance offered.

Q. Lying on his back, doctor, how much could he flex his thighs? A. I don't know.

Q. Did you put him to that test?

A. He resisted that test.

Q. Every test you gave him he resisted?

A. He resisted every effort to produce passive motion. You could feel voluntary contraction of his muscles.

30 Q. How long did you examine him?

A. I suppose, the examination took 20 minutes to a half hour.

Mr. Lewis—If Your Honor pleases, with Mr. Meredith's consent, I am willing to let the doctor examine my client now, right before Your Honor. Let's see how much he is going to resist on just the lateral bending forward and backward. Right now, if Mr. Meredith has no objection.

Mr. Meredith—I have no objection, Your Honor.

Mr. Lewis—Let this doctor do what he wants to you.

The Commissioner—What is it you purpose trying to demonstrate?

Mr. Lewis—I am confronted by a set of facts and with due respect to the doctor, they are entirely different. I feel the Court should know and the respondent should know and I want to know. After all this case has been before Your Honor two and three times and when a set of facts differ from the ones I have medically and actually, we ought to get down to the truth of this once and for all. The doctor says he resisted. After all Your Honor is the only one that is going to determine it. Let Your Honor have the benefit of determining whether this man is shamming or not. If he is, let's not take your time and Mr. Meredith's time and the Judge's time. 10 20

The Commissioner—I don't suppose, this is the proper place to conduct such an examination as that.

Mr. Lewis—The point is this, the doctor says he resisted various efforts on his part, and the petitioner tells me no. I say, see how much he resists before Your Honor.

The Commissioner—This is hardly the proper place to do that kind of an examination. It seems to me it requires the knowledge of a physician. 30

Mr. Meredith—Here is an examining physician on the part of the respondent and here is the petitioner's physician right here, and the doctor says this man is ten per cent. disabled and relates certain facts which don't seem to be consistent and I think, it is rather unusual—I will admit it. Nevertheless in order

to do justice both to the respondent and the petitioner, I think, the man should be examined right here before Your Honor.

The Witness—I would want him stripped and undressed entirely and I am going to lay him on the table.

The Commissioner—We can't do that.

10 Mr. Lewis—The doctor arrives at ten per cent of total disability, with all of these resistive measures on the part of the petitioner and I want to see how he arrives at it. This is a most unusual case.

The Commissioner—Not here. This is no place for a thing like that. We will have to do that somewhere else. We will have to arrange for another place if that must be done. We will have to arrange to have that done in a hospital or a doctor's office.

20 Mr. Lewis—Then, in that event, the doctor's testimony shouldn't be admissible, because he isn't really in a position to state the amount of this man's disability.

The Commissioner—He must speak his judgment or his conclusions as to what he found.

30 Mr. Lewis—He has been handicapped so terrifically I don't see how he can arrive at any conclusion. The doctor was handicapped because apparently of the petitioner's lack of co-operation in response to the doctor's inquiries. I don't see how he could arrive at any conclusion if he resisted the way the doctor says he did. Let's have a few of the tests which the doctor testified about. I don't mean to submit him to an entire examination.

The Commissioner—Simply strip him to the waist, would that be sufficient?

The Witness—I would like to manipulate his legs and have you see the muscles of his legs.

Mr. Lewis—Let's talk about his back.

The Witness—I can test his back by working his legs. To make an examination for the benefit of the Court, I want to make it just as I made it in April, 1933.

Mr. Meredith—Off the record.

The Commissioner—Let's take all the testimony we can. If he doesn't resist now and he did then, and you can give us a different result, let's have it. Isn't that so, doctor?

10

The Witness—I might. His condition might be different from what it was in April, 1933, too.

The Commissioner—Yes, that is a long ways back. Let's go ahead with the testimony and we will consider that when we get through with the rest of the testimony.

Mr. Meredith—Off the record.

(Discussion off the record.)

The Commissioner—Let's do what we can here. 20

Q. Your office is in Newark, isn't it, doctor?

A. Yes.

Q. You have examined any number of injured persons on behalf of respondents, haven't you?

A. Yes, quite a few.

Mr. Lewis—I guess that is all for the time being.

Re-direct Examination—By Mr. Meredith.

Q. Doctor, did you form a conclusion as to whether or not this man did or did not co-operate with you in demonstrating his full ability to use the various parts of his body? 30

A. I felt certain he did not co-operate.

Q. Did you find in this man's physique or any explanation in the x-rays, any pathological condi-

tion which would prevent him from going through the normal range of motions that you asked him to do? A. I did not.

Mr. Meredith—That is all.

Re-cross Examination—By Mr. Lewis.

Q. Just one question, doctor, did you examine him for sensitivity? A. Yes.

Q. And your examinations disclosed what?

A. His sensitivity was normal.

10 Q. You found no evidence of any hypo-asthesia at all, did you, doctor? A. No.

Q. None whatever? A. No.

Q. Assuming, doctor, that evidence of hypo-asthesia developed within a month after your examination; what would you then have to say about that? A. Did you say hypo or hyper?

Q. Hypo-asthesia?

A. That is a subjective symptom.

Q. Is it not an objective symptom?

20 A. No, that is subjective, purely subjective.

Q. Was your answer, it wasn't objective?

A. It is purely subjective.

Q. What would you call it if you stuck a pin in somebody and they winced for pain or didn't wince?

A. The wincing is objective, but the pain is subjective.

Q. You would be able to determine whether or not the person really felt it, wouldn't you, doctor?

0 A. It would be impossible for me to tell the extent he felt the pain by the amount of wincing. That would be impossible.

Q. Couldn't you tell whether or not when you applied extreme heat or extreme cold there was diminution of the sensory nerves?

A. That is purely subjective. If he said it was lessened or increased that is subjective. I could

tell how he felt. It would have to be based upon the cooperation of the patient entirely.

Mr. Lewis—That is all, doctor.

Re-direct Examination—By Mr. Meredith.

Q. Doctor, did the man complain to you of any condition of a disturbance of his ability to feel in any region of his body? A. No, he did not.

Mr. Meredith—That is all.

Re-cross Examination—By Mr. Lewis.

Q. Didn't you use sharp instruments on this man when you examined him, when he complained about hypo-asthesia? 10

A. We used some instruments; I don't know how sharp they were.

Q. For his specific complaint of hypo-asthesia?

A. He didn't complain of any symptoms of hypo-asthesia.

Mr. Meredith—I object to this girl interrupting.

The Witness—She was not present. She was not in the room. 20

Q. What did you have these sharp instruments for, doctor?

A. To test his sensation and I found no abnormal changes.

Q. If he made no complaint to you about lack of sensation, why did it become necessary for you to examine him?

A. That is a part of the examination.

Q. Each examination that you make? 30

A. No, but a man complaining as much as he did of his back, I do that.

Q. He made no complaint about lack of sensation?

A. No, no, he didn't make any complaint about his pupils, but I tested them for their reaction. He didn't make any complaint about his reflexes, but I tested them.

Mr. Lewis—That is all, doctor.

Mr. Meredith—That is all, doctor.

DR. HENRY H. KESSLER, sworn for the Respondent.

Direct Examination—By Mr. Meredith.

10 Q. Dr. Kessler, will you please state briefly for the record your qualifications?

A. I am at the present time on the staff, the orthopedic staff, of the Newark City Hospital, the Newark Memorial Hospital, the Newark Beth Israel Hospital, the Hospital and Home for Crippled Children. I am consulting orthopedic surgeon to the Irvington General Hospital, to the State Hospital at Glen Gardner, to the County Hospital at Cedar Grove and the County Hospital at Verona.
20 I am medical director of the Newark Rehabilitation Clinic. I am the author of a work called "Accidental Injuries." I have been the United States delegate to the International Congress of Industrial Accidents in Budapest in 1928 and Geneva in 1931. I have practiced orthopedic surgery for 15 years.

Q. And I take it, doctor, your experience embraces the fact of diagnosis and estimating disabilities resulting from trauma in Workmen's Compensation cases? A. Yes, sir.

30 Q. And you have had considerable experience along those lines? A. I have.

Q. You have seen the x-rays in evidence, have you not, doctor, the three groups of x-rays?

A. I have.

Q. Can you advise the court whether or not, from your reading of those three groups of x-rays, whether they indicate any gross difference in the

condition that is present which has been described as an arthritis?

A. I have looked over the three different sets, both the A.P. views and lateral views and in my opinion, then, they are identical.

Q. Is there any question in your mind, doctor, as to whether or not those three separate groups of x-rays are x-rays of the same man?

A. From the conformation of the vertebral segments and their appendages, I am of the opinion that they are of the same individual. 10

Q. Doctor, directing your attention to that point in the spine between the fifth lumbar vertebrae and the sacrum, can you state whether there is any difference in the size of the spur or lipping, whatever is present at that point, in the three sets of x-rays.

A. In the fifth lumbar vertebrae?

Q. Yes, where it joins the sacrum.

A. There is an arthritic process between the joints of the fourth and fifth lumbar vertebrae which can be noted in the A.P. view, but not in the lateral view. 20

Q. Did you state, doctor, whether or not there was any difference in the size and the contour of that growth at that point between the fifth lumbar and the sacrum?

A. I don't see any growth in the fifth lumbar vertebrae and the general conformation and size of the fifth vertebral segment is in my opinion within the normal variation. It is what one would call normal. 30

Q. You examined this man, did you not, doctor?

A. I did.

Q. On what date, sir?

A. I examined him in my offices on April 17th, 1933.

Q. At the same time, Doctor Griffith examined the man?

A. Dr. Griffith was present and Dr. Ruoff was present.

Q. Did you form a conclusion, doctor, as to whether the man was able to work as of that date?

A. I did.

Q. What was your conclusion?

A. That he was able to work.

Q. Did you see any need for any treatments around that date, doctor? A. No.

10 Q. Did you note any permanent disability as a result of your examination?

A. I found no evidence of physical disability which would incapacitate him from work. I could find evidence of functional changes of a psychoneurotic character, which I estimated for the purpose of compensation, were causing a disability of from five to ten per cent.

20 Q. Is it your opinion, that that amount of disability, five to ten per cent., is the result of this accident or happening rather when the man lifted a mould?

A. This train of psychoneurotic symptoms may have been the result of such an injury.

Q. You state you give him that allowance for the psychoneurotic symptoms. Did you find any physical disability present?

A. Yes, he had an old-standing arthritis of his spine.

30 Q. In your opinion, has that anything to do with the accident or the happening which he has described, having in mind the x-ray findings you have before you dating back from 1930?

A. From a clinical examination which showed a definite flattening of the normal lumbar curve, which would take several years to form, and from these x-ray findings, I am of the opinion that that physical disability which I noted in my examination had existed prior to my examination.

Mr. Meredith—That is all. Cross-examine.

Mr. Lewis—You couldn't tell how much pain persisted before the accident, could you, doctor?

The Witness—Pain is a subjective symptom.

Cross Examination—By Mr. Lewis.

Q. The answer to my question is either yes or no, doctor? A. No.

Q. Did he resist you also? A. To some extent. 10

Q. Referring specifically when you wanted to examine his back? A. I examined his back.

Q. You examined his back? A. Yes.

Q. He didn't resist you, did he?

A. Not altogether, no.

Q. How much limitation did you find in the bending of his back? A. About 5 per cent in all directions.

Q. Is that all? A. Yes.

Q. Were you there when Dr. Griffith examined him? 20

A. I don't know whether he was there. I don't know whether I was present at the time he was being examined by Griffith, but Griffith was present when I examined him.

Q. How many degrees would you say there was, doctor, of his forward bending?

A. He bent forward so his hands touched his ankles.

Q. How many degrees? A. Ninety degrees. 30

Q. That is normal, isn't it?

A. There is no such thing as normal. There is no fixed or arbitrary angle of forward flexion.

Q. That is almost normal? A. Yes.

Q. And lateral, Doctor, what would you say?

A. Thirty-five degrees.

Mr. Lewis—If Your Honor pleases, since all of these gentlemen are here and I say since there seems to be such a wide variation, I am willing to have all of these doctors examine Mr. Faley for the benefit of the Court; I mean, in the presence of Dr. Finegan.

Mr. Meredith—I am glad to work that out, I think it has been arranged before.

10 Mr. Lewis—Then, I say my cross-examination now is somewhat handicapped because Mr. Faley tells me a different set of facts. Insofar as the question of the adjournment is concerned, may I say this. The Respondent in this case has no cause to complain, because Your Honor will recall the first time this case was reached for trial, the doctors were here and Mr. Meredith came in with an extra added defense. I am not asking anything unreasonable. I think, probably, since we must have
20 another hearing that all of this is simply a waste of Your Honor's time, since this man is going to be examined by these physicians, they are going to give us the benefit of what they find out without any resistance.

The Commissioner—I don't know where you get this statement that there must be another hearing.

Mr. Lewis—For this reason, they are going to examine this man this afternoon.

30 The Commissioner—I didn't say so. I am trying this case. I said that matter would rest, until I see what the testimony is and that is what I have in my mind. I want you to go ahead with the case.

Mr. Lewis—I think it is most important that this man be examined——

The Commissioner—If you don't want to go ahead, if you want to rest your case you can do it. Now, proceed.

Mr. Lewis—I have no further questions.

The Commissioner—That is all, Doctor.

Re-direct Examination—By Mr. Meredith.

Q. Doctor, you stated the man did not resist the movements altogether. Did he resist to any extent in the examination? A. To some extent.

The Commissioner—That was his answer before. I don't know why you want to have it over again. 10

Mr. Meredith—That is all I wanted to bring out.

Re-cross Examination—By Mr. Lewis.

Q. Was there any complaint about hypoesthesia?

A. Hypoesthesia is not a complaint. Hypoesthesia is evidence of diminished sensation, which you detect on physical examination. 20

Q. Did he complain of that? A. No.

Q. Did you make an examination for that?

A. Yes, I included his cranial nerves and motor sensory system as well.

Q. Doctor, assuming a month later there was marked evidence of hypoesthesia, what would you then say?

A. It would confirm my opinion as to the functional nature of his complaint. 30

Q. Which means what?

A. Which means I found him suffering from psychoneurotic symptoms, and this whole picture of disability is one of psychoneurosis.

Q. Doctor, if this man were shamming numbness, you could detect that very easily, couldn't you?

A. I didn't say he was shamming.

Q. I say, if he were shamming numbness?

A. It can be shammed.

Q. Exactly? A. Yes.

Q. Thoroughly? A. Yes, completely.

Q. And you can't detect it? A. Yes.

Q. So, that it could not be detected?

A. He can sham and it can be detected that he shammed.

Q. It isn't possible he could deceive you?

10 A. It is possible he might deceive me.

Q. Even you? A. Even I.

Mr. Lewis—That is all.

Mr. Meredith—That is all.

DR. OTIS L. CHAPMAN, sworn for the Respondent.

Direct Examination—By Mr. Meredith.

Q. Dr. Chapman, you are a physician licensed to practice in the State of New Jersey? A. I am.

Q. Will you state your qualifications?

Mr. Lewis—I will admit them, Mr. Meredith.

20 Mr. Meredith—You will admit that the Doctor has had a large experience as a physician in traumatic work?

Mr. Lewis—Yes, if he works for you he must be good.

Q. And in estimating conditions arising from trauma, is that right?

Mr. Lewis—Yes.

Q. You have seen the three x-rays, the three groups of x-rays in evidence, have you not, Doctor?

30 A. I have.

Q. Can you advise the Court whether or not they are x-rays of one man or more than one man?

A. It is my opinion that they are.

Q. They are what? A. The x-rays of one man.

Q. Is there any doubt in your mind about it?

A. None, no.

Q. And having examined the x-rays, Doctor, can you advise the Court whether there is notice in the three separate groups, any progression of an arthritic condition which has been testified is present in all of them?

A. None that I could see. There is essentially
no change in the condition. 10

Q. Having in mind, Doctor, that the first of the group of x-rays were taken in 1930 and having in mind your interpretation of the x-rays, would you say this trauma has in any way aggravated the arthritic condition to make it more permanently disabling? A. No, it has not.

Q. When did you examine this man, Doctor?

A. January 28th, 1933.

Q. In your opinion, Doctor, was the man able to work at that time? A. Yes, I thought so. 20

Q. Will you describe to the Court what you found as a result of your examination, Doctor?

A. I found a man with some symptoms of an old osteo-arthritis. In addition to that, I found he was a nervous, apprehensive type of an individual who was fearful of pain and manipulation and was rather hesitant about performing any of the movements asked.

Q. Will you say he co-operated with you, Doctor, in following out your requests to demonstrate certain movements? 30

A. It took considerable coaxing and manipulating to get him to do the things; in other words, he didn't do them readily. He would do them, but he would take time to carry out various movements, after coaxing and talking to him.

Q. Did you as a result of your examination, Doctor, conclude that the man was then suffering from a permanent disability?

A. I felt that he had a permanent condition, yes.

Q. To what extent, Doctor?

A. I estimated 10 per cent. of total permanent disability.

10 Q. Had the presence of the arthritis condition shown in the x-rays anything to do with your estimate of 10 per cent.? Did you consider that or not at all?

A. I gave him 10 per cent. for any and all complaints he had. I couldn't find anything in the x-rays to show that his condition had progressed in that two or three years, insofar as the bone changes were concerned, there was no difference. He so far as I could find out, he had had two accidents; how much was due to the first or how much aggravation or increase in soreness was due to the first or second accident, I couldn't determine.

20 Q. Could you state definitely, some portion of that 10 per cent., regardless of the amount if you can't fix it, was due to the prior condition in 1930?

A. Yes, the x-ray films showed the same condition to be present and with some information that I had that he had an accident at that time to his back or complaint to his back, I feel that part of the affair, that the amount should be divided between the two happenings.

30

Mr. Meredith—That is all. Cross-examine.

Cross Examination—By Mr. Lewis.

Q. Doctor, it wouldn't take much change in the bone formation to produce pain, would it?

A. No. In arthritis some people have pain and some don't have pain.

Q. But even slight bone changes would produce pain, wouldn't it? A. Not necessarily.

Q. But it might, wouldn't it?

A. In some cases it does and in some cases there are extensive bone changes without any complaints of pain.

Q. Suppose doctor, there was a slight change in the bone formation that produced pressure on the nerve, wouldn't that cause pain?

Mr. Meredith—May I object, Your Honor, because this witness has stated there was no bone change.

10

Mr. Lewis—This is a hypothetical question.

Mr. Meredith—It must be based on some testimony. There is no testimony either in the petitioner's case or ours to show an increase in that spur.

Mr. Lewis—I believe Dr. Finnegan said there was some slight change. Didn't you, doctor?

Dr. Finegan—In my opinion.

The Commissioner—It is a very indefinite question, because you have not specified any particular point. Go ahead with your question and let's have your answer and note your objection, Mr. Meredith.

20

(Question repeated.)

A. A pressure on the nerve might cause pain and it might not.

Q. Would pressure, doctor on the fifth lumbar vertebrae produce, nerve rather, produce hypoesthesia?

30

The Commissioner—Now wait. Is that right, doctor, fifth lumbar nerve?

The Witness—I don't know of that one.

Q. Fifth lumbar nerve on the right side?

A. If he means the nerve that emerges between the fourth and fifth and between the fifth and around the sacral area, I presume that is what he means.

10 Mr. Meredith—I would like to have the same objection and exception noted to this line of questioning as well, because this witness has not said there was any increased growth at that point and the question presupposes an increased growth.

The Commissioner—There has been some testimony here about a deposit around one point where a nerve issued through some orifice.

20 Mr. Meredith—That is correct, Judge, but counsel assumes that this accident created an enlargement of that spur or growth and not even Dr. Finegan has testified to that. He says there is a thing there and all of the witnesses have indicated that the x-rays show the same thing, with no increase at that point. Dr. Finegan didn't even touch on it.

Q. If there is an increase of bone around the point in the spine where the fifth lumbar emerges, could some pressure produce an area of hypoesthesia? A. It might.

Mr. Lewis—That is all, doctor.

Re-direct Examination—By Mr. Meredith.

30 Q. I believe, you have already covered it, doctor, but to be certain, do you find any such increase in the growth at that particular point in these three groups of x-rays? Is there any increase in the size of the bone at the junction of the fifth lumbar vertebrae and the sacrum? A. No.

Mr. Meredith—That is all.

Re-cross Examination—By Mr. Lewis.

Q. Doctor, have you examined these pictures in a stereoscope?

A. I think I did, the pictures taken at the New Jersey Manufacturer's Hospital, because Dr. Charnock put them in a stereoscope.

Q. Did you examine the x-rays taken under the supervision of Dr. Finegan?

A. I didn't look at those taken under Dr. Finegan.

Q. Isn't it true, doctor, they can't be read unless they are examined in a stereoscope?

10

The Commissioner—I haven't understood, doctor these are stereoscopic pictures. These are individual units.

Q. Doctor, couldn't you tell by a stereoscopic inspection rather than looking at the flat plates, I mean the last four pictures, whether or not there was an increase in the bone formation?

A. I can't see how there could be any increase in bone without it showing in these films. There would be no sense in taking flat pictures, if they didn't show differences.

20

Q. Doctor, referring to the last four pictures taken in June, 1933—

The Commissioner—Who took those plates?

Mr. Lewis—Dr. Finegan.

The Commissioner—Were they stereoscopic?

Dr. Finegan—Yes, the A. P.

The Commissioner—They are both here to make the pair?

30

Dr. Finegan—Yes.

The Commissioner—That is the first I knew of that.

Mr. Lewis—They were offered in evidence.

The Commissioner—They haven't been explained before.

Mr. Lewis—At the first hearing they were.

The Commissioner—If you have something here away back in November, then you come along here the last of January and ask me to remember all the words I am going to do it.

Mr. Lewis—I am not asking you to do it.

10 The Commissioner—You have me straightened out.

Q. What was your answer to the last question?

A. What was the last question.

(Question repeated.)

A. Leaving out the stereoscopic part of it, I can go through the series and see if there was any change in that condition. Putting them in a stereoscope would merely mean it would make it more visible to you.

20 The Commissioner—There is some value in viewing pictures in a stereoscopic machine?

The Witness—We can take the flat series and if there is some change it must show in the flat pictures. I have looked this series over from start to finish and I don't see any change.

Q. Isn't it possible there might be a change discernible to your eye under a stereoscopic machine rather than here examining a flat film?

A. I don't think any material difference would be there.

30 Q. But, it is possible, isn't it, doctor, that there might be some slight change?

A. There might be a grain as big as an end of a pin.

Q. That would be a change?

A. I would ignore a change of that amount in an arthritis.

Q. Then stereoscopic machines shouldn't be sold, they have no bearing at all?

A. Yes, they have a wonderful value. They tell you something.

Q. But with those films, they wouldn't tell you anything, is that it?

A. I am quite definite in my opinion, if you used a stereoscope on each picture that is here and compared them, you would find no change. That is my opinion.

Q. That isn't the question I asked you.

A. I'm sorry.

10

Mr. Lewis—That isn't the question I asked you, but that is all.

Mr. Meredith—I would like to offer in evidence a copy of a report on the form prescribed by the State, form C and D of this accident or alleged accident to Joseph Faley living at 172 Sherman Avenue, Trenton, which report describes him as being at that time, age 48; the original of which was filed with the Department of Labor on or about March 18, 1930. The report indicates while lifting a mould he strained himself. The nature of the injury, strained back; and the name of the hospital is shown as the New Jersey Manufacturer's Hospital, Trenton. I would like to offer it in evidence, if there is no objection.

20

The Commissioner—For what purpose?

Mr. Meredith—As further evidence, Judge. I am told by counsel—

30

Mr. Lewis—I am objecting there, if Your Honor pleases.

The Commissioner—I have asked counsel for what purpose he wishes to introduce these forms.

Mr. Meredith—For the reason I am told by counsel and the daughter of his client that

10 they seriously dispute the fact that her father was present at the hospital at any time previous to this recent happening and intend to further dispute that no x-rays were ever taken. I offer it primarily for that reason to further identify and authenticate if I may term it that way, the first group of x-rays which we offered in evidence, and as a further indication that this man did have trouble and complained of his back two years before this happened, to indicate and support the testimony of our doctors to the effect that the arthritis was an active thing two years before his injury and causing symptoms.

Mr. Lewis—If Your Honor pleases, my client tells me during that entire week—

Mr. Meredith—If you want to put this in the form of testimony all right. I don't want you to make statements on the record.

20 Mr. Lewis—I am not objecting to the admission of that.

Mr. Meredith—All right, may I have it marked. Paper marked Exhibit R-7.

Mr. Lewis—Will you tell me at what hour those x-rays were taken on that date?

Mr. Meredith—I am going to offer this card in—

Mr. Lewis—I am objecting to the card.

30 Mr. Meredith—March 17th, 2:15 P. M. I wanted the witness to say that.

DR. MAURICE L. CHARNOCK, recalled by the Respondent.

Re-direct Examination—By Mr. Meredith.

Q. Doctor, I show you a card and ask you if that is a record taken from your hospital records?

A. It is.

Mr. Lewis—I object to that. The Doctor has already testified to this on his direct examination when he was called before, he read from the card.

Mr. Meredith—I want to offer the card in evidence in view of the dispute they have raised regarding the authenticity of these x-rays.

Mr. Lewis—The best proof is Dr. Charnock himself. That simply aides him in remembering time and dates.

10

The Commissioner—I can see no objection to that.

Mr. Lewis—Dr. Charnock testified to a certain date. Why, the card? It is simply self-serving. It doesn't add to the case. If he didn't remember the date——

The Commissioner—Does it do any harm to the case?

Mr. Lewis—I don't know what is on that card. It is simply self-serving. It is helping them out when it isn't necessary.

20

Mr. Meredith—You don't mind our helping ourselves, do you?

Mr. Lewis—Evidently I certainly do.

The Commissioner—History is history, we can't deny it.

Mr. Lewis—Hasn't he testified to that?

The Commissioner—What harm, if he did.

Q. Is there anything on that card, Doctor, to indicate whether or not an x-ray was taken of this patient when he reported? A. Yes, sir.

30

Q. When was the x-ray taken as shown by your record? A. March 17, 1930.

Q. And the x-ray noted there taken on March 17, 1930, is one of this group of three x-rays now in evidence? A. Yes.

Mr. Meredith—I would like to offer this card in evidence, Your Honor.

Mr. Lewis—May I see it?

Re-cross Examination—By Mr. Lewis.

Q. Doctor, the x-ray was taken in the afternoon at 2:15 in the afternoon of March 17, 1930?

A. He came in about that time, 2:15. That would be recorded as the time he came to the hospital and they would be taken sometime subsequent to that.

10 Mr. Lewis—All right, let it go in, I don't care.

Card marked Exhibit R-8.

Mr. Meredith—I would like to call Your Honor's attention to this Exhibit R-7 and identify a stamp mark on the back, which reads as follows: "received March 19, 1930—"

Mr. Lewis—In pencil.

20 Mr. Meredith—I would be willing to take the stand, unless counsel objects to my present procedure, I would like to identify that as the stamp of the New Jersey Manufacturer's Casualty Insurance Company, a dated stamp, which is moved up from day to day, a stamp indicating the time and the date rather than this accident report was received from the employer, the Trenton Malleable Iron Company.

30 Mr. Lewis—I am objecting, if Your Honor please, I can't see the relevancy of this particular report that Mr. Meredith wants to introduce.

Mr. Meredith—It was introduced, Mr. Lewis. I was just explaining this stamp mark on the back. If you object to my statement just made, I will be glad to swear to that under oath, if you insist on it.

Mr. Lewis—I am objecting to the introduction of this particular report, so that goes to the stamp.

The Commissioner—Mr. Lewis is not objecting to anything about it.

Mr. Meredith—That is our case, Your Honor.

Mr. Lewis—I have some rebuttal that I must bring in.

The Commissioner—Put it on now? 10

Mr. Lewis—I can't get the timekeeper here now. What about the examination by these doctors from Newark.

The Commissioner—I don't think it is necessary.

Mr. Lewis—I certainly do.

The Commissioner—That is all, unless you have the testimony here now.

The hearing then adjourned.

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

JOSEPH FALEY,

Petitioner,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent.

TRANSCRIPT OF TESTIMONY

- 10 Transcript of testimony taken in the above entitled matter before HON. WILLIAM E. STUBBS, Deputy Commissioner of the New Jersey Department of Labor, at the State House, Trenton, New Jersey, on Friday, March 23rd, 1934, at 2 P. M.

Appearances:

Irving Lewis, Esq., for the Petitioner.

George Meredith, Esq., for the Respondent.

John F. Trainor, Court Reporter.

- 20 Mr. Meredith—In this case, Your Honor, I want to make a motion to reopen this proceeding for a number of reasons.

Mr. Lewis—Don't you think it is rather unusual, Mr. Meredith, that you give me a copy of some pleading and ask me to argue it on about twenty minutes' notice? Why didn't you let me have this yesterday?

Mr. Meredith—I didn't have it prepared until this morning.

The Commissioner—Did you want to read that thing first?

Mr. Meredith—I was going to say, I would give him all the time he wanted to read that. I am limited on my time in filing the appeal.

The Commissioner—If you are of the thought there should be an appeal filed, you can file it and cancel it afterward. It doesn't cost anything to file an appeal. 10

Mr. Lewis—I can argue this in a minute.

Mr. Meredith—All right. My motion in this case, as set forth in the petition, which I have laid before you there is to re-open this petition. The petition fully sets forth our reasons for asking for a re-opening and in order that you may have them before you at this time I will read from the petition the reasons set forth there.

Aside from the preliminary matters, item No. 2 states in effect that this Petitioner, and I have in mind when I say this Petitioner, his agent and/or attorney—by his attorney or agent mentioned in part 2, the Petitioner's daughter. If you will recall, all during these proceedings she was gasping and moaning and gesturing, during the time that the Respondent was presenting evidence, and I think that led the court to believe that a lot of our testimony was not believable for some reason or other. That course of action was carried on mostly during the time we were proving some x-rays, or rather one x-ray which unquestionably was proven by the testimony to have been taken sometime in the year 1930, long before this accident. 20 30

I feel that the actions of the Petitioner or his agent, must necessarily have had some influence on the Court in deciding this matter.

Aside from that, the next point is the fact that my adversary all during the proceedings, whether

it appears on the record or not, I don't know, but the statement was made several times that the Petitioner would totally and wholly disprove the taking of that x-ray and would present rebuttal testimony. It seems to me that the Respondent was perfectly at liberty to assume that the x-rays were properly proven, as the promises were not fulfilled. It seems to me that we had no obligation under the circumstances to go ahead and prove further what

- 10 we had already established, but I say that gesture was made and I feel that that probably had some influence on the Court in deciding the merits or demerits of this issue, and, as Your Honor will recall, this matter was actually scheduled for a hearing after the Respondent's proof was closed on February 23rd and it was my understanding—, it doesn't appear in the record, but I don't think the fact is questioned that that hearing was for the purpose of giving this Petitioner an opportunity to
- 20 produce the rebuttal testimony that all through the case they had promised to produce. That was called off on short notice. I assume, in fact, I know why it was called off, they couldn't get the testimony they thought they could get.

Mr. Lewis—That is not fair, Mr. Meredith, and you know it.

Mr. Meredith—You will have an opportunity to answer this, and if you will let me finish—

Mr. Lewis—Go ahead.

- 30 Mr. Meredith—That was February 23rd, Judge. Then, if you will recall, at the close of this case and because the matter had extended over a period of four months of trial, I felt that the case ought to be briefed, so that the Respondent's viewpoint could be more clearly brought before the Court, particularly since the proof of those x-rays was made at one of those hearings. The next thing that the Respondent knew about the case, when it was actually engaged in the job of preparing a brief,

was an order allowing the Petitioner 30 per cent. of total permanent disability. In the ordinary course of events that might have gone through and no question been raised, but, Your Honor will recall, after that date, when we were discussing that matter, this case was more or less jokingly referred to, and at that time we entered into a discussion as to the validity of the x-rays which we had proven, and, if I recall correctly, Your Honor stated then, that you were satisfied that that x-ray was not fraudulently produced; that there was no fraud in the case, and that, by the way I cover in one of my statements and by the fact the information was brought directly in your office without the Respondent being present or knowing of the suggestions of the Petitioner, or his daughter or the attorney, and, as I stated, your reaction was there was no fraud involved, but you were satisfied there must have been a mistake. As I recall it, the Petitioner or his daughter or someone represented to Your Honor that that x-ray was never in fact taken. I believe, a further statement was made to you by the Petitioner, as I recall my conversation with you, that four x-rays were taken on the last occasion following this accident, and there must have been some tampering, or words to that effect, with three of this last group of x-rays here proven, or that have been proven as being taken on that date, and by some legerdemain or sleight-of-hand or whatnot, was filed elsewhere and innocently presented to the Court as an old x-ray.

That is our strongest point in the defense of this case. We started the case and feel we have satisfactorily proved that the biggest majority, if not all, of this man's disability antedated his accident, and we feel it is, in view of your reaction to the statement by the Petitioner's daughter that a doubt was raised in your mind as to the fact that

that was a proper x-ray taken at the time we proved it was taken and, since that information came to Your Honor before your finding of fact and determination here, we feel that it could not have helped but influence your judgment as to the meritoriousness of our defense.

10 In view of that, Judge, I feel that the Respondent here is entitled to a reopening of the Petitioner for one purpose, or the several purposes, which I set forth in the prayers of my Petition, and I ask at this time that the Petition be reopened for the purpose of having the Petitioner or his daughter, if it was his daughter, or his agent, or his attorney take the stand and swear under oath to the testimony or facts they related to you, the unsworn statements they made to you. I am perfectly willing that they do that, and if Your Honor is satisfied, after hearing their testimony, that the Respondent was guilty of a bit of trickery or fraud; of course, then the matter will have to be decided on its merits.

20 I say, if the Petitioner or his attorney is not willing to do that, then I feel in fairness the Respondent ought to be given the opportunity to produce further testimony to tie unquestionably and unqualifiedly the fact of the taking of that x-ray, the age of it, and to prove beyond any doubt whatever, it was taken long prior to this accident. I say, I think it is important from several standpoints.

30 Your Honor is entirely familiar with the manner in which gossip gets about, and, it seems to me, companies and individuals are particularly prone to adverse criticism in this line of work, and it just takes a little start of this sort to have it breezed through the town or through the State, that the Respondent insurance company, by the taking of this x-ray, is carrying under-handed business whereby they can postdate or antidate x-rays and bring in testimony to accomplish an end. I think,

we ought to be relieved of that suspicion, which is in the case, and I believe that suspicion is in the mind of Your Honor, although you cover that by saying your reaction is that there was a mistake.

I say, the Respondent in this case, being in the type of business that it is in, cannot afford to make mistakes of that kind. I will grant, we make mistakes, but we don't make mistakes where we are trying to palm off on the court phoney x-rays. That is, in effect, in street language, what they say we are doing and are afraid to take the stand and swear to it and, I say, we are entitled to give them a chance to swear to it and we will meet the claim. I say, if they won't do that, we want to produce further evidence to clear up any possible doubt that may exist about it. 10

I take it from your finding there must be some doubt in your mind as to the fact of this man having suffered prior to his injury some disability and, I say again, in view of that circumstance, we ought to be permitted to clear up that doubt, because the time for appeal is drawing near. 20

I would like an order entered, if my motion is passed upon favorably, withdrawing the order already filed under date of February 28th, so that this matter may have Your Honor's further consideration, and that after hearing this additional testimony a new and final order may be drawn covering your findings and based on the testimony ad- 30
duced already and whatever testimony may be produced on the question of the x-rays and prior disability, or by the Petitioner or by the Respondent, and again, because of the short time, I would like, if it is possible, to have an early date fixed for this re-hearing, if Your Honor feels that my motion should be granted—and that is the gist of the Petition.

Mr. Lewis—I am here to resist this motion. Mr. Meredith called me late yesterday afternoon and

I am here. This is the first time I have seen it. I think, at the outset, the Respondent owes to both the Court and myself its profound apology. In all my years of practice I have never been confronted with the situation like this. I am sure Mr. Meredith will agree with me that Your Honor is able to make a differentiation between gossip and evidence, sworn testimony, and that Your Honor is not swayed by passion or envy or threats or promises, and Mr. Meredith must certainly realize even though the Petitioner's daughter came to see you, that Your Honor wasn't influenced by her statement one way or another. Mr. Meredith knew very well why this hearing was called off and the reason he knew was that I spoke with him in the presence of the Petitioner's daughter, at which time I informed Mr. Meredith I could see nothing to be gained by this further hearing. The girl felt her father did not have those x-rays taken. She was in my office last week and she still feels the same way about it. This suit is whether or not this man was disabled and the amount of his disability and the Court, I know, gives credence to those x-rays and all of those x-rays. I am not accusing the New Jersey Manufacturer's Casualty Company or the Respondent of producing phoney x-rays. While Mr. Meredith says these things about me—he says here, that during the course of these hearings the Petitioner by his agent, and or attorney, did these things. Mr. Meredith knows I didn't do these things and he goes on further down here to say, "because the Respondent feels that it's substantial rights have been prejudiced by this unsworn statement of the Petitioner and or his daughter and or his attorney, the Petitioner therefore prays:"—if Mr. Meredith would be so kind as to inform the Court or inform me what I did to illegally prejudice your mind, I would like to know

it. Would you do that, Mr. Meredith? Don't give any general statements, tell me what I did to influence Mr. Stubbs in bringing in an unwarranted finding? There are no facts, if Your Honor pleases, that Mr. Meredith can substantiate in my opinion and I say Your Honor's opinion is based on years of experience. Mr. Meredith owes Your Honor an apology. I don't know how far reaching it should be, to say Your Honor would be influenced by this girl, or by me or by him. True that girl feels this x-ray wasn't taken of her father; she feels that way today and she will feel that way two years from now. The man will come up here and say that the x-ray wasn't taken. I agree with Your Honor, that you did believe the x-rays were taken back in 1930. That doesn't make any difference, because Your Honor found this Petitioner was 30 per cent. disabled. What is wrong with that? Your Honor has had the benefit of the doctors on behalf of the Petitioner and the doctors on behalf of the Respondent.

10

20

It is another smoke screen that the Respondent is trying to throw up when ten minutes before the hearing they told me they were going to deny the question of employment, putting the matter off for a few months and forcing me to subpoena the Respondent's own executives. To say I am surprised is putting it very, very mildly. I only wish Your Honor would take some step to reprimand Mr. Meredith in this matter.

30

Mr. Meredith—Your Honor, I feel I must reply to that. In the first place, about apologizing and reprimand, that is for the Court to decide. If the Court decides we have to apologize all right, but I don't know what we have to apologize for. I don't feel we ought to apologize to anyone for appearing here and making a reasonable request of this sort. I do feel counsel knowing all these

matters—and counsel has put a direct question to me and I will try to answer it—in the first place I will call on counsel to ask if he denies that during the course of this trial he stated not once, but several times, that he intended to put on rebuttal evidence to prove that the Petitioner worked the whole afternoon that this x-ray was taken.

Mr. Lewis—Are you asking me that question?

Mr. Meredith—Yes.

10 Mr. Lewis—You are asking me a question and I will answer the question, the way I want to answer it. You ask them and I will answer them. Are you through with your questions?

Mr. Meredith—You can answer that yes or no.

The Commissioner—We are not after yes or no answers. If a yes or no answer doesn't explain it.

20 Mr. Lewis—The situation is this, as the case developed and the Petitioner's daughter and the Petitioner himself heard this testimony they relayed information to me that her father worked on that day and the x-rays weren't taken at the time they were supposed to be taken. You will find it in the testimony, I was informed of the fact, that—

Mr. Meredith—That is all I have said here, Mr. Lewis.

Mr. Lewis—No, you make an issue out of this with me, and that is what I am getting a little bit hot about.

30 Mr. Meredith—The only thing I referred to in the petition as far as counsel's contact is, he personally during the case offered once or at least more times to refute the fact of the taking of the x-ray.

As far as this girl's visit to your office is concerned, if it was the girl or her father or both, I believe, counsel not only knew about but was present at the time——

Mr. Lewis—Mr. Meredith, please.

The Commissioner—Now, wait a minute.

Mr. Meredith—Or just after the conference was coming to a close.

Mr. Lewis—Why don't you say which one of the three it was.

Mr. Meredith—I wasn't there.

Mr. Lewis—I wasn't either, and you know I wasn't.

Mr. Meredith—I can only go by what you told me. You said you got in the office just about the time the girl finished with her story. 10

Mr. Lewis—Which office?

Mr. Meredith—The Commissioner's office.

Mr. Lewis—Mr. Meredith, your memory is not so good. I said Mr. Stubbs called me up and I was sore because the girl spoke to you—

Mr. Meredith—Counsel wants to know what in the petition refers to him. Of my knowledge, I can only state what happened in my presence, and that is his offer two or three times to rebut this testimony. Counsel speaks of smoke screens and the Respondent's dilatory tactics in denying employment here. We didn't deny employment. We deny this petitioner met with an accident arising out of and in the course of his employment and our position at the first hearing was that this man was doing a usual act in the usual course of his work whereupon he complained of a pain, the same kind of a pain he had before. 20

I say, and counsel speaks of credibility, that is the very reason why we want this in, because if the Petitioner has lied or anyone for him has lied in connection with the taking of these x-rays, by the same token he can lie to Your Honor and perjure himself as to the degree of his pain, and as to his inability to do things. As I say, if we can establish clearly to Your Honor this x-ray was taken and is a proper x-ray, and was taken back in the year 1930, then I say it reflects very badly on this man's 30

credibility and I don't think a whole lot of his testimony concerning his pain or any of his subjective symptoms ought to be given a whole lot of weight, but I can't see for the life of me, how a man lifting a 30, 40 or 60 pound weight, can as a result of that suffer a thirty per cent. total disability and I think, the whole question hinges on the presence or absence of this prior condition, and I feel from the determination, as it is drawn, that Your Honor
10 was particularly convinced by our proof of that x-ray and all I ask is an opportunity to let them rebut it and if they refuse to, then I say we will tie up that matter so clearly and unquestionably, that there can't be any question about it. And I say, there is another matter here, the doctor who took it, it seems to me his veracity is being questioned and I most anxiously, knowing Dr. Charnock and knowing him to be one hundred per cent. honest, I want him to stand before this Court in the future with
20 the same feeling that his word is being accepted, as it has been in the past and as I hope it will be in the future. That is as big an issue as the question of compensation. I don't like to have it appear that the doctor is either careless or dishonest and I don't know of any other way it can be straightened out except by a reopening of this petition.

Mr. Lewis—When the Petitioner's daughter was in my office, relative to the last scheduled hearing,
30 I myself could see no use for it and I communicated with Mr. Meredith and spoke to Mr. Meredith in front of my client, carried on a conversation with Mr. Meredith and Mr. Meredith will corroborate that, won't you? I told you, it would be no use, because there would be an affirmation on one side and a denial on the other.

The Commissioner—That is immaterial.

Mr. Lewis—After the Petitioner's daughter was satisfied, I then, informed Your Honor there was

no necessity for a further hearing. When Mr. Meredith comes up here and tells Your Honor I was present when this interview took place or that I knew about it before or just left, he is evidently as Your Honor knows isn't giving you accurate facts.

The Commissioner—I know you were not there and she was there alone.

Mr. Lewis—The first intimation I had was when Your Honor called me and I was a little sore, because she was present when all the arrangements were made. All the arrangements were made in her presence and from Mr. Meredith these vague insinuations is beyond me. I don't blame Mr. Meredith, but at the same time I do believe he is going beyond the bounds of decency in this matter. Your Honor has heard the testimony and Your Honor must have been satisfied he was disabled thirty per cent and I know Your Honor wasn't influenced by these petty things.

10

The Commissioner—We can keep this see-sawing going on all afternoon. I have been sitting here for fifteen minutes waiting a chance to say something.

20

Mr. Meredith—All I object to, is his saying I was present at this meeting when the girl was there. I wish I was there.

Mr. Lewis—The girl was in my office when I spoke with you over the telephone, but I wasn't at the Commissioner's office when she was there and you know I wasn't.

30

The Commissioner—Are you through your talking?

Mr. Meredith—Yes, Judge.

The Commissioner—Are you through?

Mr. Lewis—Yes, sir.

The Commissioner—I don't know that there is an awful lot to say about this. I think, Mr. Meredith is under a very great misapprehension if he

thinks I noticed what the girl was doing back there. I heard her once speak up and you called her and told her to keep quiet. As regards x-ray pictures, as to their validity or honesty, the question was raised here at that time and all of the excitement about it and the agitation since has been raised by Mr. Meredith, nobody else has said anything about it. Mr. Meredith has been the one causing all this disturbance about the question of x-rays. I said to him over the phone that the only possible way
10 I could harmonize the statements of the girl and of Dr. Charnock was that somewhere along the line there was a mistake, somebody was mistaken. I didn't say who was mistaken and the only way you could harmonize the statements was that one or the other was acting under a misapprehension, it might have been the girl. As regards to these x-rays, I disregarded them in my findings. I gave no consideration to a previous accident. This man was
20 working up until the time of the second occurrence and from that time on he couldn't work and whether there was a pre-existing condition or was not, it makes no difference. There was either an actual disability created at that time or else an exaggeration of a pre-existing condition of which Dr. Charnock is of the belief there was present. I see no occasion for reopening the matter. If there was any publicity given to it, all the publicity given to it was by Mr. Meredith. The matter as
30 far as my determination is concerned stands, and I can see nothing further to be gained except causing further trouble. If Mr. Meredith thinks it was an unwarranted award, the right thing for him to do is to take it to the Courts.

Mr. Meredith—Judge, may I say something?

The Commissioner—We are not going to discuss it further.

Mr. Meredith—You say take it to a Court that will correct it. How can we correct something we

know nothing about. That is my very basis for asking for a reopening of this petition, because this girl has said things and I don't know what she said to you.

The Commissioner—This girl has not influenced me in any way in my decision.

Mr. Meredith—She did to the extent that you say a mistake was made.

The Commissioner—I didn't say there was a mistake made.

10

Mr. Meredith—I understood you to say——

The Commissioner—You understood, I said, the only way I could harmonize the true statements was the fact that one or the other made a mistake.

Mr. Meredith—I don't want to have any doubt creep into the facts.

The Commissioner—You can't get away from the fact.

Mr. Meredith—They were not taken, as the girl alleged to you.

20

The Commissioner—I didn't say they weren't taken. I said, the only way their statements could be harmonized was that there was a mistake made.

Mr. Meredith—I would like an exception.

The Commissioner—You can have an exception.

Mr. Meredith—Can I consider that that petition has been filed?

The Commissioner—That ends it. I fixed it on the facts proven of the second accident and I said nothing about the first x-rays or anything about them.

30

The hearing then adjourned.

I, John F. Trainor, one of the court reporters of the New Jersey Workmen's Compensation Bureau, do hereby certify that the foregoing is a true and correct transcript of the testimony taken in the above entitled cause at the time and place hereinbefore stated.

JOHN F. TRAINOR,
Court Reporter.

10 I, William E. Stubbs, Deputy Commissioner of the New Jersey Workmen's Compensation Bureau, do hereby certify that John F. Trainor is the court reporter who took stenographically the testimony in the above entitled cause and is the proper person to certify to the correctness of said transcript.

W. E. STUBBS,
Deputy Commissioner,
N. J. Workmen's Compensation Bureau.

NEW JERSEY SUPREME COURT.
No. 216, January Term, 1935.

JOSEPH FALEY,

Petitioner-Defendant,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Prosecutor-Respondent.

On
Certiorari.

OPINION

(Filed April 4, 1935)

10

Submitted January 25, 1935; decided
1935.

Before BROGAN, Chief Justice, and Justices
PARKER and BODINE.

For the prosecutor, HENRY M. HARTMANN.

For the defendant, WILLIAM REICH.

Per Curiam. This is a certiorari to the Mercer
Common Pleas, which affirmed an award of the
Workmen's Compensation Bureau in favor of the
petitioner Faley. The case is submitted on briefs,
and the grounds argued are (1) that the deputy
commissioner refused to dismiss the petition for
lack of proof of an accident; (2) (a) that he re-
fused to give consideration to certain X-ray photo-
graphs duly admitted in evidence, (b) or to a pre-
vious accident suffered by the petitioner; (3) that
the Common Pleas on appeal erroneously required
the employer to pay the cost of a stenographic

20

transcript for the use of the petitioner; (4) that the proofs do not furnish a rational basis for the judgment: which seems to be tantamount to saying that the vidence does not support the finding.

The date of the alleged accident was August 9, 1932. From the commissioner's determination it appears that there was previously either an agreement or an award of temporary disability plus three per cent. total disability for fifteen weeks.

- 10 On June 27, 1933, the formal petition was filed herein, the employer answered in due course, and the matter was tried before the deputy commissioner, who found on the testimony before him that "petitioner must have had an arthritic condition of the back prior to the accident of August 9, 1932," and that on that day he sustained an injury to his back while at work. The disability was fixed at 30 per cent. for 135 weeks.

- 20 There was a petition by the employer to reopen this award, for several reasons not necessary now to reproduce in full. This was denied, and on appeal to the Common Pleas the award was affirmed.

As to the first point, we think there was substantial proof of an accident in the sense intended by the statute. In fact, the answer admitted this. Moreover, we have the prior award or agreement, whatever it was, and the evidence indicated a sudden breakdown while handling a heavy mould. The point seems altogether unsubstantial.

- 30 Point 2 (a) is that certain X-ray photographs taken in 1930, two years before the accident, were not considered, and (b) that the prior accident in connection with which they were taken was not considered. It does appear, at the very end of the printed book, that on a motion to reopen the case, March 23, 1934 (a petition of that date was filed April 10), the commissioner said, "as regards these X-rays, I disregarded them *in my findings*. I gave no consideration to a previous accident. This man

was working up until the time of the second occurrence and from that time on he couldn't work, and whether there was a pre-existing condition or not, it makes no difference." Concluding, he said: "I fixed it on the facts proven of the second accident, and I said nothing about the first X-rays * * *." There had been some hint, apparently unsupported by proof, that the 1930 X-rays were not pictures of the petitioner, but it was not followed up, and fell by the wayside. The commissioner filed a written order denying the petition to reopen, repudiating any suggestion that he had given any attention to ex parte suggestions out of court that the X-rays were spurious, and added that "an understanding reading of the decision would show that consideration was given the respondent's evidence concerning the original X-rays." As to the second branch of Point 2, the case makes it fairly clear that the award was based on the difference in disability between that existing after the second accident (1932) and that due to the 1930 accident, if persisting at the time of the second. The award is for "30 per cent. total disability *as the result* of lighting up or rendering active this pre-existing arthritic condition."

Point 3 challenges the award in the pleas, of \$127, as part of the costs, for stenographic transcript of the hearing before the Bureau. We think the award was proper. The petitioner had prevailed: the employer appealed, and petitioner had to defend his award. The case, under the statute, is heard upon the stenographic transcript of the evidence before the commissioner. P. L. 1932, page 38. The proposition is that the successful petitioner must pay for a state of the case when his award is appealed. To this we do not agree. The act just cited requires the transcript to be filed in the Common Pleas, and provides that costs when awarded shall be taxed and allowed as for like services in

the Common Pleas courts. The Common Pleas fees and costs, Act of 1926 (P. L., p. 395 at p. 403) provides that "a party to whom costs are awarded in an action, motion, or other proceeding, is entitled to include his necessary disbursements, as follows * * * the fees for taking depositions, as provided by law; * * * the legal fees paid for a certified copy of a deposition or other paper * * * recorded or filed in any public office, necessarily
10 used or obtained for use * * * upon appeal * * *."

We perceive adequate statutory authority for the award in question.

Point 4. Finally, that "the proofs did not furnish a rational basis for judgment." We have examined them, and think that they do. Moreover, two independent courts have agreed in the same finding, on evidence deemed satisfactory, and we see no good reason to overrule them in this regard.

20 The judgment will be affirmed, with costs.

A true copy.

FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT.

JOSEPH FALEY,

Petitioner-Defendant,

vs.

TRENTON MALLEABLE IRON
COMPANY,

Respondent-Prosecutor.

**RULE AFFIRMING JUDGMENT AND
REMITTITUR**

(Filed April 13, 1935)

10

This cause having been duly submitted on briefs at the present term of this court by Henry M. Hartmann, of counsel for the respondent-prosecutor, and William Reich, of counsel for the petitioner-defendant, and the Court having considered the same and finding no error in the record or proceedings in the Mercer County Court of Common Pleas:

It is, thereupon ORDERED and ADJUDGED that the judgment of the Mercer County Court of Common Pleas, affirming the judgment of the Workmen's Compensation Bureau, be affirmed with costs, and that the record be remitted to the Mercer County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of said Court.

20

On motion of

IRVING H. LEWIS,

Attorney of Petitioner-Defendant.

30

Rule actually entered this 13th day of April, 1935.

NEW JERSEY SUPREME COURT.

JOSEPH FALEY,

Defendant-Appellee,
vs.

TRENTON MALLEABLE IRON
COMPANY,

Prosecutor-Appellant.

NOTICE OF APPEAL AND GROUND

(Filed April 27, 1935)

- 10 To Irving H. Lewis, Attorney of the Defendant-Appellee.

Sir:

PLEASE TAKE NOTICE that the Prosecutor-Appellant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the ground that the Supreme Court erred in giving judgment to the Defendant-Appellee instead of to the Prosecutor-

- 20 Appellant.

GEORGE E. MEREDITH,

Attorney of Prosecutor-Appellant.

HENRY M. HARTMANN,

Of Counsel.

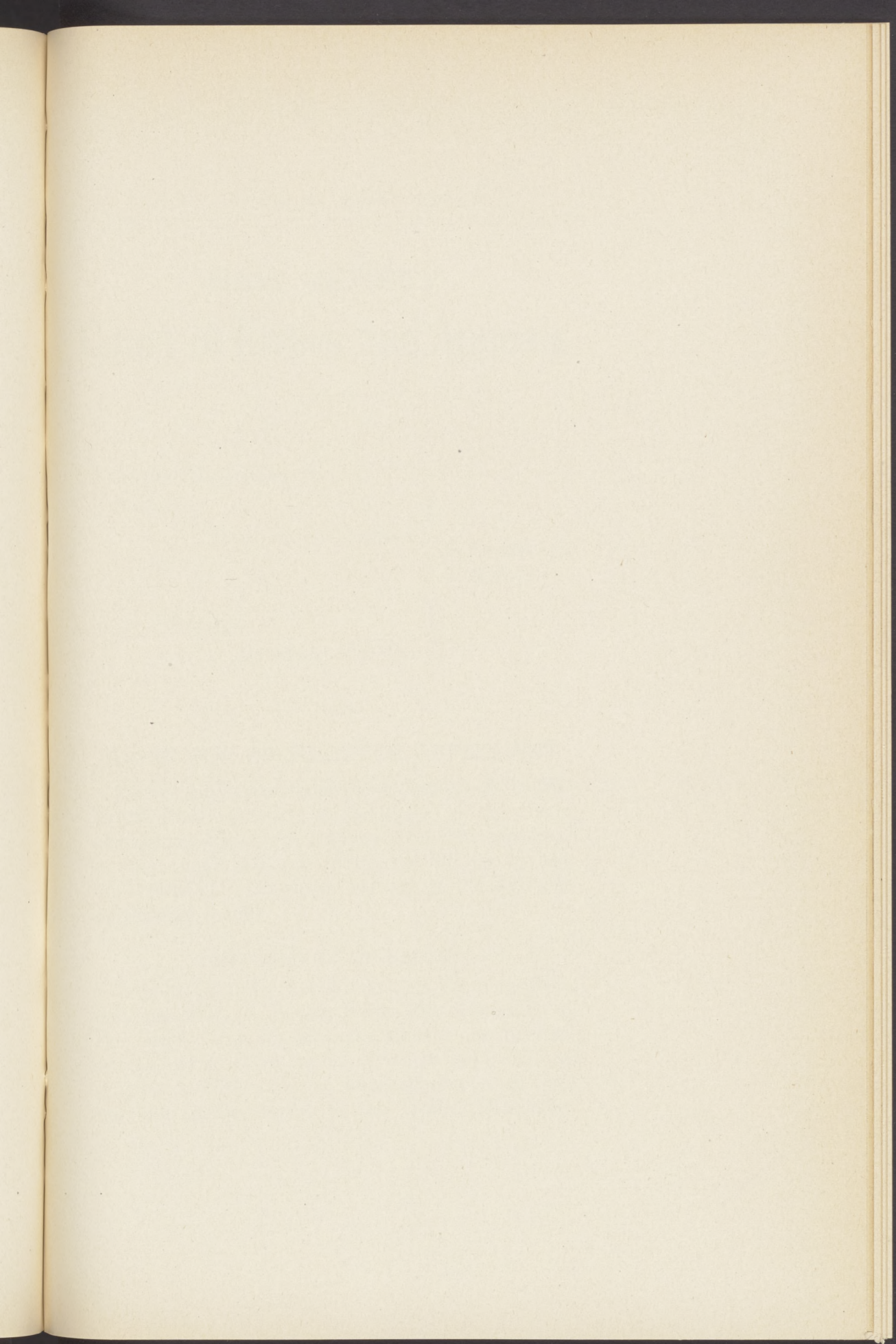
Dated: April 23, 1935.

Due and legal service of the within Notice of Appeal is hereby acknowledged this 23rd day of April, 1935.

- 30

IRVING H. LEWIS,

Attorney for Defendant-Appellee.



C

T

J

P
C
C
V
C

A
t
a
A
r

NEW JERSEY

Court of Errors and Appeals

TRENTON MALLEABLE IRON
COMPANY,

Prosecutor-Appellant,

vs.

JOSEPH FALEY,

Defendant-Appellee.

} On Certiorari.
Appeal.

BRIEF FOR PROSECUTOR-APPELLANT

This is an appeal from the judgment of the Supreme Court affirming the judgment of the Court of Common Pleas, which affirmed the determination of facts and rule for judgment allowed by the Workmen's Compensation Bureau on the 28th day of February, 1934.

STATEMENT OF FACTS

A petition under the Workmen's Compensation Act was filed by Joseph Faley, the defendant in this cause, for compensation claimed to be due him as the result of an accident which happened on August 9, 1932, while he was engaged as an iron moulder in the employ of the Trenton Malleable

Iron Company, the appellant in this case. The alleged accident is claimed to have taken place while Faley was engaged in doing his usual work in the usual way and while in the act of lifting a mould. There was no testimony that the mould which was being lifted at the time of the accident was of such unusual size as to require extraordinary effort to lift, but merely that the petitioner suffered pain in his back at the time of lifting the same.

Deputy Commissioner of Labor William E. Stubbs conducted the hearings, and on the 28th day of February, 1934, made his determination of facts and rule for judgment allowing the petitioner 135 weeks' compensation at the rate of \$13.93 per week, with costs, medical expenses and attorney's fees.

During the course of the hearings, X-ray photographs were legally admitted in evidence by the Commissioner to show a previous accident, but the Deputy Commissioner disregarded the same in the making of his determination. (State of Case, page 190, lines 17 to 23.)

The case was appealed to the Court of Common Pleas of Mercer County, and the judgment of the Workmen's Compensation Bureau was affirmed, and in addition the said Court allowed the sum of \$127.00 to the petitioner to cover the cost of a copy of the transcript of the record in the case for the petitioner's uses.

A writ of certiorari was allowed by the Supreme Court to review the judgment of affirmance of the Court of Common Pleas which was also affirmed.

ARGUMENT

POINT ONE

The Deputy Commissioner erroneously denied the motion of the prosecutor to dismiss the petition of defendant because of lack of proof of an accident.

At the conclusion of the petitioner's case before the Deputy Commissioner, counsel for the Trenton Malleable Iron Company, moved for the dismissal of the petition on two grounds: (1) that no proof appeared in the petitioner's case of an accident arising out of and in the course of his employment, and (2) that no competent evidence was adduced to show that the petitioner's condition was due to trauma. The Deputy Commissioner denied this motion, and an exception to his ruling was taken. See State of Case, pages 95-103.

An examination of the testimony, so far as the petitioner's case is concerned, shows that the petitioner was employed as an iron moulder, which work required him to lift 70 or 80 moulds every day, the moulds being more or less uniform in weight, and varying from 70 to 75 pounds. On August 9, 1932, petitioner was doing his usual work in the usual way, and while in the act of lifting a mould, he felt a pain and dropped to one knee. There is no testimony that the petitioner slipped or stumbled or that the mould was of an unusual size, or that the mould was stuck and required extraordinary effort to lift; there was merely the petitioner's statement that while so engaged in lifting a mould, he got a pain in his back. This description of the accident is not varied in any way by the testimony of the several witnesses called by the petitioner. On these facts, it is respectfully contended that the petitioner failed to sustain the burden of proof that he suffered an injury arising out of and in the course of his employment as defined by the Workmen's Compensation Act.

It is not sufficient that a claimant show that he suffered a pain at a certain time during the progress of his work in order to establish an accident. Under the decisions of the Courts of this State he must go a step further and show unusual circumstances and prove the occurrence of an unexpected, fortuitous, untoward or unusual event. Nor is it sufficient to show that a fall occurred, if no proof is offered to account for the fall by way of an accident or an unusual happening. Our Supreme Court expressed that thought in the case of *Johnson vs. Ulster Iron Works*, 153 Atl. Rep. 95. In that case the petitioner was a puddler in an iron factory, and just prior to his death, while he was at his usual work, he was observed to fall, after which he died of a cerebral hemorrhage. The Court said in that case,

“There is no testimony of an accident. The man was last observed at his place of work. There was nothing unusual in the same or in the manner of the performance of his work . . . This is a case where the proofs show no more than a fall at the usual place of work—not a fall from a platform. There is no testimony that deceased was doing anything different from that which he was called upon to do, and the usual appliances appear to have been in order. There is nothing to suggest an accident save Johnson’s death.”

Applying this reasoning to the case at bar, there is nothing to suggest an accident save petitioner’s complaint of a pain in his back. See also the cases of *McFadden vs. Lehigh Nav. Coal Co.*, 170 Atl. Rep. 314; *Rocco vs. Ellsworth Collieries Co.*, 170 Atl. Rep. 316, and *Weissman vs. Philadelphia Electric Co.*, 170 Atl. 318.

In the McFadden case, the decedent was endeavoring to push a piece of timber 6 feet in length and 7 inches thick up an incline set at an angle of thirty-four degrees. After going some distance, it was noticed that McFadden had fallen and he subsequently died. An attempt was made to prove that the work was strenuous, and that the extra energy required in doing this special job brought on a cerebral hemorrhage causing death. In dismissing the claim the Court laid stress on the fact that the decedent had done the same kind of work in the same manner for several years, and the mere fact that misfortune overtook him while engaged in his usual work was not sufficient to establish an accident.

A somewhat similar situation was presented in the Rocco case. Again the Court points out that the form of labor was a part of the regular routine of the employee's work and had been performed by him as part of his daily work for more than a year. There was no evidence of a mishap or unusual occurrence. In this case the Petitioner was engaged in boring a hole in a coal mine by means of a drill. He was observed some time later by his son in a kneeling position resting on his right knee leaning against the coal car. He was sweating and complained of his right side. The Court on appeal found as a fact that no accident had been established and compensation was refused. The Weissman case likewise involves an alleged strain in the usual course of work and in this case the Court held that no accident had been established.

The Courts will not deal in speculation or inference based upon inference, but only with probabilities. A reading of the record in this case will show that there was no probability that the petitioner suffered an accident.

The Supreme Court decided the case against the prosecutor on the theory that the answer of the

prosecutor admitted the accident, and, therefore, precluded the defense that there was no accident. The Court, apparently, failed to notice in its reading of the record that the answer as originally filed was amended so as to enter a denial of the accident. (See pages 33-38, State of Case.)

The Court below decided "there was a sudden breakdown while handling a heavy mould." Unless the breakdown was due to lifting the mould, the defendant is not liable, for the petitioner was lifting a mould of the same weight, kind and character he had lifted in his daily work over a long period.

Reinhold vs. Associated Humane Society,
3 Misc. 868.

It is, therefore, respectfully urged that the Deputy Commissioner should have dismissed the petition at the close of the petitioner's case, since the petitioner had not sustained the burden of proving that he had suffered an accident arising out of and in the course of his employment. An exception was duly taken to this refusal to dismiss the petition, and we therefore contend that this was such error as would justify this Court in setting aside and reversing the judgment below.

POINT TWO

The Deputy Commissioner willfully refused to give consideration to X-ray photographs legally admitted in evidence or to a previous accident suffered by the petitioner.

The whole force of the appellant's medical defense to this claim rested upon the fact that the petitioner had been suffering from arthritis for years, and the proof of the prior existence of the arthritic condition was based not on mere con-

jecture or supposition, as in most cases of this kind, but on X-rays taken of the petitioner two years prior to this alleged accident. When the petitioner reported to Doctor Charnock for treatment for his alleged injuries, and again on the witness stand, he denied ever having had any previous trouble with his back. (Page 95, State of Case.) The Prosecutor, however, produced a set of X-rays which were taken on March 17, 1930, two years before this alleged accident. The X-rays were marked in evidence R1, R2 and R3. The Prosecutor likewise produced a record from the Manufacturers Hospital which contained the man's name, his employer's name and a history of the case. All of the facts shown on the card indicated clearly that the man who was X-rayed and who complained of a backache at that time was the petitioner in this case, and no one else, his age and address corresponding (State of Case, pp. 105-108), and as all of the doctors testified, the X-rays taken at that time could have been X-rays of no one other than the petitioner. In the history shown on this card, which was also offered in evidence and marked Exhibit R8, the petitioner gave a history of feeling a pain in his lower back while shovelling, and the history also indicated that the petitioner suffered from a condition of lumbago, which was shown to be a painful condition of the lower back (State of Case, pp. 107-109) for a period of nine weeks in the year 1928.

On the date of the alleged accident for which this petition was filed, August 9, 1932, Doctor Charnock took another X-ray marked R4, R5 and R6 in evidence. Other X-rays of the back were taken by the Petitioner himself at a still later date and testimony of all of the Prosecutor's doctors indicates that all three X-rays showed an arthritic condition which has not progressed in the slightest as the result of their comparing the X-rays taken in

1930, 1932 and 1933. Doctor Finnegan, the only doctor for the petitioner, who testified concerning the X-rays, testified as follows on Page 142, State of Case:

Q. "Now, from a close inspection of the two X-rays, doctor, can you say that this last group you have read, exhibits R1, R2 and R3, show a lesser condition of arthritis or about the same or more?"

A. "Allowing for differences in the films; that is, technical differences due to the manner in which they were taken, it is difficult for me to see a marked difference."

The importance of these X-rays and their interpretation by all of the experts, without exception, becomes manifest when it is remembered that Doctor Finnegan in his original testimony ascribes the nerve disorder or hypo-aesthesia to a bony proliferation caused by the arthritic process and he ASSUMED that this alleged accident aggravated the arthritis and increased the size of this bony proliferation. This opinion was based solely on the one X-ray which he arranged for and he had not seen the earlier X-rays, more particularly the one taken in 1930. The X-rays showed conclusively that this bony proliferation had not increased in size over the period of five years and for that reason the Prosecutor urged that this testimony discounted entirely any assumed theory that the arthritic process was aggravated by this alleged accident.

It is at this point that we find it necessary to condemn the decision of the Deputy Commissioner. In the determination of facts and rule for judgment, the Commissioner states:

“A study of the testimony as given by the various doctors leads me to conclude that the petitioner is suffering 30 per cent. total disability as the result of lighting up or rendering active this pre-existing arthritic condition.”

This conclusion in the face of a total absence of any testimony stating that the arthritic process had been lighted up or aggravated would in the normal course of events be unexplainable. However, the explanation is found in the transcript when the Court stated:

“I can't recall these little details you have been speaking of.”

But the real explanation is contained in the following remark of the Deputy Commissioner on page 190 of the State of Case:

“As regards to these X-rays, I disregarded them in my findings. I gave no consideration to a previous accident. This man was working up until the time of the second occurrence and from that time on he couldn't work, and whether there was a pre-existing condition or was not, it makes no difference.”

In other words, the Commissioner blindly accepted a few things that he heard from the petitioner's case, added to them some preconceived notions of his own, and totally disregarding the weighty and convincing defense, made a finding of fact with no competent testimony whatever to support it.

The ruling of the Deputy Commissioner invaded the rights of the appellant by not considering all of the legally admitted evidence adduced by it. The Deputy Commissioner heard and determined the

case after excluding from his consideration evidence of great probative force, and thus denied the appellant a fair trial.

It is deemed unnecessary to cite cases in support of so elementary a proposition.

POINT THREE

The Court of Common Pleas had no power to assess the cost of a copy of the transcript obtained by the petitioner for his own use against the Prosecutor.

The Court of Common Pleas, in its determination and judgment of affirmance, ordered the prosecutor to pay the costs of a copy of a transcript amounting to \$127.00, which was ordered and procured by the petitioner for his own use, although there was a copy of the transcript on file in the case which had also been paid for by the prosecutor. In the light of this, we do not understand the Court below when it says, "The proposition is that the successful petitioner must pay for a state of case when his award is appealed." The stenographic copy of the state of case filed in the county clerk's office was paid for by the Prosecutor, and we do not think that the Court below intended to say that the Prosecutor should supply two stenographic copies of the transcript of the record, one for filing and one for the convenience of the successful petitioner.

This point, at first blush, may seem to the Court to be inconsequential, but it is asserted that there is no authority, statutory or otherwise, for the allowance of this sum for a transcript of the testimony to be had solely for the use of the petitioner. It was perfectly reasonable to allow against the prosecutor the cost of one copy to be filed with the case, but beyond this the Court can not go. In this connection counsel calls to the Court's attention the case of *Chink vs. Augustus Carey Company*, 113 Atl. Rep. 32, which was passed upon by the

Supreme Judicial Court of Maine. This was a workmen's compensation case where the Commission by its order directed that the defendant pay the expenses of a surgical operation when the statute in force created no such liability. The Court said in this regard:

"The commission invokes chapter 238 of the Laws of 1919 as creating a liability on the part of the defendants to pay the expenses of a surgical operation, for which admittedly there was no liability under the law in force at the date of the accident. In accordance with the principle above stated, this ruling must be reversed."

It seems to us that entering a judgment against the prosecutor for the cost of a transcript of the case wholly for the use of the petitioner is analogous to ordering a defendant to pay surgical expenses not expressly provided for by a provision of the Workmen's Compensation Act. Even though the action of the Court were not beyond the statutory power conferred upon it, it would at least be an abuse of discretion.

The Court below disposed of this point on the theory that the compensation act provides for the filing of a transcript and that costs when awarded shall be taxed and allowed as for like services in the Common Pleas Courts. It held that the Common Pleas fees and costs Act of 1926 (P. L. page 396 at page 403) was sufficient authority.

Let us examine the later act. The title of the act reads "An act to establish uniform fees and charges relating to the filing . . . or proceedings of the Circuit Court or Court of Common Pleas in this State in the County Clerk's offices &c., *together with the taxation of costs in cases commenced in said courts.*" Surely, this case can not

fall within a class of cases being commenced in the Common Pleas Court. The intention of the Legislature was to so limit its application.

The language of the paragraph on page 403 of the 1926 laws referred to by the Court as adequate authority does not expressly or impliedly include a transcript of the case. The word "deposition" is used, but this is in no sense a record of a case. If the Legislature had so intended it would have used language which would have been definite and unmistakable. Section 7 as amended by the laws of 1927, makes it clear that this legislation deals with cases originally commenced in these courts, and not those on appeal. The fact that the Legislature made the law applicable to cases "where the summons is issued after this act shall take effect, and in all cases pending" is significant. The word "summons" can only mean that the act applies to civil cases originally commenced in these courts.

POINT FOUR

The proofs did not furnish a rational basis for judgment.

Counsel is familiar with the rule frequently laid down by our Court of last resort that appellate courts will not disturb judgments of lower courts if there are any facts to support them. However, we feel that the facts in this case do not furnish a rational basis for the judgment entered below. Counsel would not presume to take the Court's time to restate under this point the insufficiency of the petitioner's case, because that has already been discussed at length under Point One.

The Deputy Commissioner should have dismissed the petition for lack of proof in support of it, but when the prosecutor's case, which is principally medical testimony, is considered along with the inadequacy of the petitioner's case, it can be fairly

said that there was no rational basis for the judgment. It has also been argued under Point Two that the petitioner was suffering for two years prior to his alleged accident from an arthritic condition of the back. It might be well to discuss the medical testimony as it was adduced by the prosecutor.

Doctor Griffith, a man of great experience in traumatic and industrial surgery, testified on page 150, State of Case, that the three sets of films in evidence, one taken before the alleged accident and two taken later, did not show any progression of the arthritic process. At page 151 the doctor stated that the man in his opinion was disabled only to the extent of 10 per cent. total permanent disability, that this disability was due solely to the arthritic condition which existed prior to the injury, and that the alleged strain would not have aggravated the condition so as to increase the amount of permanent disability. The doctor, in his cross-examination explains very well the fact of the discrepancy in the testimony offered by the fact that the patient exaggerated the symptoms and did not co-operate in his examinations. (State of Case, page 154.) The doctor stated that he was unable to demonstrate any area of hypo-anesthesia from his examination and that the condition in his opinion did not exist.

Doctor H. H. Kessler, a man of wide experience, who is considered an authority in compensation matters insofar as they relate to medical problems and who has written a book on the subject, testified that the X-rays showed no progression whatever of the arthritic process (State of Case, page 161), that the petitioner was able to work at the time of his examination, and finally, on page 162, the doctor testified:

“From a clinical examination which showed a definite flattening of the normal lumbar curve, which would take several years to form, and from these X-ray findings, I am of the opinion that that physical disability which I noted in my examination had existed prior to my examination.”

The doctor further stated on page 163 that the petitioner did not co-operate in the examination in that he resisted all movements. On page 165 the doctor testified that he was unable to discover the alleged area of hypo-asthesia, and further that the petitioner did not complain of it at the time of his examination.

Doctor O. P. Chapman, another expert of many years' experience in traumatic injuries, was called by the prosecutor. His testimony was to the same effect that the man's condition was the result of the arthritis, that the arthritic condition, as shown by the three sets of X-rays, had not progressed and in his opinion the petitioner was able to work and suffered no permanent disability as a result of the alleged strain.

The petitioner presented two medical experts, the first of whom was Doctor Finnegan. A reading of his testimony beginning on page 62 of the State of Case will indicate that he was uncertain, contradictory and, most important, at no point in his testimony did he state that the man's condition was the result of the alleged strain. The following are just a few of the contradictory statements made by Doctor Finnegan. On page 64 he testified that the man was 25 per cent. totally disabled. On page 64 he also testified that an examination several months later indicated that the condition was the same. Without any change whatever in the man's condition the doctor testified on page 71 that the disability was 50 per cent. And this seesawing

between 50 per cent. and 25 per cent. continues through the doctor's testimony. And in conclusion the following is quoted from page 83 of the State of Case:

Q. "Now I ask you, Doctor, did you express your opinion on March 31, as to what his disability was?"

A. "Yes, sir."

Q. "What did you state then?"

A. "I stated then, I believe, that the man had a total permanent disability of 25 per cent."

Q. "And you have already stated on the record twice today, I believe, Doctor, that the man's condition has not changed in any respect since the first time you saw him; he is no better or no worse, is that right? Answer that question yes or no."

Mr. Lewis—If you can.

A. "I stated that in my opinion his status was the same."

Among other things Doctor Finnegan testified that the petitioner was suffering from a condition which he described as hypo-aesthesia. He was asked point blank by the petitioner's counsel as to whether or not it came from the injury and his answer on page 65 was "I don't know whether it was there previously or not . . ."

Doctor Holland's testimony was very brief. He stated that the petitioner had a disability which he estimated at 60 per cent. At page 86 he stated that he allowed 10 per cent. for the nerve disorder or hypo-aesthesia and 50 per cent. for the bone disorder. At no place did he say either condition was produced or aggravated by the alleged accident.

Although Doctor Finnegan was permitted to testify again over objection, after part of the prosecutor's defense was put in, his testimony was not at all helpful to the Court in determining whether the pre-existing arthritis was aggravated, and if so, to what extent. This is particularly important to keep in mind in view of the obligation imposed upon the petitioner by law to sustain the burden of proof. The following excerpts taken from Doctor Finnegan's testimony when recalled, will bear out this contention:

Page 137:

A. "How much of his present disability is due to arthritis?"

Q. "Yes, that is right, Doctor?"

A. "All of it."

Page 145:

Q. "Because you did not see him prior, and I am trying to help you by supplying additional facts which were not within your knowledge, I am asking you with those additional facts of pain in the back in 1930, arthritis in the entire lumbar area, as you yourself have read the condition from this group of X-rays, I say with those conditions present that you did not know of when you formed your opinion of 50 per cent disability due to this trauma alone, would not those additional facts modify your opinion to some extent in stating all of that disability was due to this recent trauma?"

A. "That would, if true . . ."

Page 146:

Q. "I am not asking you, Doctor, to decide this matter as to whether the history you got is correct, or the one I gave you is correct, I

am asking for an answer on the set of facts I have given you."

A. "I will answer it now. If the man had the pre-existing disability prior to my examination, my first examination which was due to the same condition, which is now operative, I would say the amount of total disability that he now has, which in my opinion is 50 per cent, is not solely due to the accident in question."

Q. "That is fine. That is all I have been trying to get at. Are you in a position to separate the two things, so as to say how much is due to this trauma, and how much pre-existed?"

A. "No, sir."

Q. "Having in mind the X-ray findings and my statement that the man complained of pain and sought treatment in 1930?"

A. "No, sir."

The prosecutor concedes the theory of aggravation of a pre-existing condition in a proper case. However, if the fact of aggravation is not proved, the principle of law cannot be applied, and that is the exact situation existing in the case at bar.

Doctor Finnegan, from the above testimony, was unable to say whether or not there actually was an aggravation and if there were how much aggravation was brought about by the alleged strain, and if his interpretation of the X-rays is to be considered in conjunction with the reading made by all the other doctors, there was not in fact any aggravation of a pre-existing arthritic condition.

Schneider on "Workmen's Compensation" is, beyond a doubt, the foremost authority on workmen's compensation matters in this country. In volume I, page 538, of his work, the following statement appears:

“Arthritis caused or aggravated by an accidental injury is a compensable disease, but if disability results from a pre-existing disease not aggravated by accident or from progressive arthritis, it is not compensable.”

The Court is also referred to the following cases, many of which concern claims of arthritis alleged to have been aggravated by a strain or by trauma wherein most instances the lower court made an award on the much-abused theory of aggravation in the absence of concrete proof, and the awards were reversed and the petitions dismissed on appeal.

Rosenkranz vs. Ind. Comm. of Colo., 262 Pac. 1014.

Citizen's Coal Mining Co. vs. Ind. Comm. et al., 141 N. E. 134.

Gooch vs. Ind. Comm. et al., 153 N. E. 624.

Jacksonville & H. R. Co. vs. Ind. Comm. et al., 168 N. E. 302.

Autley vs. Louisiana Central Lumber Co., 122 So. 78.

The Court's attention is called to the fact in most of the above cited cases, and particularly in the *Rosenkranz case*, the prior existence of arthritis was shown merely as a matter of opinion based on X-rays taken *after* the accident. The case at bar is even more forceful in that the prosecutor produced X-rays taken two years prior to the alleged strain and compared them with two sets of X-rays taken afterwards, and all three sets show the identical condition with no indication of an extension or aggravation of the arthritic process.

From the foregoing, the prosecutor respectfully submits that the decision of the Deputy Commissioner was not supported by evidence which would

furnish a rational basis for judgment. Doctor Finnegan, on whom the petitioner relied, has had two years' experience in general practice. In view of the contradictory nature of his testimony and the uncertainty which runs throughout it, the testimony should not have been given any weight whatsoever. Doctor Holland's only contribution to the claim was the description of an alleged area of hypoaesthesia. There was no claim that this condition was produced wholly or in part by the alleged accident. On the other hand, the prosecutor produced four men of unquestioned ability and integrity, all of whom stated that the petitioner was suffering from arthritis, which condition was not caused or aggravated by the alleged strain.

This evidence, augmented by the X-ray pictures, approaches a demonstration of the defendant's contention, as far as that is possible in a field outside of mathematics.

CONCLUSION

Counsel is not unmindful of the fact that the Compensation Act is social legislation, and that the Courts will only reluctantly set aside a judgment for compensation, and then only where there has been harmful and grievous error committed by the Court below. It is respectfully submitted that the case at bar falls within this class. The right of the worker should be protected by the Court in order to carry out the purpose and the true intent of the Legislature as expressed in the Compensation Act, but due regard should also be given to the right of the employer.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and set aside.

Respectfully submitted,

GEORGE E. MEREDITH,

Attorney for Prosecutor-Appellant.

HENRY M. HARTMANN,

Of Counsel.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

TRENTON MALLEABLE IRON COMPANY,
Respondent-Appellant,

v.

JOSEPH FALEY,
Petitioner-Defendant.

ON APPEAL FROM AFFIRMING AWARD MADE BY WORK-
MEN'S COMPENSATION BUREAU.

BRIEF FOR PETITIONER-DEFENDANT.

STATEMENT OF FACTS.

Joseph Faley, petitioner-defendant (hereinafter called the employe), filed his petition claiming compensation due him from Trenton Malleable Iron Company, respondent-appellant (hereinafter called employer), as a result of an accident alleged in his petition to have happened on August 9, 1932, while he was employed as an iron moulder by the employer.

The employer filed an answer and, among other things, it admitted the accident and stated that the employe sustained a sprained back as a result thereof; that he was compelled to stop work because of injuries on August 9, 1932, and that the employe sustained "some slight permanent disability" as a result of the accident.

Brief for Petitioner-Defendant

The case was heard before Honorable W. E. Stubbs, one of the Deputy Commissioners of the Workmen's Compensation Bureau, who, after having heard the testimony adduced, made an award for permanent disability to the extent of thirty per cent. This award was affirmed by the Mercer County Court of Common Pleas and also by the Supreme Court.

ARGUMENT.

POINT ONE.

The Deputy Commissioner properly refused to dismiss the petition. The case was scheduled for hearing before the Deputy Commissioner on October 14, 1933. The employer moved for leave to amend its answer so as to deny the occurrence of an accident and resultant injury therefrom. The hearing was thereupon adjourned without the taking of any testimony, evidently for the purpose of enabling the employer to amend its answer. The employer argues that the Supreme Court failed to notice in its reading of the record that the answer was amended so as to enter a denial of the accident.

The Workmen's Compensation Law, Section 236-47, p. 3891, Vol. 2, Compiled Statutes, 1924 Cum. Suppl., provides, among other things, that the answer shall

“admit or deny the substantial averments of the petition and shall state the contention of the defendant with reference to the matters in dispute as discussed by the petition.”

Brief for Petitioner-Defendant

It also provides that

“the answer shall be verified by the oath or affirmation of the respondent and shall be filed in duplicate.”

An examination of the record discloses no amended answer at all so that when the case came up for hearing before said Deputy Commissioner on November 9, 1933, the sole issue before the Commissioner was as to the extent of the employe's disability, and on that point the employe testified (Case, p. 89): that while he was lifting a mould from the bench to the floor he fell on his knee and something snapped in his right side and the mould dropped and he couldn't get up; he was not able to continue with his work. On Case, p. 91, he pointed to the area which the employe termed his right side and it developed that that area is properly termed “right above the pelvic bone in the auxiliary line.” The employe's testimony was that ever since the occurrence of this accident he was never able to return to work because of severe pain. He never had any pain before this occurrence; that he never received any medical treatment to his back.

The Court below properly decided that “the evidence indicated a sudden breakdown while handling a heavy mould.” The case of *Reinhold v. Associated Humane Society*, 3 Mis. 868, cited by the employer, is not applicable. In that case the testimony was merely to the effect that after cranking his car in the usual course petitioner felt a pain in his back. There was no testimony whatever in that case indi-

cating that anything unusual occurred at the time petitioner was cranking his car.

Dr. Paul Finegan, a specialist in bone and joint surgery, after having testified as to the employe's disability, concluded on page 68 that in his opinion the employe has a permanent disability to the extent of fifty per cent.

Dr. John A. Holland, a nerve specialist, testified in behalf of the employe that, after having described the physical condition of the employe, he concluded (on page 86) that in his opinion the employe was permanently disabled to the extent of fifty to sixty per cent.

The case at bar is similar to the case of *George T. Newell, Jr., v. Workmen's Compensation Bureau*, 10 N. J. Misc., p. 405; affirmed by the Court of Errors and Appeals, 110 Law, p. 25. The testimony in the Newell case as to the accident was to the effect that the employe helped carry a can of ashes up the cellar stairs when something happened to the employe that caused him to almost drop the can; that the employe gave immediate evidence of having suffered an injury to his back. That is exactly the situation in the case at bar.

POINT TWO.

It should be borne in mind that point two in the employer's brief deals with remarks made by the Commissioner after the order allowing compensation had been made by him, and it arose in connection with an application made by the employer

Brief for Petitioner-Defendant

to vacate the judgment allowing compensation and grant a rehearing. This would be equivalent to an application in a court of law for a new trial. It is elementary that a motion for a new trial is addressed to the sound discretion of the trial Court and the Court's refusal to grant a new trial in its sound discretion is not appealable. This rule it would seem applies to cases heard before the Workmen's Compensation Bureau. Under this heading the employer argues that from remarks made by the Commissioner at the hearing of its application for a new trial it is evident that the Commissioner willfully disregarded certain X-rays introduced in evidence. The Commissioner's order denying a new trial (Case, p. 19) clearly indicates that the accusation of the employer as to the conduct of the Commissioner has no foundation in fact. The Commissioner in referring to the X-rays on Case, p. 20, says:

"Further, an understanding reading of the decision would show that consideration was given the respondent's evidence regarding the original X-rays."

As to the latter part of Point 2 (relating to a previous accident suffered by the petitioner) it is obvious that the award was based on the difference in disability between that existing after the second accident and that due to the prior accident, if persisting at the time of the second. The Commissioner found (Case, p. 13) that:

"A study of the testimony as given by the various doctors leads me to conclude that the

Brief for Petitioner-Defendant

petitioner is suffering 30% total disability *as the result* of lighting up or rendering active this pre-existing arthritic condition."

This contention, then, of the employer is without merit.

POINT THREE.

It is discretionary with the Court of Common Pleas to assess against the employer the costs of a copy of the transcript obtained by the employee for his own use in connection with the appeal.

Under Chapter 25, Laws 1932, p. 38, the Common Pleas Judge may, in his discretion, award costs "and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services in the Common Pleas Courts."

Chapter 237, Laws 1926, p. 325, relating to fees and charges in the Court of Common Pleas, provides (at p. 403) that costs may be awarded

"for the legal fees paid for a certified copy of a deposition or other paper or document, or map, recorded or filed in any public office, necessarily used or obtained for use on the trial of an issue of fact or the argument of an issue of law, or upon appeal, error or otherwise; the reasonable expenses of printing the papers and points for a hearing or argument."

Also:

"Such other reasonable and necessary expenses as are taxable according to the course

and practice of the Court or by express provision of law.”

These provisions of the law are ample authority to the Judge of the Court of Common Pleas to allow the costs of a copy of a transcript of the testimony even though the same was ordered and procured by the petitioner. The Common Pleas Judge, reviewing the case, in his sound discretion found that such transcript was necessary for the petitioner.

Counsel for the employer argues that Section 7 of the Common Pleas Fees and Costs Act of 1926 (P. L., p. 405), as amended by the Laws of 1927 (p. 193), is limited to cases originally commenced by summons. Certainly that could not have been the intention of the Legislature, for the Act of 1926 (p. 403) provides that

“a party to whom costs are awarded in an action, motion or other proceedings is entitled to include his necessary disbursements as follows * * * the fees for taking depositions, as provided by law * * * the legal fees paid for a certified copy of a deposition or other paper * * * recorded or filed in any public office, necessarily used or obtained for use * * * *upon appeal.*”

A careful reading of Section 7 of the Act of 1926, as amended by the Act of 1927, clearly shows that said provision deals with the time *when*, and not in which cases, the fees, costs and charges provided for in said Act, should be allowed. To place any other construction upon said section would of necessity make the preceding provisions of said Act of no effect whatever.

Brief for Petitioner-Defendant

Furthermore, whatever the intention of the Legislature may have been at the time of the enactment of the Laws of 1926 and 1927 in this regard, it is clear that by the Act of 1932 (in dealing with appeals from the judgment of the Commissioner, Deputy Commissioner or Referee to the Court of Common Pleas) it intended the allowance of costs *on appeal*. Otherwise, the provision that "costs may be awarded by the said Judge in his discretion * * * " would be superfluous if it was intended to apply only to cases commenced by summons since said Chapter 25, Laws 1932, relates only to an appeal.

We submit that the finding of the Common Pleas Court in this respect is not reviewable.

POINT FOUR.

The proofs do furnish a rational basis for judgment. Under this heading we beg to urge the same argument advanced by us under point one herein. At the close of the whole case the employe's case was considerably strengthened by the testimony of the expert witnesses.

Dr. Maurice L. Charnock, one of the medical experts in behalf of the employer, testified (Case, p. 116):

"* * * Now, he did have tenderness and symptoms which may have come on exactly at that moment. I didn't see him until 10 days afterwards, and for which I am perfectly willing to give him a reasonable part of that disability, say between 5 and 10 per cent.

Brief for Petitioner-Defendant

Q. When you say you are willing to give it, Doctor, do you mean to say in your sound, honest judgment, that the act of lifting contributed to an extent to the disability which he now presents, or is there a doubt in your mind?

A. There is a doubt in my mind which I am willing to give him the benefit of,"

and on page 114: The doctor thought that the employe had a disability of between fifteen and twenty per cent.

Dr. Roy Griffith, another medical expert, testified in behalf of the employer at Case, p. 151:

"Q. Did you consider that the man as you then observed him had any disability, Doctor?

A. I thought his existing disability at that time was approximately ten per cent of total."

and on page 152 Dr. Griffith testified:

"Q. Are you in a position to state, Doctor, from your interpretation of these X-rays or from your clinical examination, whether or not this man's arthritic condition was aggravated by this act of lifting which has been described to you?

A. No, it is possible to aggravate it or cause an increase in pain, but I can't say whether it was or not."

Dr. Henry D. Kessler, another medical expert, testified on behalf of the employer (Case, p. 162):

"Q. Did you note any permanent disability as a result of your examination?

A. I found no evidence of physical disability which would incapacitate him from work. I could find evidence of functional changes of a

Brief for Petitioner-Defendant

psychoneurotic character, which I estimated for the purpose of compensation, were causing a disability of from five to ten per cent.

Q. Is it your opinion, that that amount of disability, five to ten per cent, is the result of this accident or happening or rather when the man lifted a mould?

A. This train of psychoneurotic symptoms may have been the result of such an injury."

Dr. Otis L. Chapman, another medical expert, testified on behalf of the employer (Case, p. 168): that from examination of the employe he felt that he was suffering from a permanent disability and estimated such disability at ten per cent, total permanent disability.

And again on the same page:

"A. I gave him 10 per cent for any and all complaints he had. I couldn't find anything in the X-rays to show that his condition had progressed in that two or three years, insofar as the bone changes were concerned, there was no difference. He so far as I could find out, he had had two accidents; how much was due to the first or how much aggravation or increase in soreness was due to the first or second accident, I couldn't determine.

Q. Could you state definitely, some portion of that 10 per cent, regardless of the amount if you can't fix it, was due to the prior condition in 1930?

A. Yes, the X-ray films showed the same condition to be present and with some information that I had that he had an accident at that time to his back or complaint to his back, I feel that part of the affair, that the amount should be divided between the two happenings."

Brief for Petitioner-Defendant

Every one of the medical experts produced by the employer conceded or admitted that the accident had brought about some disability on the part of the employe, but the employer's medical experts were in disagreement with the employe's medical experts as to the percentage thereof. The burden of fixing the percentage of disability fell upon the Deputy Commissioner hearing the case. He heard the testimony of the medical experts and the employe. He had an opportunity to observe the employe and the extent of his disability. After due consideration of the whole case he fixed the percentage of permanent disability at thirty per cent, which finding is amply supported by the evidence in the case.

Three tribunals have reviewed the evidence and found the same sufficient to support the award made to petitioner. The law is well settled (so that the citation of any cases seems unnecessary) that when two independent and distinct tribunals have examined the facts and heard the testimony, a conclusion thus reached should not be lightly disturbed by this Court.

We respectfully submit that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

IRVING H. LEWIS,
*Attorney for Petitioner-
Defendant, and*
WILLIAM REICH,
Of Counsel.

