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Notice.

(Filed May 14, 1945.)

New Jersey Supreme Court

MINNIE WEHRLE, Petitioner-Defendant, *vs.* SHERWIN WILLIAMS COMPANY, Respondent.	Notice.

10

To: William F. Nies, Esq., Attorney for Petitioner-Defendant, 9 Clinton Street, Newark 2, New Jersey.

20

Sir:

PLEASE TAKE NOTICE that on Saturday, the 12th day of May, 1945, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the Honorable Charles W. Parker, Justice of the New Jersey Supreme Court, at the Essex County Court House, Newark, New Jersey, for a Writ of Certiorari to review the proceedings and judgment of the Essex County Court of Common Pleas in the above entitled matter.

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JOHN W. TAYLOR,
Attorney for and of Counsel with
Respondent-Prosecutor.

Service of a copy of the within Notice is hereby acknowledged by me this 8 day of May, 1945.

WILLIAM F. NIES,
Attorney for Petitioner-Defendant.

40

Petition for Issuance of Writ of Certiorari.

(Filed May 14, 1945.)

NEW JERSEY SUPREME COURT.

10

MINNIE WEHRLE,
Petitioner-Defendant,

vs.

SHERWIN WILLIAMS COMPANY,
Respondent-Prosecutor.

Petition for Issuance of Writ of Certiorari.

To the Honorable New Jersey Supreme Court:

20 The petition of Sherwin Williams Company, a corporation, respectfully shows unto the Court that:

1. The petitioner-defendant, as the widow of Charles E. Wehrle, Sr., filed a petition with the New Jersey Department of Labor, Workmen's Compensation Bureau, alleging that on October 4, 1943, the deceased, Charles E. Wehrle, Sr., sustained injuries to his heart arising out of and in the course of his employment with respondent-
30 prosecutor, which caused his death. Compensation benefits were sought on behalf of the petitioner-defendant and Kenneth Wehrle, a child of the deceased and the petitioner-defendant, born September 19, 1932.

2. Respondent-prosecutor filed an answer thereto among other things denying that the decedent sustained an injury by accident arising out of and in the course of his employment and denying that
40 decedent's death was causally related to an acci-

dent arising out of and in the course of decedent's employment, and putting petitioner-defendant to her proof.

3. The matter came on for hearing before the Workmen's Compensation Bureau of the New Jersey Department of Labor, on September 14 and September 28, 1944. It was conceded that the decedent was employed by the respondent-prosecutor on the date alleged at a salary of $245.00 monthly. Upon a hearing and consideration of the evidence the Workmen's Compensation Bureau found that the petitioner-defendant had failed to carry the burden of establishing that the decedent met his death as a result of an accident arising out of and in the course of his employment as set forth in the opinion delivered orally as follows: 10 20

> "The burden of proof in this case, as in all compensation cases, is upon the petitioner to establish the essential allegations of her petition by the greater weight of evidence in order to entitle her to an award.
>
> "After careful consideration of the testimony, the stipulations of counsel and the proofs adduced, I am of the opinion that the petitioner has not sustained the burden of proof with which she is charged, and I find and determine that on the basis of reasonable probabilities the petitioner has not established that the decedent met his death as a result of an accident arising out of and in the course of his employment. Where the medical testimony is in dispute it becomes necessary for me to accept the view and theory which to me appears to be the more reasonable or probable, and viewing the case in such a light I must conclude that on the question of causal 30 40

relationship the proofs overwhelmingly predominate in favor of the respondent."

4. In accordance with the opinion so rendered, a judgment was entered October 31, 1944 in favor of respondent-prosecutor and against the petitioner-defendant. On appeal to the Essex County Court of Common Pleas this judgment was reversed upon a finding that the decedent's efforts in the discharge of the duties of his employment advanced the time of his death and controlled the time and place of his occurrence. Upon this opinion and finding, a judgment was entered in the Essex County Court of Common Pleas on April 3, 1945, awarding the statutory compensation benefits to the petitioner-defendant, Minnie Wehrle, for herself and on behalf of Kenneth Wehrle. This application is for a Writ of Certiorari to review the judgment so made.

5. The evidence in the Workmen's Compensation Bureau was as follows:

The decedent was 51 years old and was employed at the time of his death as a foreman and shader of paint. Some 6 or 7 years prior to his death he suffered an injury to his ribs, following which he suffered frequent pains around his heart and spells of indigestion for which he took Eno salts and Tums. For two or three days prior to October 3, 1943 the decedent seemed more ill than usual. At 6 P. M. on October 3, 1943, he complained of feeling ill, took some Eno and was unable to eat his usual meal because of his illness. He lay down until about 9 P. M. and left for work at about 9:40 P. M.

6. John Robak who was called as a witness for the respondent-prosecutor, testified that he was

the elevator operator in the plant where decedent was employed and that he took the decedent upstairs on the elevator on the evening of October 3, 1943. This witness testified that on the way up in the elevator the decedent complained of being very sick and his stomach was swollen. The witness testified that he stopped the elevator at the second floor where decedent went to the medicine box and took some Eno, and that the decedent then returned to the elevator and was taken to the fourth floor. 10

7. William Stern, called as a witness for the petitioner-defendant, testified that he saw and spoke with the decedent in the wash room where decedent was changing his clothes preparatory to going to work. The decedent complained to this witness of pain in his chest. The witness testified that thereafter the decedent undertook his work and as part thereof, carried, one at a time, two pails weighing from 40 to 50 pounds, a distance of about 40 feet, placed them on the floor and ladled some of the coloring matter therein into a vat where paint was being prepared. This was done with a spoon approximately the size of a household tablespoon. Seven or eight such spoonfuls of coloring matter were ladled into the vat by the decedent who bent over to do so. There is no evidence or testimony that while so doing the decedent suffered from any shortness of breath, or made any complaint, or that there was anything unusual about him or the way he did it. The witness testified further that following this operation the decedent waited in his office about twenty-five minutes. His evidence was further that thereafter the decedent took a half-pint can of the paint upstairs to test it. In so doing, the decedent walked 20 30 40

a distance of 100 or 125 feet on the fourth floor to the stairway, up the stairway and the further distance of 100 to 125 feet to the room on the fifth floor where the paint was tested. The witness testified that the decedent walked fast on the night in question and that it was necessary for the de-
10 cedent to complete his task of testing the paint before other workmen could assume their duties. On cross examination, however, the witness stated that the decedent always had a fast walk and that every Sunday night it was necessary for the other workmen to await the preparation of the first batch of paint. The witness had also testified that the decedent went upstairs two or three times and that he took big steps going up, but on cross examination and on examination by the Court, ad-
20 mitted that the decedent went upstairs only once that evening and that he only saw the decedent walk toward the stairs and did not see decedent actually ascending the stairs. About fifteen minutes after decedent left the fourth floor he was found dead or dying in the room where the paint was tested. The sample half-pint can of paint was on the bench in that room.

8. The witness, Alphonse St. Amand, called on
30 petitioner-defendant's behalf testified that the decedent used to take a lot of Eno, but that on the night in question he saw the decedent only on the bus on his way to work, and next saw him when he was lying dead or dying on the floor.

9. The witness, Daniel McLearey, testified that he saw the decedent in the foreman's office and decedent complained to him that he was feeling unwell. This witness next saw the decedent lying
40 on the floor dead.

10. Matthew Stangreciak testified that the decedent complained to him of feeling unwell on the night in question and that he next saw the decedent dead.

11. The death certificate offered in evidence as the exhibit of the petitioner-defendant, showed the cause of death to be "hypertensive cardiovascular renal disease". 10

12. Dr. Carmen G. Berardinelli, Assistant County Medical Examiner, testified he performed an autopsy of the decedent as a result of which he certified the cause of death as hypertensive cardiovascular renal disease. The doctor testified on cross examination that he expressed no opinion as to any relationship between the decedent's work and his death. The doctor testified further that all of the findings on autopsy were findings attributable to heart disease. 20

13. The only proof indicating a causal connection between the decedent's work and the death consisted of the testimony of Dr. Jerome Kaufman whose evdience was given wholly on the basis of a hypothetical statement of facts in the questions. On cross examination Dr. Kaufman stated that there was no specific exertion that one can speak of as causing decedent's death, and that the decedent was sick and had a very bad heart at the time he went to work. Also, on cross examination, the Doctor stated that he had assumed, in arriving at his opinion, that the decedent had worked continuously for most of an hour and that he had climbed four flights of stairs, which facts were not established in the evidence, or incorporated in the hypothetical question. Dr. Kaufman 30 40

on further cross examination stated that the correction of his erroneous assumptions of fact "may not change my opinion". Dr. Kaufman conceded further that the decedent's heart disease was so advanced that he might die from it at any time.

10

14. Dr. George P. Olcott, Jr., called as an expert witness on behalf of the respondent-prosecutor, testified in response to a question incorporating a hypothetical statement of the facts, that in his opinion there was no causal relationship between decedent's death and his work. The Doctor testified that the autopsy findings were characteristic of this type of disease and that the decedent's complaints before he assumed to do any

20

work were definite indications that decedent was in the terminal stage of the disease where the heart could stop of itself when decedent was at complete rest. The Doctor testified further that the attack must be coincident with the alleged effort in order to admit causal relationship.

15. The Court of Common Pleas in reversing the dismissal of the Workmen's Compensation Bureau held that the decedent's efforts in the discharge of the duties of his employment advanced

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the time of his death and controlled the time and place of its occurrence rendering an award for compensation death benefits at the rate of $20.00 a week to Minnie Wehrle and Kenneth Wehrle for a period of 258 6/7 weeks and to Minnie Wehrle for an additional period of 41 1/7 weeks at the rate of $19.79 per week and allowing the burial expense in the sum of $150.00, all chargeable against the respondent-prosecutor, in addi

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tion to which, fees and costs were assessed.

Petition for Issuance of Writ of Certiorari.

Your petitioner respectfully contends that the Essex County Court of Common Pleas erred in reversing the judgment of dismissal entered in the Workmen's Compensation Bureau and in entering an award for compensation as set forth, in that the petitioner-defendant failed to establish by the greater weight of the probable and credible evidence, that the death of decedent was causally related to any injury by accident arising out of and in the course of his employment, in that there is a complete failure of any evidence or reasonable ground of inference that the comparatively small amount of work done by the decedent in any way injured his heart, exceeded his capacity or strained him or his heart in any way; in that it appeared that the decedent's long standing heart disease was far advanced and that the onset of the fatal termination thereof commenced while the decedent was at home and before he went to his place of work; in that the petitioner-defendant failed to establish that the decedent's death was related to or accelerated by his employment and that the judgment of the said Essex County Court of Common Pleas was contrary to law and to the greater weight of evidence in the case.

Your petitioner therefore prays that a Writ of Certiorari issued to the said Essex County Court of Common Pleas to review the proceedings and judgment in said Essex County Court of Common Pleas in this cause.

And your petitioner will ever pray, etc.

Sherwin Williams Company,

By Everitt Rhinehart,
Attorney and Agent.

Petition for Issuance of Writ of Certiorari.

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

Everitt Rhinehart, of full age, being duly sworn according to law upon his oath deposes and says that:

10

1. He is an attorney and counsellor at law of the State of New Jersey associated with John W. Taylor, attorney for the respondent-prosecutor above named, and that he has been charged with the conduct of the above entitled cause.

2. He has seen and is familiar with the record and proceedings in the above entitled matter and with the matters, facts and things set forth in the annexed petition and that the same are true to the best of his knowledge and belief.

20

Everitt Rhinehart.

Subscribed and sworn to before me this 12 day of May, 1945. }

Thomas J. Brett,
A Master in Chancery of N. J.

30

40

Writ of Certiorari.

(Filed May 25, 1945.)

New Jersey, ss.:

The State of New Jersey to the Court of Common Pleas in and for the County of Essex and Russell C. Gates, Clerk of the said Court and Minnie Wehrle—Greetings:

(Seal)

10

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 23rd day of April, 1945 by the Honorable Dallas Flannagan, Judge of the said Court of Common Pleas in and for the County of Essex, in a certain proceeding brought on behalf of Minnie Wehrle, petitioner against 20 Sherwin Williams Company, respondent for the determination and recovery of compensation under the Statutes of the State of New Jersey, known and cited as R. S. 34:15-1 to R. S. 34:15-102, relating to the liability of an employer to make compensation for injuries received by an employee arising out of and in the course of his employment and the acts amendatory thereof and supplemental thereto we command you, the said Court of Common Pleas in and for the County of 30 Essex and Russell C. Gates, Clerk of said Court, that the said determination and judgment, together with a transcript of the evidence and all proceedings for making of the same and all things touching and concerning the same, as fully and entirely as before you they remain, or are in your custody and control, you do certify and send together with this our Writ, to our Justices of our Supreme Court of Judicature at Trenton, on the 1st day of June, 1945, that therein may be caused 40 to be done what of right and justice according to law ought to be done.

Allocatur.

Witness, the Honorable Thomas J. Brogan, Chief Justice of our Supreme Court, at Trenton, this 15th day of May, in the year of our Lord, one thousand nine hundred and forty-five.

James J. Gavin,
Clerk.

10

John W. Taylor,
Attorney for Respondent-Prosecutor.

Service of a copy of the within Writ of Certiorari is hereby acknowledged by me this 12th day of May, 1945.

20

Thomas J. Brett and William F. Nies,
Attorneys for Petitioner-Defendant on Certiorari.

Allocatur.

This Writ is allowed. Let it be sealed.

30

Dated: May 12, 1945.

Charles W. Parker,
Justice Supreme Court.

40

Return to Writ of Certiorari.

(Filed May 25, 1945.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

We, Dallas Flannagan, Judge of the Court of Common Pleas, in and for the County of Essex and State of New Jersey, and Russell C. Gates, Clerk of the Court of Common Pleas, in and for the County of Essex, State of New Jersey, DO HEREBY CERTIFY and return to the Supreme Court of Judicature of the State of New Jersey, the judgment of the Court of Common Pleas and Determination and Award and Proceedings made and given by the Workmen's Compensation Bureau of New Jersey, Department of Labor, in the Compensation Proceedings of Minnie Wehrle, Petitioner *v.* Sherwin Williams Co., Respondent, together with all things touching and concerning the same as by the within writ to us directed and as commanded.

10

20

IN WITNESS WHEREOF, we have hereunto set our hands and official seal this 24th day of May, A. D. 1945.

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

30

RUSSELL C. GATES,
Clerk.

(Seal)

40

Dependent's Claim Petition for Compensation.

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU,

TRENTON, N. J.

10

MINNIE WEHRLE, Petitioner, *vs.* SHERWIN WILLIAMS CO., Respondent.	**Received at Trenton Dec. 29, 1943.** **Claim Petition No. . . . .** **Date of Accident Oct. 4, 1943.**

20 If known state name of insurance company. Liberty Mutual Ins. Co.

Attorney for Petitioner. William F. Nies, 9 Clinton Street, Newark 2, N. J.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

30

1. What was the full name of the decedent? Charles E. Wehrle, Sr.
2. Where did decedent live? 1157 West Clinton Avenue, Irvington, 11, N. J.
3. Sex of decedent. Male.
4. Date of birth of decedent January 14th, 1892
5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

40

Dependent's Claim Petition for Compensation.

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Minnie Wehrle...	52	April 10, 1891	Wife
Kenneth Wehrle..	11	Sept. 19, 1932	Son

6. By whom was decedent employed at the time of accident? (Give name and business address) Sherwin-Williams Co., Lister Avenue, Newark, N. J. 10

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

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

9. Did he receive such notice from the employer? No. 20

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

11. Did you notify the employer of this accident? Yes.

12. If so, on what date? On day of accident.

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

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Foreman, shading and testing of paint. 30

15. When did the accident happen? October 4, 1943, at about 12.15 A. M.

16. Where did the accident happen? At plant of respondent.

17. What was the nature of the accident, and how did it happen? Decedent sustained injuries to his heart from which he died. 40

Dependent's Claim Petition for Compensation.

18. Did deceased work any after the accident? No.
19. If so, give date he was compelled to stop work ....
20. Give date of death October 4, 1943.

10

21. Were his wages fixed by piece work? No.
22. If so, what was his average weekly wage?....
23. If wages were fixed by the hour, state rate per hour ....
24. Give number of hours in an ordinary working day ....
25. Give number of days in an ordinary working week ....

20

26. State the amount of weekly wages Salary at $245.00 per month.
27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.
28. Has the employer promised to pay you any compensation? No.
29. If so, how much?..............................

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30. Was medical aid required?..............
31. If so, was this service furnished by the employer? ....
32. What other sum did you expend for medical, surgical or hospital service?..............
33. Give name and address of physician and hospital ....
34. What other facts are there which you believe

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important?..............................

Dependent's Claim Petition for Compensation.

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? No.

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

10

20

And your petitioner will ever pray, etc.

MINNIE WEHRLE (sgd)
(Petitioner)

1157 West Clinton Avenue,
Irvington, N. J.
(Address)

30

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } SS.:

MINNIE WEHRLE, of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matter and

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things therein set forth are true according to the best of his knowledge and belief.

MINNIE WEHRLE (sgd)
(Petitioner)

Subscribed and sworn to before me this 27th
10 day of December 1943, at Newark, N. J.

WILLIAM F. NIES (sgd)
A Master in Chancery 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.)

20 TO THE RESPONDENT.

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

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

WORKMEN'S COMPENSATION BUREAU.

....
Secretary.

40

Respondent's Answer to Dependent's Claim Petition.

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU,

TRENTON, N. J.

MINNIE WEHRLE, Petitioner, *vs.* SHERWIN WILLIAMS CO., Respondent.	Claim Petition No. 78881. Mar. 17, 1944.

10

Attorney for Respondent John W. Taylor, 24 Commerce St., Newark, N. J.

20

In answer to Claim Petition filed in this case:

1. What was decedent's name? Charles Wehrle, Sr.
2. Where did decedent reside? 1157 W. Clinton Ave., Irvington, New Jersey.
5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify ....

30

6. Was the decedent in your employ at the time of the accident? See No. 34 for all answers to this Claim Petition.
7. State your business............
8. Did you receive written notice from the decedent at the time of hiring, or later, that the

40

Respondent's Answer to Dependent's Claim Petition.

Compensation Law was not to apply to him? ....

9. Did you give such notice to him?............

10. When did you first have knowledge of this accident?............

11. Did you receive notice of this accident from the Petitioner?............

12. If so, on what date?............

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

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

15. When did the accident happen?............

16. Where did the accident happen?............

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

18. Did the decedent work any after the accident?............

19. If so, give date he stopped work............

20. Give date of death............

21. Were his wages fixed by piece-work?........

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

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

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

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

Respondent's Answer to Dependent's Claim Petition.

26. State the amount of weekly wages..........
27. How much have you paid as compensation (not medical aid) since the accident?........
28. Have you promised to pay compensation?....
29. If so, how much? ....
30. Was medical aid required? 10
31. If so, did you furnish all the medical, surgical, or hospital services, or other expenses of last sickness? ....
32. Between what dates was service rendered? ....
33. Give name and address of physician and hospital rendering service at your direction.....
34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion 20
    1. Respondent denies each and every allegation of the Claim Petition herein and leaves petitioner to his proof.
    2. Respondent denies that decedent suffered an injury by an accident arising out of and in the course of his employment with respondent.
    3. Respondent denies that decedent's death was causally related to his employment by Respondent. 30
    4. Respondent is without sufficient knowledge or information to form an opinion as to the alleged dependency of the claimed dependents and puts petitioner to her proof.
    5. Respondent denies knowledge or notice of the alleged occurrence within the manner and time prescribed by the Statute in such 40

case made and provided and is prejudiced thereby.

SHERWIN-WILLIAMS CO.
(Respondent)
Lister Avenue, Newark, N. J.
(Address)

10 By: B. Franklyn Boggia (sgd)
Agent
24 Commerce St., Newark, N. J.

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

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

SHERMAN-WILLIAMS CO.
(Respondent)
By: B. Franklyn Boggia (sgd)
30 Agent

Subscribed and sworn to before me, this 13th day of March, 1944, at Newark, New Jersey.

ARTHUR J. BLAKE (sgd)
An Attorney at Law of New Jersey

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

Determination and Judgment.

(Filed November 24, 1944.)

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU.

MINNIE WEHRLE, Petitioner, *vs.* SHERWIN WILLIAMS COMPANY, Respondent.	On Claim Petition. No. 78881. Determination and Judgment.

10

The petitioner by her claim petition herein filed December 29, 1943, seeks compensation benefits under and by virtue of 1937 R. S. 34:15-1 *et seq,* as amended and supplemented, for herself and her son, Kenneth Wehrle, as the result of the death of the decedent, Charles E. Wehrle, Sr., on October 4, 1943, allegedly caused by accident arising out of and in the course of his employment with respondent, and respondent having filed its answer thereto, the cause came on for hearing before me at Newark, September 14, 1944 and September 28, 1944.

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30

It was stipulated between the parties that the decedent, Charles E. Wehrle, Sr., was employed by the respondent on the date alleged at a wage of $245.00 monthly.

The petitioner, Minnie Wehrle, testified that she is the widow of the decedent and that she and her son, Kenneth Wehrle, resided with decedent at the time of his death, that decedent had worked for the respondent for many years and was a

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foreman on the night shift for a year or two preceding his death. The marriage certificate of petitioner and decedent was offered and received in evidence as Exhibit P-1 as of September 14. The birth certificate of the child, Kenneth Wehrle, was offered and received in evidence as Exhibit P-2
10 as of the same date, and the certificate of death of Charles E. Wehrle, Sr., was offered and received in evidence as Exhibit P-3. The death certificate, signed by Carmen G. Berardinelli, Assistant Medical Examiner of the County of Essex, certified the cause of death to be "hypertensive cardiovascular renal disease" and the date of death was given as of October 4, 1943. The funeral bill of J. J. Manger in the sum of $596.70 was offered and received in evidence as Exhibit P-4 on
20 September 14, 1944. The petitioner testified further that on the evening of October 3, decedent left his home at about twenty minutes of ten in the evening to go to work at the plant of respondent on the shift from 11:00 P. M. to 7:00 A. M., that six or seven years prior to his death, he had suffered an injury to his chest and ribs following which he complained of illness and pains in his chest, that he had these complaints very frequently as much as every other day, that at about
30 6:00 P. M. the evening of October 3, he complained of pains in his chest and took some "Eno", that he laid down from 6:00 P. M. until 9:00 P. M. that evening and, when he got up, again complained that he was sick and did not feel well, that he appeared pale but nevertheless left for work at his usual time. On cross examination, it appeared that for two or three days prior to October 3 decedent had complained more than usual and that he felt too ill to eat his supper on
40 October 3. It further appeared that decedent had

not worked the preceding night, it having been his regular night off.

William Stern, called on petitioner's behalf, testified that he had worked for respondent for many years and knew and worked with the decedent, who was night foreman and shader of the paint. On the evening of October 3, he was on the same bus with the decedent from Raymond Boulevard and Broad Street in Newark to the vicinity of respondent's plant on Lister Avenue in Newark from whence the decedent walked one block from the bus to the plant. Preparatory to going to work the witness saw decedent in the room where they changed their clothes and while changing his clothing, the decedent complained that he felt "funny" and indicated that he had pains in his chest. The decedent went to work to get the paint ready and in order to do so he carried two five-gallon pails, one at a time, a distance of approximately forty feet and then bent down to dip coloring matter from the cans into the batch of paint. This was done with a spoon slightly larger than a household tablespoon and approximately seven or eight spoonfuls of coloring matter were taken from the cans. Following this, the decedent was in the foreman's office for 25 or 30 minutes following which he took a half pint can of the paint to the fifth floor to sample. On direct examination, the witness stated decedent went to the fifth floor two or three times, but on cross examination, stated that it was only once. All on direct examination, the witness stated that decedent walked fast or faster than usual in order to get the batch of paint ready so that the other employees might have something to do. On cross examination, however, the witness stated that the decedent's gait was a fast one and that he walked

with his usual gait on the night in question. To get to the fifth floor where the paint was tested, the decedent walked a distance of 100 or 125 feet on the fourth floor and from there, ascended to the fifth floor where it was necessary to walk a further distance of 100 to 125 feet to the point
10 where the paint was tested and where decedent was found dead. The decedent was alone when he went to the fifth floor and after he was absent for about fifteen minutes from the fourth floor, one of the employees went to the fifth floor. At about 12:05 or 12:10 A. M. October 4, 1944, the decedent was found lying in the room on the fifth floor where the paint was tested. He appeared to be dead within a matter of a few minutes. This witness testified also on cross examination that
20 decedent, while dressing for work, stated that if he did not feel better, he was going home. It also appeared that the decedent had spent 25 or 30 minutes in the foreman's office before taking a half pint sample can of paint to the fifth floor for testing. It also appeared that the witness did not see the decedent after leaving the fourth floor and did not see him ascend the stairs. The half pint can of paint which decedent had taken from the fourth floor was on a bench or desk in the paint
30 testing room.

Alphonse St. Amand testified that he was a watchman for respondent and had known decedent eighteen years. He knew the decedent customarily took a lot of "Eno" for his pains and testified generally to the nature of decedent's duties substantially as related by the previous witness. The witness came upon the decedent on the fifth floor after he was dead.

Daniel McLeary testified that he was a co-
40 worker and had known decedent four or five

years, that on the night of his death he saw and spoke to the decedent while he was in the foreman's office. The decedent complained of feeling ill and indicated his chest as the site of his pain. At the time the decedent seemed to be leaning forward.

Matthew Stangreiak testified that about 11:30 P. M., October 3, 1943, he went into the foreman's office on the fourth floor and inquired of decedent how soon a batch of paint would be ready. The decedent told him he would be three-quarters of an hour or more and complained to the witness of feeling ill. The witness testified also that decedent was leaning forward and seemed to be pressing against his chest. 10

John Roback was called as a witness by the respondent out of turn. Mr. Roback testified that he was the elevator operator in the building and that he took decedent from the first or main floor to the fourth floor on the night in question, that the decedent complained of pains in his chest and the elevator was stopped at the second floor by the decedent who went to the "medicine room" and took some "Eno", that decedent returned to the elevator saying he felt all right and proceeded to the fourth floor. Mr. Roback testified that the decedent indicated his chest as the site of his pain and said also that decedent's stomach or abdomen seemed to be swollen up. 20 30

Dr. Carmen G. Berardinelli, called on petitioner's behalf, testified that he performed an autopsy on October 4, 1943 as a result of which he determined the cause of death to be hypertensive cardiovascular renal disease with hypertrophy of the left heart. The original written report of the autopsy finding was offered and received in evidence as petitioner's exhibit. The doctor stated 40

further that exertion or effort could precipitate death in such a case, but he expressed no opinion as to whether such was the case in this instance.. On cross examination, he stated that the findings on autopsy were typical of the disease and that there was no evidence on examination of the
10 heart, that trauma or exertion had played any part in the death.

Dr. Jerome Kaufman, called on petitioner's behalf, testified that in response to a hypothetical statement of facts that in his opinion the decedent's work on the night in question had been a contributing cause to his death. Dr. Kaufman stated, however, that the decedent was obviously gravely ill with heart disease and might have died from the disease alone at any time.

20 Dr. George P. Olcott, Jr., called on respondent's behalf, testified in response to a hypothetical statement of facts that in his opinion decedent's death was the result of heart disease alone and that in his opinion the exertions of his work had not precipitated his death or aggravated the heart disease.

The burden of proof in this case, as in all compensation cases, is upon the petitioner to establish the essential allegations of her petition by the
30 greater weight of evidence in order to entitle her to an award.

After careful consideration of the testimony, the stipulations of counsel and the proofs adduced, I am of the opinion that the petitioner has not sustained the burden of proof with which she is charged, and I find and determine that on the basis of reasonable probabilities the petitioner has not established that the decedent met his death as a result of an accident arising out of
40 and in the course of his employment. Where the

medical testimony is in dispute it becomes necessary for me to accept the view and theory which to me appears to be the more reasonable or probable, and viewing the case in such a light I must conclude that on the question of causal relationship the proofs overwhelmingly predominate in favor of the respondent. 10

It is thereupon on this 31st day of October, 1944, ORDERED that the petition herein be dismissed and judgment be and is hereby entered in favor of the respondent and against the petitioner.

JOHN M. KERNER,
Deputy Commissioner of Compensation.

20

I, DANIEL A. SPAIR, secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the petition, answer and determination filed in connection with the above cause.

DANIEL A. SPAIR,
Secretary, Workmen's Compensation Bureau.

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Notice of Appeal.

(Filed November 24, 1944.)

NEW JERSEY DEPARTMENT OF LABOR,

Workmen's Compensation Bureau,

Claim Petition No. 78881.

10

Minnie Wehrle,
Petitioner,

vs.

Sherwin Williams Co.,
Respondent.

Notice of Appeal.

20

To: John W. Taylor, Esquire, Attorney for Respondent, 24 Commerce Street, Newark 2, N. J.

Secretary of Workmen's Compensation Bureau:

Clerk of County of Essex:

Sirs:

Please take notice that the petitioner Minnie
30 Wehrle appeals to the Court of Common Pleas in and for the County of Essex from the finding of facts, Determination and Order of Dismissal, made in the above entitled cause on the 31st day of October 1944, by Deputy Commissioner John M. Kerner, which Determination and Order of Dismissal dismissing petitioner's petition, determined that petitioner as a dependent, and Kenneth Wehrle, also a dependent of Charles E. Wehrle, Sr., are not entitled to any compensation
40 as such dependents by reason of the death of the

Notice of Appeal.

said Charles E. Wehrle, Sr., on October 4, 1943, while in the employ of the respondent, and that he did not die as a result of an accident arising out of and during the course of his employment with respondent.

William F. Nies,
Attorney for Petitioner.

10

Dated November 15, 1944.

Service of copy of within Notice of Appeal is hereby acknowledged this 16th day of Nov. 1944.

John W. Taylor,
Atty. for Respondent.

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30

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Order.

(Filed November 24, 1944.)

ESSEX COUNTY COURT OF COMMON PLEAS.

MINNIE WEHRLE, Petitioner Appellant, *vs.* SHERWIN WILLIAMS CO., Respondent-Appellee.	On Appeal from Workmen's Compensation Bureau. Order.

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Application having been made by William F. Nies, attorney for the petitioner-appellant, for an order fixing the time and place for the hearing of the appeal in the above matter,

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It is, on this 24th day of November, 1944, ORDERED that the hearing and argument on the appeal in the above matter be had before such judge as shall be holding court in the Essex County Court of Common Pleas in the Essex County Court House, Newark, New Jersey, on the 15th day of January 1945, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

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RICHARD HARTSHORNE,
Judge.

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Opinion.

(Filed April 3, 1945.)

COURT OF COMMON PLEAS
ESSEX COUNTY.

MINNIE WEHRLE, Petitioner-Appellant, *vs.* SHERWIN WILLIAMS CO., Respondent-Appellee.	On Appeal from Workmen's Compensation Bureau. Opinion.

10

WILLIAM F. NIES, Esq., and
WILLIAM L. VIESER, Esq.,
For the Petitioner-Appellant.

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JOHN W. TAYLOR, Esq., and
EVERITT RHINEHART, Esq.,
For the Respondent-Appellee.

FLANNAGAN, *J.*

This is an appeal from the Workmen's Compensation Bureau dismissing the petition of the petitioner herein who is the widow of decedent.

30

The petitioner's decedent, a man 61 years of age, a night worker, was a sufferer from heart disease of long standing in an advanced stage. He had been working for respondent for some thirty years. On the night of October 4, 1943, he came to a sudden death in the respondent's plant, while engaged in the performance of the duties of his employment. The ground of the dismissal was that petitioner failed to sustain the burden of proving that decedent's work was a contributing factor to his death.

40

The day before the night of decedent's death was a Sunday, he had not worked the night before, getting up in time to go to church. During the afternoon he went back to bed, saying he did not feel well, and slept until about six o'clock. He then took some Eno salts and remained in bed until about nine P. M. He did not "look good at all," he was white and did not eat his supper. His wife urged him to stay at home but he decided to go to work and left the house about twenty minutes to ten o'clock P. M.

Decedent had had an accident some seven or eight years previously in which his ribs were broken. Since that time his wife testified he "wasn't really right" and complained "every day or so" of pain in his chest and had complained of these pains for a few days before the "accident" occurred. He had not had the benefit of medical advice and believed his condition to be due to "indigestion." He took Eno salts quite frequently, believing that he thereby obtained relief. His actual trouble, heart disease, neither he nor his wife seemed to even suspect.

Each side called one medical expert who gave testimony, and, in addition, petitioner called the Assistant Chief Medical Examiner of the county, Dr. Berardinelli, who had performed an autopsy and who testified to his observations more as a fact witness than as a professional expert.

All three physicians agreed that the decedent was suffering with a dangerous heart disease, the diagnosis by Dr. Berardinelli was specifically hypertensive cardio vascular renal disease.

The two experts called by the respective sides agreed that the decedent's disease was of long standing and that it had progressed to the point where his condition was in the terminal and criti-

cal stage. Dr. Olcott, the respondent's expert, made his view clear in his testimony as to the status of decedent's disease when he indicated the treatment which he would have prescribed for decedent on the Sunday night in question had he been decedent's physician. The treatment indicated was the avoidance of all exertion possible, 10 complete idleness, "flat on his back in bed" for months "without bathroom privileges, not even allowing him to sit up in bed to eat his meals." With these conditions present the doctor said "I think the chances are I may prolong his life."

Unfortunately, as already stated, decedent did not have the benefit of medical advice or aid and ignorantly and possibly in neglectful disregard of his symptoms proceeded on this Sunday night by bus to his work at his place of employment. Arriving there he complained from time to time to 20 other employees of feeling badly and of pains in his chest saying among other things "I feel awfully bad tonight," and that if he did not feel better he was going home. On reaching the plant decedent spent some time in the washroom changing his clothes and then went about his usual work which was that of night foreman and paint "shader." He was under an urge to hurry as the work of the other men could not proceed until he 30 had obtained the desired shade of color in the vats of paint by adding the necessary amount of coloring matter and testing the result.

After changing his clothes and leaving the washroom decedent in doing his customary work had to walk from place to place, carry cans of paint weighing about forty to fifty pounds some forty feet and to bend up and down in dipping color with a small spoon from a container into a vat. 40

After these things were done decedent went to the office waiting for the vat to be ready for testing the color. While in the office decedent said he was not feeling "so good" and that "I got something across here" indicating his "middle."

After remaining in the office practically at rest
10 for about thirty minutes waiting for the vat to be ready, decedent took a sample of paint for the purpose of testing it for its shade and consistency in the test or "tech." room on the fifth floor where there were panels provided for that purpose.

He walked with the sample (in a small can) some 125 feet to stairs, ascended the stairs and walked some 125 feet more to the testing room. About fifteen minutes after decedent was seen going towards these stairs he was found lying on
20 his side on the floor of the testing or "tech." room dead or, at least, expiring. The sample of paint which he brought with him in the can, for the purpose of testing it, was found on a bench alongside of which decedent was lying on the floor.

As already stated the respective sides each called one medical expert to give opinion evidence; the Assistant County Physician, Dr. Berardinelli, who performed the autopsy, testified in the main factually to what he observed and in support of
30 his death certificate. He did give an opinion, however, that exertion can produce death in one in the condition that the decedent was in.

Dr. Olcott, called by respondent, was of the opinion, based on a hypothetical question, that the death was caused solely by disease and that the exertion of decedent in the discharge of his duties had no causal connection with it.

Dr. Olcott draws his differentiation finely both as to extent of exertion and proximity of time
40 necessary in this case to associate physical effort with heart collapse.

Opinion.

The doctor was of the opinion that in order to connect the exertion as a cause of the collapse the exertion must have occurred within "five minutes" of the collapse and that, while walking upstairs or carrying a pail weighing forty to fifty pounds might have accelerated a collapse, walking 125 feet along a passageway after climbing stairs 10 would not do so. The doctor says in regard to lapse of time (p. 137) "I have come to the belief that even a short interval as five minutes would preclude the drawing of such a conclusion that it occurred as the result of exertion." Later he says (p. 144) "If the man had died carrying pails or mounting stairs, I would not be testifying on this case."

Dr. Olcott's testimony seems thus to be predicated upon the assumption that more than five 20 minutes did elapse between the time decedent climbed the stairs to go to the testing room and his collapse.

When the decedent reached the top of the steps on the fifth floor on his way to the testing room he had only 125 feet to walk on a level floor to get there. He was a rapid walker under a duty and urge to get the test made as quickly as possible in order to facilitate other workmen who were idle awaiting its results. It was as stated only about 30 fifteen minutes from the time he was seen downstairs approaching the stairway until he was found practically dead, if not entirely so. The can of paint which he came to test is not described as having been found in relation to the testing panels, but as sitting on the bench by the side of decedent's prostrate body. All the circumstances indicate that the decedant collapsed before he started his test. The assumption by Dr. Olcott that more than five minutes elapsed from the time that 40

decedent arrived on the fifth floor until his collapse seems to me an improbable one. Its assumption as the basis of the doctor's opinion materially weakens its evidential value. On the contrary, the probabilities are that as much as five minutes did not elapse from the time decedent reached the top
10 of the steps and the onset of his attack.

Taken in its entirety, Dr. Olcott's testimony is not convincing to my mind.

Dr. Kaufman, the medical expert called for petitioner, was persuasive in his view that the decedent's exertions were definitely an accelerating cause producing the decedent's collapse at the time and place in question. He was of the opinion that the decedent would not have died then but for his exertion and that with rest and treatment
20 his life would in reasonable probability "have been prolonged." The time he could not fix.

The walking to the stairs at a rapid rate, the climbing of the stairs (in itself a major effort to one with heart trouble in an advanced and critical stage) the walk from the top of the stairs to the testing room, one effort on top of another, all under an urge to hurry, constituted an extended continuous strain culminating, as a contributory accelerating cause, to the decedent's collapse.

30 Decedent's efforts, in good faith, to discharge the duties of his employment advanced the time of his death and controlled the time and place of its occurrence.

The question presently presented to the court may be stated thus:

From the rational hypotheses tendered by all the evidence, is it by a fair preponderance of probabilities, according to common experience of mankind the most probable inference, that the effort
40 which decedent made in the discharge of the du-

ties of his employment on the night of his death, was a cause contributing to his death to such extent that his death, without it, would not have occurred at the particular time and place it did occur? *Gilbert* vs. *Gilbert Machine Works,* 122 L. 533, 538 (Sup. Ct.); *Micieli* vs. *Erie Railroad,* 130 L. 488 at 454 (Sup. Ct.); *Schlegel* vs. *Baron,* 130 L. 611 (Sup. Ct.); *Kramerman* vs. *Simon,* 131 L. 250 (Sup. Ct.); *Jones* vs. *Newark Term. and Trans. Co.,* 128 L. 193, aff'd. 129 L. 58.

10

This question, upon all the evidence presented, should be answered in the affirmative.

A determination in favor of petitioner, in concise form, reciting only the essential findings of fact and conclusions of law may be presented under Rule Nine. The amount of award provided by the statute may be inserted and the other amounts left blank to be filled in by the Court.

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Dated March 29, 1945.

Dallas Flannagan
Judge.

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Determination of Facts and Rule for Judgment.

(Filed April 24, 1945.)

ESSEX COUNTY COURT OF COMMON PLEAS.

10

MINNIE WEHRLE, Petitioner-Appellant, *vs.* SHERWIN WILLIAMS CO., Respondent-Appellee.	**On Appeal from Workmen's Compensation Bureau. Determination of Facts and Rule for Judgment.**

20 A claim petition was filed in the Workmen's Compensation Bureau by Minnie Wehrle, widow of Charles E. Wehrle, in which she alleged that her deceased husband suffered a personal injury by accident arising out of and in the course of his employment with respondent on October 4th, 1943, and an answer thereto was filed by Sherwin Williams Co., denying that petitioner's deceased suffered a personal injury by accident arising out of and in the course of his employment within the
30 meaning of our Compensation Act.

Issue was joined before the Workmen's Compensation Bureau and after a hearing a Determination of Facts and Rule for Judgment was entered on the 31st day of October, 1944, holding that petitioner had failed to sustain the burden of proving that the deceased, Charles Wehrle, met his death by accident arising out of and in the course of his employment and the petition was accordingly dismissed.

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Determination of Facts and Rule for Judgment.

An appeal was taken to this court and the matter came on for a hearing before me on transcript of the record and testimony and this court after a consideration of the transcript and record and the arguments of counsel hereby determines as follows:

Finding of Fact.

10

Petitioner in this case has sustained the burden of proving, for the reasons set forth in memorandum filed by this court on March 29th, 1945, that on October 4th, 1943 her deceased husband, Charles E. Wehrle, sustained a personal injury accident arising out of and in the course of his employment with respondent within the meaning of our Compensation Act, and that said petitioner, together with an infant son of deceased, Kenneth Wehrle, born September 19th, 1932, are entitled to the benefits provided by R. S. 1937, 34:15-13 as full dependents of deceased.

20

I find that deceased's wages were $245.00 per month, giving him a weekly salary of $56.54, and that his widow and infant son Kenneth are entitled to forty per cent of that amount or the maximum of $20.00 a week for a period of 258 6/7 weeks from the date of the accident up to and including September 18th, 1946, when Kenneth Wehrle reaches the age of sixteen years, and that thereafter Minnie Wehrle is entitled to thirty-five per cent of $56.54 or $19.79 per week for a period of 41 1/7 weeks, the balance of three hundred weeks, subject to adjustment or revision in accordance with the provisions of the statute.

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Conclusions of Law.

The judgment should be entered in favor of petitioner-appellant, Minnie Wehrle, and the infant son of deceased, Kenneth Wehrle.

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Judgment.

It is, therefore, on this 23rd day of April, 1945, ORDERED, that judgment be entered in favor of petitioner-appellant and against respondent-appellee as follows:

10 To Minnie Wehrle and Kenneth Wehrle, as dependents of deceased Charles W. Wehrle, compensation at the rate of $20.00 per week for a period of 258 6/7 weeks from October 4th, 1943, to and including September 18th, 1948; to Minnie Wehrle from September 19th, 1948, for a period of 41 1/7 weeks, the balance of three hundred weeks, compensation at the rate of $19.79 per week; to Minnie Wehrle statutory burial allowance in the amount of $150.00; to Doctor Jerome Kaufman for testimony before the Bureau the sum of $35., payable
20 $15. by petitioner and $20 by respondent; to Doctor C. G. Berardinelli for testimony before the Bureau the sum of $35., payable $15. by petitioner and $20. by respondent; to counsel for petitioner for services rendered in the Workmen's Compensation Bureau the sum of $900., payable $360. by petioner and $540. by respondent, stenographic fees in the Bureau to be paid by respondent.

For services and expenses on appeal to this court judgment is entered as follows:

30 To costs of stenographic transcript filed with this court on the appeal of this matter the sum of $112.50, to be paid by respondent and taxed in the costs.

To counsel for petitioner for services on appeal to this court the sum of $600., payable $240. by petitioner and $360. by respondent.

DALLAS FLANNAGAN
Judge

40 On Motion of

WILLIAM F. NIES

Notice of Motion.

(Filed April 24, 1945.)

ESSEX COUNTY COURT OF COMMON PLEAS.

MINNIE WEHRLE, Petitioner-Appellant, vs. SHERWIN WILLIAMS CO., Respondent-Appellee.	On Appeal from Workmen's Compensation Bureau. Notice of Motion.

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To: John W. Taylor, Esquire, Attorney for Sherwin Williams Co., 24 Commerce Street, Newark, N. J.

20

Sir:

PLEASE TAKE NOTICE that on Monday, the 23rd day of April, 1945, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Honorable Dallas Flannagan, Judge of the Essex County Court of Common Pleas, Court House, Newark, N. J., for approval of the attached Determination of Facts and Rule for Judgment and the fixing of counsel fees and other costs in connection with the appeal of the above matter.

30

THOMAS J. BRETT,
Attorney for Petitioner-Appellant.

Service of Notice of Motion is hereby acknowledged this 11th day of April, 1945.

JOHN W. TAYLOR,
Atty. for Respondent-Appellee.

40

Reasons for Reversal.

(Filed May 31, 1945.)

NEW JERSEY SUPREME COURT.

MINNIE WEHRLE, Petitioner-Defendant, *vs.* SHERWIN WILLIAMS COMPANY, Respondent-Prosecutor.	On Certiorari. Reasons for Reversal.

10

The respondent-prosecutor, Sherwin Williams Company, prays that the judgment of the Essex County Court of Common Pleas in the above entitled matter may be set aside, reversed and for nothing holden for the following reasons:

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1. That petitioner-defendant failed to establish by the greater weight of the probable and credible evidence that decedent, Charles E. Wehrle, Sr., suffered an injury by accident arising out of and in the course of his employment with respondent-prosecutor on October 4, 1943.

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2. That petitioner-defendant failed to establish by the greater weight of the probable and credible evidence that decedent, Charles E. Wehrle, Sr., died as a result of an injury by accident arising out of and in the course of his employment with respondent-prosecutor on October 4, 1943.

3. That the judgment and award made by the Essex County Court of Common Pleas in favor of the petitioner-defendant and against the respond-

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ent-prosecutor is contrary to the weight of the evidence.

4. That the judgment and award entered by the Essex County Court of Common Pleas in favor of petitioner-defendant and against respondent-prosecutor is not predicated upon legal evidence but is based upon speculation, surmise and conjecture. 10

5. That the judgment and award entered by the Essex County Court of Common Pleas is based upon a disregard of the testimony elicited on cross examination of petitioner and her witnesses.

6. That there is no competent and probative evidence to support the judgment entered in favor of the petitioner-defendant and against the respondent-prosecutor. 20

7. That the Essex County Court of Common Pleas erred in finding that under the evidence petitioner-defendant had established that the alleged accident was a contributing cause of decedent's death.

8. That the Essex County Court of Common Pleas erred in finding that decedent's efforts to discharge the duties of his employment advanced the time of his death and controlled the time and place of his occurrence. 30

9. That the Essex County Court of Common Pleas erred in reversing the findings and conclusions of the Honorable John M. Kerner, Deputy Commissioner of Compensation, and in reversing the findings of fact and conclusions of law of the said Deputy Commissioner. 40

Reasons for Reversal.

10. That the Determination and Judgment of the Essex County Court of Common Pleas is contrary to law and the evidence in the case, and is in other respects irregular, unjust, illegal and oppressive to the respondent-prosecutor.

10

JOHN W. TAYLOR,
John W. Taylor,
Attorney for Respondent-Prosecutor.

Service of a copy of the within Reasons for Reversal is hereby acknowledged by me this 28 day of May, 1945.

20

EDWIN JOS. O'BRIEN,
Attorney for Petitioner-Defendant.

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40

Testimony.

NEW JERSEY DEPARTMENT OF LABOR,
WORKMEN'S COMPENSATION BUREAU,
NEWARK, ESSEX COUNTY DISTRICT.

10

MINNIE WEHRLE,
Petitioner,
vs.
SHERWIN WILLIAMS COMPANY,
Respondent.

Testimony.

September 14, 1944.

20

Before HONORABLE JOHN M. KERNER, Deputy Compensation Commissioner.

Appearances:

WILLIAM F. NIES, ESQ., for the petitioner.

JOHN W. TAYLOR, ESQ.,
By EVERITT RHINEHART, ESQ.,
For the Respondent.

30

MINNIE WEHRLE, the petitioner, called as a witness on her own behalf, and duly sworn, testified as follows:

Direct examination by Mr. Nies:

Q. Where do you live, Mrs. Wehrle? A. 1157 West Clinton Avenue, Irvington.

The Court: Just a minute. Let us have a stipulation for the record so we can know what can be admitted.

40

Mr. Rhinehart: Yes. It can be admitted and is admitted, your Honor, that the decedent was employed by the respondent on the date alleged at a salary of $245.00 monthly.

The Court: What is the salary?

10 Mr. Rhinehart: $245.00 monthly. I haven't figured that out by the week as yet.

The Court: Are the dependents, as alleged in the petition, full dependents?

Mr. Rhinehart: We haven't sufficient knowledge to admit that. I think there is no question about that, but I believe I will leave the petitioner to her proof as to that.

The Court: Is it admitted by the petitioner that the regular salary that the de-
20 cedent earned was $245.00 a month

Mr. Nies: That is the allegation, $245.00 a month.

The Court: Has any compensation been paid?

Mr. Rhinehart: None whatever. All the other issues are disputed, that he suffered an injury by accident, or that he died as a result thereof.

The Court: Has any medical expense or
30 funeral expense been paid?

Mr. Rhinehart: No. You mean by the respondent? Not by the respondent.

Mr. Nies: The decedent died immediately, your Honor, so there was no medical expense.

Mr. Rhinehart: Incidentally, may I add further, your Honor, that we deny also that we had any notice or knowledge of an injury by accident prior or within the time
40 prescribed by law.

The Court: Proceed.

By Mr. Nies:

Q. Where do you live, Mrs. Wehrle? A. 1157 West Clinton Avenue, Irvington.

Q. And you are the widow of Charles Wehrle? A. That is right.

Q. And when were you married? A. Thirty-one years ago. 10

Q. I show you a marriage certificate showing a marriage between Charles Wehrle and Minnie Fischer, certifying that you were married on the 3rd day of September, 1913. A. That is right.

Q. And ask you whether that is the date of the marriage and the marriage certificate? A. That is right.

Q. Since then you have lived with Mr. Wehrle to the time of his death? A. That is right.

Q. Never were divorced? A. No. 20

Mr. Nies: I offer this marriage certificate in evidence.

The Court: Any objection?

Mr. Rhinehart: I haven't seen it. I have no objection to it.

(The article referred to was received in evidence and marked P-1.)

Mr. Nies: Your Honor please——

Mr. Rhinehart: If I might just, Your Honor, perhaps Your Honor does not wish to retain it and we might read it into the record and return it to the witness. 30

The Court: By consent of counsel, it has been stipulated that the contents of the record may be placed on the record. The certificate was issued on Wednesday, September 3, 1913, setting forth that on that day Charles Wehrle, Junior, of Newark and Minnie Fischer of Newark, New Jersey, 40

were married by the Reverend W. H. W. Reimer of Newark. The certificate, therefore, by consent of both counsel is returned to the petitioner's attorney.

By Mr. Nies:

10 Q. Mrs. Wehrle, you are the Minnie Fischer mentioned in this certificate? A. That is right.

Q. That was your maiden name? A. That is right.

Q. As a result of that marriage were any children born to you and Mr. Wehrle? A. Three children.

Q. Will you give us their names and ages? A. Charles Wehrle, Junior, 29; then I have—I would

20 have a girl, Eleanor, 29.

Q. Your daughter Eleanor died at the age of five. A. Five and a half.

Q. That is two. Did you have another one? A. Then I have Kenneth Wehrle, age 12 next Tuesday.

Mr. Rhinehart: Next June, did you say?

The Witness: Next Tuesday.

The Court: You mean September 19th?

Mr. Nies: Yes, sir.

30 The Witness: That is right.

By Mr. Nies:

Q. I show you a birth certificate issued by the Irvington General Hospital, certifying that a Kenneth Wehrle was born on September 19, 1932, and ask you whether you received that certificate when your son was born to you? A. That is right.

Q. Your son is still alive? A. That is right.

Q. Kenneth is alive and still living with you?

40 A. That is right.

Mr. Nies: I offer this certificate in evidence.

Mr. Rhinehart: No objection.

(The article referred to was received in evidence and marked P-2.)

Mr. Nies: I wonder if the same procedure could be followed on this, Mr. Rhinehart, as we did on the marriage certificate. Can we read it into the record? 10

Mr. Rhinehart: I think so.

(Discussion off the record)

The Court: The certificate is made by the Irvington General Hospital, certifying that Kenneth Wehrle was born on September 19, 1932. The certificate is signed by Elizabeth Shilling, superintendent. I have examined the certificate which has been marked as an exhibit for the petitioner, and by consent of both parties I am returning the certificate to the petitioner's attorney. 20

By Mr. Nies:

Q. During your married life did you ever work, Mrs. Wehrle? A. No.

Q. Was Mr. Wehrle your support? A. That is right. 30

Q. And where did he work? Where was his place of business? A. Sherwin Williams.

Q. How long did he work there? A. Thirty years, all but four months.

Q. What day did Mr. Wehrle die? A. October 4th.

Q. Nineteen what? A. 1943.

Q. I show you a death certificate certifying that he died on that day and ask you whether that is the record of the death of Mr. Wehrle? 40

Mr. Rhinehart: Well, I object to that. The record perhaps speaks for itself.

Mr. Nies: All right. I will offer this. It is a certified copy by the City Clerk of the City of Newark.

Mr. Rhinehart: I have no objection.

10 (The article referred to was received in evidence and marked P-3)

By Mr. Nies:

Q. Now, Mrs. Wehrle, did you pay the funeral bill for the funeral of your late husband? I. I did.

Q. Is this bill—this receipted bill for the funeral? A. Yes.

Q. Did you pay it yourself? A. No. My son

20 paid it.

Q. Your son paid it for you? A. That is right.

Mr. Nies: I offer this in evidence. Any objection, Mr. Rhinehart?

(The article referred to was received in evidence and marked P-4.)

By Mr. Nies:

Q. Now, you testified, Mrs. Wehrle, that Mr.

30 Wehrle worked for the Sherwin Williams Paint Company. And where was the plant located? A. Brown and Lister avenue.

Q. And what type of work did he do in that company? What was his position? A. He was a foreman.

Q. How long was he a foreman, do you know? A. Twenty-eight years.

Q. Did he work on the day shift or night shift? A. He worked on the night shift for the last year.

40 Q. Prior to his death? A. Yes.

Q. And when was he required to start on this night shift? A. He left the house, you mean?

Q. Well, what time did he leave the house? A. Twenty minutes of ten.

Q. In the evening? A. That is right.

Q. And when was he required to start, if you know? 10

Mr. Rhinehart: I object to that. If she knows I have no objection, but I think it would be most likely hearsay.

The Court: If you know you may tell us.

By Mr. Nies:

Q. Do you know when he was supposed—— A. I think it was eleven o'clock.

Q. And when did he return home from work? 20 A. Eight or nine o'clock, sometimes later.

Q. Eight or nine o'clock, did you say? A. That is right.

Q. Now, do you remember the night of October 3, 1943? A. Yes, I do.

Q. And what day of the week was that? A. Sunday.

Q. What? A. Sunday.

Q. You have to speak a little louder, Mrs. Wehrle, so we can hear you. 30

Q. And do you remember what time he left the house that Sunday night, October 3rd? A. Yes; twenty minutes of ten.

Q. And then did you see him again after that? A. No, I didn't.

Q. Did you have any conversation with him? A. Twenty-five after eleven he called me up.

Q. And what did he say? A. He said——

Mr. Rhinehart: I object to that, if the Court please. 40

The Court: Just a minute.

Mr. Nies: Just a minute, Mrs. Wehrle.

The Court: Objection sustained.

By Mr. Nies:

Q. Did you recognize his voice over the telephone? A. Yes, I did.

Q. Do you have a telephone in your home? A. I have.

Q. And what was the condition of his health prior to his death for a period of time? A. Well, after the accident to his ribs he always had pain here (indicating).

Q. Indicating where? Where did you indicate he had pains? A. Here (indicating), his chest.

The Court: Indicating the region of the chest.

By Mr. Nies:

Q. When did he have an accident with his ribs? A. Oh, several years ago.

Q. Well, can you approximate when it was? A. Well, I would say at least six or seven years.

Q. Did he use any medication during—since he had the accident with his ribs? A. That is right. He used to take Eno salts and carry Tums with him.

Q. Now, after—what happened to him when he broke his ribs?

Mr. Rhinehart: Well, I object to that.

By Mr. Nies:

Q. Do you know?

Mr. Rhinehart: I object to that.

The Witness: Yes. The doctor— He went to the doctor's——

The Court: Just a minute.

Mr. Rhinehart: Might I be heard? I object to it as being remote.

Mr. Nies: I am only trying to fix the time, your Honor, and the condition at that time. 10

The Court: The time has been fixed as six or seven years ago. I think you should reframe the question. I don't know whether this witness knows what happened to him seven years ago.

By Mr. Nies:

Q. After he broke his ribs was he attended by a physician? A. By Dr. Ulan, strapped him all in.

Q. How long was he strapped? A. Oh, I believe a week or longer. 20

Mr. Rhinehart: One week or longer?

The Witness: About a week and a half, I believe.

By Mr. Nies:

Q. Did he ever complain of any illness to you?

Mr. Rhinehart: I object to that, if the Court please. 30

The Court: I will allow it.

Mr. Nies: She can answer yes or no.

By Mr. Nies:

Q. Did he ever complain of any illness to you? A. Yes, after that he did.

Q. Of what illness did he complain? A. Here (indicating) all through here in his chest (indicating). 40

Q. How often would he complain? A. I don't know; just ever so often, every other day or so.

Q. For what period of time prior to his death did he complain of those pains? A. That very night.

Q. Well, how much time before that? A. Well,
10 about six o'clock he took a dose——

Mr. Rhinehart: I object to what he complained.

The Court: I will allow the question.

Mr. Nies: All right.

By Mr. Nies:

Q. Answer the question. A. He took a dose of Eno that night at six o'clock. He said he didn't
20 feel well.

Mr. Rhinehart: I object to that and ask that it be stricken, if the Court please.

The Court: It will be stricken, the fact that he said he didn't feel well.

By Mr. Nies:

Q. He took the Eno at six o'clock? A. That is right.

30 Q. What did he do? Not what he said but what did he do after he took the Eno, if anything? A. Well, he said he didn't feel good.

Q. No. A. Oh.

Mr. Rhinehart: I ask that that be stricken.

By Mr. Nies:

Q. What did he do around the house?

40

The Court: It will be stricken.

The Witness: He lied down, then it was time——

By Mr. Nies:

Q. How long did he lie down? A. Till about nine o'clock, then he got up to go to work. I told him to stay home. 10

Q. From your observation, tell us what his condition was? A. He didn't feel well at all and I told him to stay home, so he said no.

Mr. Rhinehart: I object to the witness' conclusion that he didn't feel well.

The Court: Just answer the question. The question is: from your observation what did you notice about him?

The Witness: I noticed that he was sick. 20

By Mr. Nies:

Q. Now, how long a time prior to this six o'clock incident did he complain of pains as you mentioned before?

Mr. Rhinehart: I object to that.

By Mr. Nies:

Q. Over what period of time? A. That day? Q. No. 30

The Court: I will allow the question.

The Witness: A few days before.

Mr. Nies: A few days before.

By Mr. Nies:

Q. I don't know whether you understand my question properly. You said before that he had an injury to his ribs? A. That is right. 40

Q. About six or seven years ago? A. That is right.

Q. That thereafter he complained? A. He did, yes.

Q. Of pain? A. Yes.

10 Q. Now, how often did he complain of this pain in his chest during the past six or seven years? A. Oh, quite often; several times a week. He wasn't really right after that.

Mr. Nies: You may cross examine.

Cross examination by Mr. Rhinehart:

Q. Does Kenneth live with you, Mrs. Wehrle? A. That is right, yes.

20 Q. And was he living with you in October, 1943? Was he living with you and your husband? A. Yes, that is right.

Q. This was your only marriage, to the decedent? A. That is right.

Q. Now, I understand you to have said that for a few days before October 3rd he was complaininng about his chest, is that correct? A. Ever since the accident he complained.

Mr. Rhinehart: (To the reporter) What
30 is the answer?

(The reporter read the last answer.)

By Mr. Rhinehart:

Q. Well, I am not asking you about ever since the accident. I am asking you for the day or two or three immediately before October 3rd. A. Yes.

Q. Was he complaining? A. Yes. He complained two days before that; two or three days
40 before that he has not been feeling right.

Q. In other words, for the two or three days before October 3rd— A. He always felt sick since the accident, but this seemed to be worse.

Q. It seemed to be worse? A. Indigestion.

Q. Let me ask you—let me repeat my question. For the two or three days before October 3rd his condition—his physical condition seemed to be worse? A. Just the same as it always was, yes. 10

Q. You just told us it seemed to be worse. A. Yes.

Q. Is that correct? A. Indigestion; he called it indigestion.

Q. Maam? A. He called it indigestion.

Q. Now, aside from what he complained or told you, what, if anything, did you observe about his appearance or his actions? A. He wasn't feeling well; that I know. 20

Q. I understand that. Was there anything about his appearance that was—that looked unwell or sick? A. Yes.

Q. What was it? A. Well, all he would say to me he got indigestion. He never wanted to complain that he was sick, but he was.

Q. Well, did he point to his chest when he complained of indigestion or to his abdomen? A. That is right. He always said "I got such pains here." 30

Q. You are indicating the chest now? A. Here, right across here (indicating).

Q. Over the heart? A. Yes.

Q. Would you say— A. Well, he would hold his hand here (indicating). He would say "I got pains in here."

The Court: The witness indicates the center of the chest.

40

By Mr. Rhinehart:

Q. When he worked nights what hours would he usually sleep? A. When he came home he slept all day.

Q. When he came home at eight o'clock in the morning? A. That is right.

10

Q. He would go to sleep? A. That is right.

Q. So that it was out of the ordinary for him to lie down at six P. M. and stay in bed until nine, as he did— A. Yes.

Q. (Continuing)— on October 3rd? A. Yes, that is right.

Q. Now, was there anything about his color or the expression of his face that you could tell us about when he suffered these pains, indigestion? A. I know that night he was white. He didn't really look good at all.

20

Q. He was white? A. Yes.

Q. You are speaking of six o'clock or nine o'clock or when? A. I am talking about six o'clock when he left for work.

Q. He was white? A. Yes.

Q. You mean to say there wasn't the normal color in his face? A. That is right. He wasn't well.

30

Q. What time had he eaten dinner that night? A. He didn't eat that night because—he didn't eat that night because he didn't feel well.

Q. He didn't eat because he was unwell. Was his abdomen distended or swollen that you could observe? A. Not as I know of.

Q. Not that you know of. How did he go to work that night, by automobile or by bus? A. By bus.

Q. By bus? A. Yes.

40

Q. He took some Eno at six o'clock, is that correct? A. Yes.

Q. Is that right? A. Yes.

Q. Had he been in bed all day, sleeping all day? A. That is right yes. Well, from the time he came home from church, that was about 12:30, he went to bed after that. He always went to church Sunday morning.

Q. But did he go to bed after church because he felt unwell? A. No. 10

Q. Just to get his sleep? A. Just to get his sleep, then he got up during the afternoon. He said he didn't feel well and went back again. He got up at six and took the Eno.

Q. Had he been that way—I will withdraw that.

Mr. Rhinehart: I think that is all.

The Court: That is all.

Mr. Nies: Just a minute. 20

Re-direct examination by Mr. Nies:

Q. Had Mr. Wehrle been working the night before?. A. No. That was Saturday night; he didn't work on Saturday night.

Q. Why not? A. Well, they worked—he started Sunday night. He had a lot of work to do that night.

Q. Did he ever work Saturday night?

Mr. Rhinehart: I object to that. Just a minute. 30

The Witness: I think he did.

The Court: Objection sustained. How does the witness know?

By Mr. Nies:

Q. Was he home every Saturday night?

Mr. Rhinehart: I object to that.

The Witness: If he wasn't working. 40

The Court: I will allow the question.

Mr. Rhinehart: What is the answer?

The Witness: If he wasn't working he was home. I believe there was some Saturday nights he had to put in but that Satur-
10 day night he didn't.

Mr. Nies: That is all.

Re-cross examination by Mr. Rhinehart:

Q. Well, in that case I want to ask you, Mrs. Wehrle, why—didn't he sleep Saturday night if he wasn't at work? A. Yes.

Q. Why did he go to church again on October 3rd? A. Because he always went to church.

20 Q. No. I didn't mean to ask you why he went to church. I wanted to ask you why he went to bed after church on the 3rd, if he had been home and sleeping on Saturday night? A. Well, he always done that. He had to go to work at night, didn't he?

Mr. Rhinehart: All right.

Mr. Nies: That is all, Mrs. Wehrle.

(Witness excused)

30 (A short recess was taken at this point.)

William Stern, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Nies:

Q. Where do you live, Mr. Stern? A. I am liv-
40 ing at 15 Lincoln Park.

Q. Newark? A. Newark.

Q. Where do you work? A. Sherwin Williams.

Q. How long have you worked there? A. Oh, the last fifteen, seventeen years.

Q. What do you do in the plant? A. I mix and run mills sometimes.

10

Mr. Rhinehart: Mix and what?

The Witness: Mixer and run the mill at times.

By Mr. Nies:

Q. What shift do you work on? A. Well, now I work from 8 to 4; I am working daytime.

Q. What shift were you working on in October, 1943? A. From 11 to 8 at night.

20

Q. Did you know Charles Wehrle? A. Yes.

Q. How long have you known him? A. Oh, ever since I worked down there.

Q. And what type of work did he do? A. He was sort of night foreman and shader.

Q. What kind of work does a shader do? A. Well, he has to put the different colors in it and bring up the right shade on all the paints.

Q. How long prior to October 4, 1943, had you been working on the night shift? A. Well, I been working on there right along.

30

Q. Well, how many—how long before—— A. About two or three years.

Q. How long before October, 1943, had Mr. Wehrle been working on this night shift? A. He had been working on there a couple of years, too.

Q. Now, how many days a week does the plant work? A. At that time?

Q. At that time. A. That time I think we were working forty hours.

40

Q. Well, how many days? A. That is five days.

Q. And what days was the plant closed during each week? A. Saturdays and Sundays.

Q. Now, what nights did Mr. Wehrle not work in October, 1943, during each week? A. It was Saturday night but on the shift that we were working that time we had to report on Sunday
10 night and then that went for Monday.

Q. Do you remember Mr. Wehrle's death? A. Yes.

Q. And when did that occur? A. Well, that—let me see. We went in there October 3d, and he died—I believe at ten minutes after twelve. That made it October 4th.

Q. In the morning? A. In the morning, yes.

Q. Now, had you or Mr. Wehrle been working the night before that Saturday before? A. No,
20 no. The plant was closed.

Q. The plant was closed? A. Yes. The only ones was down there was the watchmen.

Q. On October 3d, Sunday, what time did you get to work? A. Well, I got that 10:30 bus at Raymond Boulevard and Park Place, the Chapel Street Bus.

Q. What time were you supposed to be at work? A. We were supposed to be at work at 11 o'clock; got down there about 10 minutes to 11, I believe
30 it was.

Q. When you got on the bus did you meet anybody that you knew on the bus? A. Yes. Charlie Wehrle got on with us.

Q. Was he on the bus before you got on? A. No. We got on together.

Q. You got on together? A. Yes.

Q. Where did you meet him? Where did you meet him? A. At the corner Raymond Boulevard waiting for the bus.

40 Q. What time did you arrive at the plant? A. Oh, somewhere around ten minutes to eleven.

Q. How far is it from the bus to the plant? A. Oh, about a block you might as well say to walk in.

Q. And after you arrived at the plant, what did Mr. Wehrle do? A. Well——

Q. In your presence, just what you know. A. Well, we went in, rang up. From there we went upstairs on the fourth floor. He went into the office and I went into a washroom to change my clothes, and finally he came in, into the washroom to change his clothes. So he said to me, "Well, he says, "I don't know," he says, "I feel kind of funny today." He says, "I got sort of pain around here now and then."

So I says to him, "Well, maybe it is what you ate."

> Mr. Rhinehart: I object to what the witness said to him.
>
> The Court: Don't tell us what you told him.
>
> The Witness: What?
>
> The Court: Don't tell us what you told him.
>
> The Witness: All right.

By Mr. Nies:

Q. And did he— A. So——

Q. Then start to work? A. No. He changed his clothes. We all went out together.

Q. Now, what were his duties from that time on?

> Mr. Rhinehart: I object to what his duties were. If the witness knows what he did, he can tell us.
>
> Mr. Nies: Withdraw it.

By Mr. Nies:

Q. What did Mr. Wehrle do immediately after he left the washroom? A. Well, he went in the office to look what we had to do. The foreman that was supposed to be the same foreman who was in there, would tell us what paint we had to make, and the color, and all that. So he came out and we started to work there.

10

Q. What did he do? A. Well, then he went downstairs in the filling department.

Q. Where is the filling department? A. That is on the next floor; found out what they want to fill and all that, then he came back again, then we started to work.

Q. Did you and the other men immediately start to work? A. Yes, both of us. It was mixing at the time.

20

Q. What did Wehrle do A. Wehrle, he was down on what they call the half floor getting his colors ready.

Mr. Rhinehart: On what?

The Witness: On the half floor, what they call the half floor. Mixers are like on the top here (indicating) and the half floor is like down where you are sitting. That is where the tanks are.

30

By Mr. Nies:

Q. Well, what position are the tanks in in relation to the floor? A. They are right even with the floor.

Q. What did Wehrle have to do with the tanks? A. Why, he had to go get his color.

Q. Where did he get the color? A. Well, he had to work about—we will say about from here to

40

the end of the room and get his color and put it on

the scale, weigh it up, and then kind of lean over and throw the color in the tank.

Q. Now, in this color—was this in containers? A. No. You got it in five gallon pails.

Q. How much do all these five gallon pails weigh? A. They weigh, I should judge, about 35, 40, 50 pounds. 10

Q. And where did he have to get these pails? A. Just as I says, like I says, from the distance to the end of the room.

The Court: Indicating a distance of about 40 feet.

By Mr. Nies:

Q. How many did he carry right then? A. One at a time. 20

Q. How many times—can you tell us about how many he carried during that evening? A. Well, to start off—they was just starting off, he had to carry two pails and sit them on the scale to get ready.

Q. Then what did he do with the pails? A. He left them right on the scales.

Q. Well, what did he do after that? A. Then he went in the office and what he done then I don't know. 30

Q. Well, after he left the pails on the scales, did he remove the contents of the pails? A. No, just enough that he had to put in.

Q. About how much did he put in? A. Well, he has got to weigh that off, and he has a little spoon, on the same style of spoon that you use at home. He dips it in and bends it over that way (indicating) and dips it in.

Q. What position was he in when he did that? A. He was bending down like that (indicating). 40 That is the only way to get it in. You got to bend.

Q. How often did he have to bend? A. Several times.

Q. Can you tell us approximately how many times? A. Well, I should judge about seven or eight, if not more.

Q. After he finished this dipping into the container and taking out the—what was it, a powder? A. No, it is paste.

Q. What did he do then? A. Then he had to wait until the batch was out. Then he was in the office, and after the batch was out, then he goes to work and tests—takes it on a small knife.

Mr. Rhinehart: I object to what——

Mr. Nies: What he does. What he did that night.

Mr. Rhinehart: I ask the witness be limited to what he saw the decedent do that night.

By Mr. Nies:

Q. Did you work right with him? A. I worked right with him.

Q. Tell us just what he did that night. A. Well, then he went to work and taking a can. He had to go upstairs, up to the testing room and test it out and paint it out on the panels.

Q. Why is that done? A. That is to see if the consistency is all right and color is right.

Q. And how often did he go up to see whether the colors were right? A. He went up——

Mr. Rhinehart: I object to that. How often did he go up?

Br Mr. Nies:

Q. Well, did he go more than once? A. Yes, he went more than once.

Q. How many times? A. I believe twice. Twice or three times he went up.

Q. And can you tell us whether he walked or— A. Oh, yes. He walked up. He has to walk up.

Q. Did he walk fast or slow? A. He made quite big steps when he went up.

Q. How high are these steps? A. Well, it is up. He has to go up to the top floor. 10

Q. How many floors, how many floors is that, Mr. Stern? A. One flight up.

Q. And can you tell us about how many steps there are in that flight of steps? A. All I know you walk up, then there is a landing and walk up again another flight, then you are up on the top.

Q. Where does that stairway start? A. The beginning of it starts all the way down on the first floor, way on the ground floor. 20

Q. No. In relation to these tanks that he was mixing the paint in,—you said he worked on the third floor? A. No, fourth.

Q. Fourth floor? A. We are on the fourth floor.

Q. He had to go up to the fifth floor to test it? A. In the next building.

Q. How far did he have to walk from the place where he was dipping this paste to the place where he had to paint out the samples? A. Well, I say the distance from here out to the other end of the wall. 30

Q. To that (indicating) wall? A. The other one, the outer wall way in the back.

The Court: Indicating a distance of about 40 feet?

Mr. Nies: No. He said the outside.

The Witness: The outside.

40

By Mr. Nies:

Q. You mean outside the door? A. Yes, outside.

The Court: What wall do you mean?

The Witness: Where the young man sits out there on the chair there (indicating). There is a young man sitting.

Mr. Rhinehart: The young man with gray hair?

The Witness: Yes.

The Court: That distance would be about 100 to 120 feet.

By Mr. Nies:

Q. After he walked that distance, then what did he do? A. Then he was up there and——

Q. Well——

Mr. Rhinehart: If he knows. Was this witness up there?

Mr. Nies: Just a minute.

The Witness: No.

By Mr. Nies:

Q. In order to test the paint, he would test it taking a sample, as I understand it, from the tanks? A. Tanks.

Q. And then where would he go? A. Up to the testing room.

Q. What was his first—where did he first walk to? Did he go up on the steps immediately? A. He had to go up on the steps, walk around and walk through the tunnel in through the storeroom and then up the stairs.

Q. Well, now, will you give me the various distances that he had to walk. First he went up the steps? A. The steps.

Q. How many steps? A. I could not tell you. I never counted them steps.

Q. Can you say approximately how many steps? A. I think about—I judge about six, if not more.

Q. Then after that? A. He had to walk the length from here to there (indicating).

Q. Which you said was about 100 to 125 feet? A. Altogether, yes. 10

Q. Then what? A. He had to go upstairs.

Q. How many steps then? A. Just as I said, he had to go up a flight, then tier, and another flight and then up.

Q. Then he would be in the testing room? A. No, no. Then he had to walk through the hall, from here to the end of the wall before he got to the testing room.

Q. That would be another 125 feet? A. Yes. 20

Q. He started to work at 11 o'clock? A. 11 o'clock.

Q. And over what period of time was he doing this testing? A. That was from about a quarter after—just a minute. A quarter after 11, no, later than that. Twelve o'clock; it was before he got started testing.

Q. How many—strike it out. Do you remember when he died? A. Yes.

Q. What time was that? A. Well, I got up there—— 30

The Court: He has already answered the question. He said ten minutes after twelve on the morning of October 4th.

By Mr. Nies:

Q. How many times did he walk up to that room to test the paint between the time that you say he started and the time of 12:10 when he passed out? A. He went up twice up in that room. 40

Q. Will you tell us whether or not he was walking fast or slow? A. He was walking quite fast.

Q. Did he always walk fast?

Mr. Rhinehart: I object to that.

The Court: I allow it.

10 By Mr. Nies:

Q. Did he always walk fast? A. Yes. He has a—he always did have a quick walk about him.

Q. Did he walk any faster that night? A. A little bit.

Q. Why that particular night and not other times, if you know?

Mr. Rhinehart: If he knows.

20 By Mr. Nies:

Q. Why did he walk faster that night than any other night? A. So he could get started, so the man downstairs could get started so he gets the batch done, so we get started to work downstairs.

Q. Well, aren't the men able to work? A. No.

Q. While the batch was being made? A. No.

Q. Why not? A. Because the tanks were empty.

Q. Why were they empty? A. There was no-

30 body working Saturday.

Q. He was the first one in the plant to take care of the tanks? A. Why, after we were downstairs —well, that was the filler downstairs.

Q. —Did Mr. Wehrle have to take care of the tanks? Was he the first workman to take care of the tanks? A. Shade up and all that, and then he would let the party downstairs know the tank was okay to fill.

Q. Were the other men able to work before Mr.

40 Wehrle finished his testing? A. No, not filling.

Q. Would anybody else do this mixing besides Mr. Wehrle? A. Shading.

Q. Or shading, rather? A. No, not at night. He was the man that done all the shading there at night.

Q. So then as I understand it—correct me if I am wrong—all the workmen who were there could not work until Mr. Wehrle was finished with the shading, is that right? A. That is the filling department, yes. 10

Q. And what process was used on other nights outside of Sunday night? A. Well, the other nights, why, they generally used to have the tank ready for the night fellows to start up while we were mixing getting the batch ready.

Q. Was that left by the day man? A. Yes, that is left by the day man. 20

Q. So then on Sunday nights the tank was empty and it is necessary for someone first to take care of the filling in order to get these men to work? A. That is right.

Q. That is the start of a new week? A. That is the start of a new week.

Q. Now, in what room—strike it out. In the room in which Mr. Wehrle—does the room in which Mr. Wehrle did this shading have a particular name? A. Tech service. 30

Q. The service room, is that what it is called? A. Yes.

Q. And after Mr. Wehrle went up to that room, did you go up there? A. Well, later on.

Q. At what time? A. Well, that was—must have been five after twelve.

Q. Five after twelve. Why did you go up there? A. Why, there was one party there—Adam was his name—wanted to run the mill. He went up to find out why Mr. Wherle was up there. 40

Mr. Rhinehart: I object to what Adam did or why he did it.

By Mr. Nies:

Q. Was Mr. Wehrle in that Tech room for any length of time? A. Yes.

10

The Court: Is the tech room the room where they do the shading or where they do the testing?

The Witness: Shading and the testing.

By the Court:

Q. That was on the fifth floor? A. Yes. That was on the top floor; that is in the other building.

Q. What is on the fourth floor? A. Down below there, that is the ware floor. They have stock laying in there.

20

Q. Is that where he carried the pails from, the fourth floor? A. No. On the same floor where we were working, see? That is in a separate building. To get in the other building you have to go through a bridge. There is a bridge there.

The Court: All right. Proceed.

30

By Mr. Nies:

Q. Who was up in—he was up in that tech room for a length of time? A. Yes.

Mr. Rhinehart: I object to counsel leading.

Mr. Nies: No. He said that before. I wanted to pick him up on it.

By Mr. Nies:

40

Q. How long had he been up there before you missed him?

Mr. Rhinehart: I object to counsel saying he missed him.

The court: The question is leading. Ask this witness what he knows, what he saw.

By Mr. Nies:

Q. What did you see or what did you know about the situation after Mr. Wehrle went upstairs? A. Well, the party that was running the mill, this Adam, he went up and he came running downstairs and says to me, "Hurry up, Will, Wehrle is laying on the floor." 10

Q. Did you go up? A. So I run upstairs and I found him laying on the floor, and I told him—

Mr. Rhinehart: I object to what he told him. 20

The Court: Don't tell us what you told anybody.

By Mr. Nies:

Q. What did you do? A. What did I do? I sent him downstairs to call up and get the watchman to call up for the ambulance.

Q. Did you call up anyone yourself? A. I believe they called.

Q. Did you call up anybody else? A. No. I didn't do no calling. I stood with him. 30

Q. Was Mr. Wehrle alive or dead at that time? A. He was alive yet.

Q. And did he die later? A. He died later.

Q. How long after? A. Oh, it must have been about five minutes afterwards he died.

Q. Did you at that time instruct anyone to call anyone on the telephone?

Mr. Rhinehart: I object to that, if the Court please. 40

By Mr. Nies:

Q. What did you do after that? A. Well, I told this Adam here to get down——

Mr. Rhinehart: I object to what he told Adam.

10 The Court: Don't tell us what you told anybody.

By Mr. Nies:

Q. Who came in later? A. In there? The watchman walked in.

Q. Who else came in? A. McLearey.

Q. Who is McLearey? A. A fellow down in the back there (indicating).

20 Q. Who else? A. And Matty came up.

Q. Who is Matty? A. He is the filler.

Q. Anyone else? A. No, that is all.

Q. Anyone from the office? A. That was later on.

Q. Who came in after that then? Then after these people came in what did you do about the body? A. Well, why, then the ambulance came and took him out.

Q. Anyone come up after that? A. Then afterwards William Graham came up.

30 Q. Who is William Graham? A. He is the manufacturer manager.

Q. He is what? A. Manufacturer manager.

Q. Manufacturer manager? A. Yes. He is the boss of the manufacturers.

Q. Did you tell him what happened? A. Why, he knew already. They called him up.

Mr. Rhinehart: I object to that and ask that it be stricken.

40 The Court: It will be stricken.

By Mr. Nies:

Q. Did you discuss with him what happened? A. Yes. I told him what all happened.

Q. Anyone else come in at that time? A. Then later on Tommy De Castore came in.

Q. Who is he, Mr. Stern? A. Why, that is the party does all the hiring. 10

Q. The personnel manager? A. The personnel manager.

Q. Did you have a conversation with him? A. Just simply told him what did happen.

Q. Now, when you got upstairs into the tech room, the service room, where was Mr. Wehrle? A. Lying on the floor.

Q. What was the position of his body? How did he look to you? A. He was stretched right out and there was froth coming out of his mouth. 20

Q. What was the color of his face? A. Why, it turned real blue.

Q. Was he breathing? A. No.

Q. Now, when he started to make the tests——

Mr. Rhinehart: I object to that, if the Court please. The witness wasn't there when he started to make the tests.

The Court: Are you going back over the same story again, Mr. Nies? 30

Mr. Nies: No, sir.

The Court: How much time elapsed between the time you saw Mr. Wehrle laying down upstairs and the time you saw him walking alive?

The Witness: Oh, about fifteen minutes.

The Court: All right. What was he doing the last time you saw him?

The Witness: The last time I saw him, when he passed me with the can of paint in his hand to go upstairs to test it. 40

By Mr. Nies:

Q. Did he have that can of paint upstairs? A. He had the can of paint upstairs.

Q. Did you see it when you got upstairs? A. Yes.

10 Q. Where was it? A. It was laying on the desk or bench, I want to say.

Q. Did you have any conversation with Wehrle on the way to work while you were on the bus? A. No, he didn't.

Mr. Rhinehart: I object to that, if the Court please.

The Court: He has answered the question. He said no, he didn't.

20 By Mr. Nies:

Q. Did Wehrle complain to you at any time that night about not feeling well? A. Yes, when we were in the washroom there.

The Court: He has already answered the question several times.

Mr. Nies: Cross examine.

The Court: If your cross examination is going to be rather lengthy, Mr. Rinehart, then I suggest we take a recess at this

30 time.

Mr. Rhinehart: I thank your Honor. I think that it will be advisable.

The Court: We will take a recess until two o'clock.

(Whereupon an adjournment was taken to 2:00 P. M.)

40

Afternoon Session

William Stern, resumed the stand and testified further as follows:

Mr. Rhinehart: I presume the direct examination is concluded, Mr. Nies?

Mr. Nies: I think so. 10

Cross examination by Mr. Rhinehart:

Q. You worked in the same department with Mr. Wehrle? A. Yes.

Q. Wehrle, is that the way you pronounce it? A. Wehrle.

Q. He was the foreman, night foreman? A. Night foreman and shader.

Q. Was that of the whole plant there or just—— 20 A. Just among the ones that were working nights. There wasn't many working nights. There was just us mixers and mill man and fillers.

Q. Mixers and fillers? A. Yes.

Q. What did the fillers do? A. They take the paint out of the tanks into the containers.

Q. In other words, they packaged it? A. Yes, in the cans.

Q. In cans? A. In cans, yes.

Q. How many men altogether—I will withdraw 30 that question.

Had Mr. Wehrle complained to you before of feeling unwell? A. No, just that one night.

Q. How many others were there on the fourth floor? A. I never counted them up. There was four of us, counting—including Mr. Wehrle.

Q. Did Mr. Wehrle say anything to you that if he didn't feel better he was going home that night. A. Yes, he did in the washroom.

Q. He said it in the washroom? A. In the wash- 40 room.

Q. Before he went to work. A. Before he went to work.

Q. Was there anything out of the ordinary that you observed about him? Was he doing anything or acting out of the ordinary? A. No.

Q. Or did he appear any different? A. No, he didn't appear any different or he didn't act any different.

Q. Did he hold on to himself anywhere or indicate where his difficulty was? A. No.

Q. Did he tell you where he had a pain? Did he tell you his pain was—where it was? A. The only thing he said it was up around here (indicating); every once in a while he would get it.

The Court: Indicating the region of the left chest.

By Mr. Rhinehart:

Q. Now, you said on direct examination, Mr. Stern, that you don't work Saturday and Sunday nights, is that correct? A. Not work Saturday nights, but we went in on Sunday night and that went for Monday morning. That was the beginning of the week, on a Monday; time went in on a Monday.

Q. In other words, you worked—you would not call that Sunday night; that was Monday that you were working? A. Yes, Monday.

Q. Now, do you work—you hadn't worked the previous night, that was from Saturday to Sunday? A. No.

Q. Now, had you worked the night before that? A. That was Friday to Saturday, yes. Yes, Friday night and worked until Saturday morning. We worked Friday night until Saturday morning.

Q. Now, you worked five nights a week? A. Five nights a week?

Q. What other nights did you have off other than—— A. Only Saturday night we would stay home. Sunday night, naturally, we would have to go back to work to make up for Monday, starting Monday, see.

Q. You mean to say that you worked six nights a week or five? A. No. Our time went in for five nights. 10

Q. I am not talking about the time. At the time in October, 1943. A. Well, naturally, you had to start going to work on Sunday night, if you work —if you go to work on a Monday; Monday at midnight or Sunday at midnight, see? So I used to get the 10:30 bus. That was on Sunday night.

Q. Is it true, as I understand you to have testified, that you were working 40 hours a week, made up of five days of eight hours a day? A. Yes. 20

Q. That would mean that you would have two nights during the week that you would not work?

A. Well, see, the way we use to work there, we went home on Saturday morning, see? We didn't come in on Saturday night but we had to come to work Sunday morning or Sunday night to report for work.

Q. Well, counting—— A. See, and punch in for twelve o'clock.

Q. If I were to count with fingers, you go to work Sunday, Monday, Tuesday, Wednesday, Thursday, and Friday. That would make six nights instead of five. A. No. The time went for every Monday. It was Monday, Tuesday, Wednesday, Thursday, Friday. 30

Q. Then you didn't go to work Friday night? A. Yes, we went to work Friday night. That is you had to work Friday night.

Q. That would make six nights then, would it not? What did you call Friday night? Would that be Saturday morning? That is Saturday morning. 40

Q. Now, did you have two days off together? A. That was on Saturday, all day, and Saturday night, and Sunday all day until evening.

Q. Well, that is what you mean when you say five days a week? A. Yes.

Q. You were not—definitely working 48 hours a
10 week? A. No, no, forty. It was forty hours.

Q. When you went to work at—on the 11 to 8 shift you would have an hour off for lunch, is that correct? A. An hour off for lunch.

Q. So that that would make eight hours a night? A. That is it.

Q. Work? A. Work.

Q. Well, is it clear to you that from what you told us you were working six days a week and 48 hours a week? A. No, not six days.

20 Q. You were not working six days. Let us count them up. I don't want to take a lot of time, but you went to work Sunday night, Monday night? A. No. Sunday night went for Monday.

Q. Well, now, listen—— A. Time went in from twelve o'clock on, that was Monday.

Q. All right. Let us start again. You went Monday? A. Yes.

Q. Tuesday, right? A. Yes.

Q. Wednesday? A. Yes.

30 Q. Thursday? A. And Friday went for Saturday.

Q. Am I wrong?

The Court: The first time you went into work on Sunday night?

The Witness: Yes, but that time went for Monday.

The Court: The second time you went in, you went in on Monday and that counted for Tuesday?

40 The Witness: That is it.

The Court: The third time you went in was Tuesday night and that counted for Wednesday?

The Witness: That is it.

The Court: The fourth time you went in on Wednesday night, that would be for Thursday? 10

The Witness: Yes.

The Court: The fifth time you went in on Thursday night, and that counted for Friday?

The Witness: Yes. I see, now that you are counting.

The Court: So you only worked five days, is that right? You only worked five days a week?

The Witness: No. According to that it would be six days. 20

Mr. Rhinehart: What is the answer?

(The reporter read the last answer.)

Mr. Rhinehart: You worked six days.

By Mr. Rhinehart:

Q. Now, Mr. Stern, Mr. Wehrle's work wasn't strenuous work, was it? A. What was that? I didn't get that. 30

Q. I say, Mr. Wehrle's work wasn't strenuous work? A. Yes. To a certain extent it is, it was.

Q. In what respect was it strenuous? A. Well, he had to see that all the fellows had work.

Q. Well, when I say—you are thinking about mental abilities or physical actions.

Mr. Nies: I don't think he knows what you mean by that. 40

By Mr. Rhinehart:

Q. The hardest thing that Mr. Wehrle had to do was to take a five gallon can of color and carry it perhaps twenty feet? A. Yes.

Q. That is the hardest thing he had to do? A. Well, run up and down stairs. That is a lot of work to do, going up and down. He may have to go up twice; just depends how he gets that color.

Q. Let us not talk about what he might have done. So far as any weight is concerned, that was the heaviest weight he had to lift, wasn't it? A. Yes.

Q. Now, on this particular night you didn't see him go upstairs, did you, or come down? A. I seen him go up.

Q. Well, did you go up with him? A. No.

Q. How did you see him go upstairs then when the stairway started at a point 100 or 125 feet away from where you were working and through a passageway into another building? Tell us how you saw him go upstairs. A. Well, I seen him pass me.

Q. You saw him go towards the stairs, is that what you mean? A. He had to pass me to go up the stairs.

Q. Well, you were not on the stairway? A. No, I wasn't on the stairway.

Q. You were not even in the building where the stairway was, were you? A. No.

Q. All right. When you say that he went upstairs, did you mean—all that you know and saw is that he went by you towards the stairway, isn't that correct? A. Yes, he passed me.

Q. Now, how long were you in the room where you changed your clothes that night? A. You mean in the washroom?

Q. Yes, in the washroom. A. Oh, we were in there about ten or fifteen minutes.

Q. And following that, you testified that Mr. Wehrle brought two of these color cans over to the tanks? A. Yes.

Q. These color cans were five gallon affairs, is that correct? A. That is correct. 10

Q. Do you know if they were full or partly full? A. They were full.

Q. How do you know? A. Because I seen it.

Q. You saw it. You say they weighed how much? A. Well, difference of weights it is. It goes from —oh, from 40 up to about 50 or 60; some weigh 75 pounds.

Q. It has gone up from 35 to 50 that you testified on direct examination; they are heavier now? A. No. 20

Q. They are always the same weight? A. Depends what color that is.

Q. What color was this, do you know? A This was ochre.

Q. How much did that weigh? A. That would be between 40 and 50.

Q. Between 40 and 50 pounds. How do you know that? A. Because I weighed them already.

Q. You weighed them. Do you know that this one was full? A. This one was full. 30

Q. He carried that twenty feet? A. Yes.

Q. There were two of them, I think you said. A. Two of them, yes.

Q. Now, when he dipped the color out he used a spoon? A. Yes.

Q. How large a spoon? A. A handle about that big (indicating) and the spoon is about that big (indicating).

Q. About the size of a kitchen table spoon? A. No, a little bit bigger. 40

Q. A little larger than a household table spoon? A. Yes.

Q. With that he would dip some of the color from these cans into the vats? A. Into the vats.

Q. I think you indicated that he would put perhaps seven or eight spoonsful— A. Yes.

10 Q. (Continuing)—into the vat? And then following that operation he went back into the foreman's office? A. Into the foreman's office.

Q. That was his office, is that correct? A. On the same floor.

Q. I mean, when you say the foreman's office, you are speaking of Mr. Wehrle's office, is that correct? A. That is where all the foreman is and everything.

20 Q. He was the foreman? A. Yes, night foreman, yes.

Q. In other words, different foremen use it in the day? A. Yes.

Q. But at night time that was his office? A. Yes.

Q. Did he stay in there till the vat was ready or— A. Ready, yes.

Q. How long would that be? A. Oh, a half hour, twenty-five minutes.

30 Q. Twenty-five minutes to a half hour? A. Yes.

Q. And then he came out and took a sample? A. Took a sample.

Q. And when he passed you towards the stairway—now, when you say he took a sample, what sort of a—how much did he take? A. A half pint can.

Q. Half pint can? A. That is what we take it out of each tank, take it upstairs for the sample.

Q. He took a half pint of paint from this batch

40 that he had put the color in before? A. Yes.

Q. When he passed you on his way upstairs, you presumed to have—he went to sample or test it? A. Yes.

Q. Is that correct? A. Yes.

Q. Is that the last you saw of him alive? A. That is the last I saw him—no, after that when the party called me he was still alive when I went upstairs, when the party called me. 10

Q. Well, he was prostrate, in any event, when you were upstairs? A. Yes.

Q. That is the last time you saw him on—when he was walking around? A. Walking, that is right.

Q. It was about fifteen minutes later, as I understand you to have testified, that you went upstairs or were called upstairs and found him on the floor, is that correct? A. That is correct. 20

Q. Now, do you know of him having gone to the first aid room to get some Eno that night? A. No, I don't.

Q. Now, was he out of your presence long enough at any time up to twelve o'clock to have been to the first aid room? A. The only time there was when he was in the office there, when I seen him go in the office.

Q. In other words, you don't know what he did in the office or whether he stayed there, is that correct? A. Yes. 30

Q. He was in there, I think you have said, twenty-five to thirty minutes? A. Yes, about that.

Q. Well, then, this was the first trip he made upstairs, was it? A. Yes, that was the first trip.

Q. And he never came down? A. He never came back.

Q. Do I understand you to say that there were others around there that didn't have anything to do until this batch of paint was ready? A. Yes. 40

Q. Well, was that—wasn't that always true on Sunday night or Monday morning, whichever you call it? A. It was only on Sunday night.

Q. That was true every week on Monday morning? I say, that was the same thing that was true every week? A. Yes, at the beginning of it, yes, at the beginning of the week.

Q. And you say in spite of the fact that Mr. Wehrle was feeling so unwell that night that he said he was going home if he didn't feel better, he walked faster than he ordinarily did? A. Yes, he did.

Q. He didn't usually walk that fast Monday morning? A. He always had that one steady fast step.

Q. Well, now just a minute. Did he have one steady step or did he have two steps, one for Monday morning and one for the other mornings? A. No, I didn't say that.

Q. You mean to say he always walked the same? A. He always did, yes.

Q. You thought it was fast? A. Fast.

Q. It wasn't any faster this morning than it had been on any other morning? A. The same way.

By the Court:

Q. You said that this was the first trip he made upstairs and he never came back. Is that right? A. That is right.

Q. And that trip he made upstairs, was that the trip that he was carrying the 40 pound pail of ochre? A. No. That is the same can he had.

Q. When he was—when was he carrying the 40 pound pail? A. That was before he had taken that half pint of paint upstairs.

Q. How many trips did he make upstairs? A. He just went up that once.

Q. Did he ever during that night carry up any pails weighing 40 pounds? A. Not upstairs.

Q. Where did he carry them? A. He carried, just as I said, from the end of the room there on to the scale. 10

Q. When is the last time he carried them before you saw him laying down on the floor upstairs? How long before that? A. Oh, about twenty-five minutes or so.

Q. And that was ten minutes before you saw him pass you with the small can of paint, is that right? A. That is right.

The Court: All right. 20

By Mr. Rhinehart:

Q. Well, let me make that clear: This small can of paint that he carried upstairs—of course, how much does that weight. Does it weigh a pound? A. I could not tell you what that weighs.

Q. Very light? A. Yes.

Q. A half pint? A. A half pint.

Q. Now, prior to him carrying that half pint of paint up to the fifth floor, he had been in the foreman's office for twenty-five or thirty minutes? A. Yes. 30

Q. Is that right? A. Yes.

Q. Now, he hadn't carried any of these 40 or 50 pound cans during that period, had he? A. You mean—

Q. While he was— A. Pails upstairs?

Q. While the batch or—after he put the color in the batch he went into his—into the foreman's office? A. Yes.

Q. He stayed there for about twenty-five to thirty minutes, is that correct? A. Yes. 40

Q. Then when he came out he took a half pint can full of paint and carried it upstairs? A. Yes.

Q. Is that correct? A. Yes.

Q. He didn't carry any 40 pounds? A. No.

Q. Can at that time? A. Not upstairs.

10 Q. So that it was fifteen minutes after he went upstairs that you saw him, and it was twenty-five or thirty minutes before that that he had last carried this 40 or 50 pound can, correct? A. Yes.

Q. And so that instead of twenty-five to thirty minutes it would have been twenty-five to thirty plus fifteen, making 40 or 45 minutes before you found that he had last carried this five gallon 40 pound can of color, isn't that correct? A. Yes.

20 Q. That is true. You say that he carried—withdraw that. You said that he was alive when you got upstairs? A. Well, a little bit.

Q. What makes you say that? A. Because the foam was coming out of his mouth.

Q. Because there was foam? A. Yes.

Q. Coming out of his mouth? A. Mouth.

Q. You don't remember that you attempted to feel if he had a pulse or heartbeat? A. Yes, we did.

30 Q. Could you feel any? A. No.

Q. Could you feel whether he was breathing or not? A. Just the least bit.

Q. Did he say anything? A. Nothing, nothing at all.

Q. The can of paint sample—the sample of a half pint can that he was carrying upstairs was right— A. On a bench.

Q. On a bench, where was he with relation to that? A. Lying on the floor alongside the bench.

40 Q. Alongside the bench? A. Yes.

Q. Aside from seeing bubbles coming out of his mouth there was no breathing, I mean you didn't see or feel or hear him take any breath, did you? A. No.

Q. Did he move? A. The only time he moved was when he grunted and stretched. 10

Mr. Rhinehart: That is all.

Re-direct examination by Mr. Nies:

Q. Mr. Stern, do you know how much Mr. Wehrle weighed? A. I could not tell you.

Q. Can you give us an estimate? Do you know how tall he was? A. I could not even tell you how tall he was neither.

Mr. Nies: That is all. 20

(Witness excused.)

Alphonse St. Amand, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination by Mr. Nies: 30

Q. Where do you live, Mr. St. Amand? A. 1871 Vaux Hall road, Union.

Q. What is your occupation? A. Watchman.

Q. Where are you employed? A. Sherwin-Williams.

Q. How long have you been employed there? A. Eleven years.

Q. Do you know Mr. Wehrle? A. Yes. I knew him about eighteen years.

Q. Evidently you knew him before you started to work there? A. That is right. 40

Q. Do you remember the night of his death? A. I do.

Q. Did you go down with him on the same bus that night to work? A. I went down on Number One bus as far as Chapel Street, that is where the Chapel Street bus comes in. I boarded it there and went with him. They were already on.

Q. They were what? A. They were already on that bus which left from the Boulevard.

Q. Then did you have a discussion with him on that night about his health? A. No. I didn't have nothing to say to him.

Q. Did he walk from the bus to the building? A. That is right.

Q. And when did you see him next? A. When I made my second round.

Q. And where did you see him? A. He was lying on the floor.

Q. Where? A. Up in tech service.

Q. Where is that? A. It is on the fifth floor.

Q. Do you know what the duties were of Mr. Wehrle?

Mr. Rhinehart: I object.

Mr. Nies: Do you know? If he knows—I don't know whether he does know.

The Court: It would be better to ask the witness if he knows what the decedent had been in the habit of doing.

By Mr. Nies:

Q. Did you know or do you know what the decedent had been in the habit of doing when he came to work on Sunday night? A. Well, he used to take a lot of Eno, as far as I know.

Q. No. A. That is supposed to be a medicine.

Q. In relation to the work that he did in the plant. A. Do I know?

Mr. Rhinehart: I object to that, if the Court please. This witness is a watchman.

Mr. Nies: I don't think he understood.

The Court: Do you know what kind of work? The question is do you know what kind of work?

The Witness: I used to be a mixer myself. I worked on the same floor for nine years. 10

By Mr. Nies:

Q. With Mr. Wehrle? A. What?

Q. With Mr. Wehrle? A. Mr. Wehrle wasn't—well, he was part foreman a little while while I was there, but Mr. Boch was the foreman.

Q. Well, do you know what type of work Mr. Wehrle was doing? A. He is a shader. 20

Q. What does a shader do?

Mr. Rhinehart: Well, I object to that, if the Court please.

The Court: I will allow it. I think it would be better for the witness to be asked what he had been in the habit of seeing Mr. Wehrle do.

Mr. Nies: All right.

The Court: What did you see him do? What were his actions? 30

By Mr. Nies:

Q. Will you tell us what he did and what his actions were, and so on? A. You mean in regard to the work? Well, whenever I made the rounds I used to see him putting color in the batches. Of course, I only walk through there. I am not in there no more than we will say a minute. There is only one key to be punched in there. 40

Q. What did he do when he put color in the batches?

Mr. Rhinehart: I object to that, if the Court please. The man's opportunities for observation were very limited.

Mr. Nies: Just what he saw.

10 The Court: I will allow the question.

By Mr. Nies:

Q. Well, just what did—what did he do? A. What did he do?

Q. Yes, that you saw with your own eyes? A. I seen a can of paint—a can of color on the scale. I seen him do more than once, see?

Q. Did you ever see him carry this can of color?

20 Mr. Rhinehart: I object to that.

The Witness: Well——

The Court: Just a minute.

The Witness: I didn't——

The Court: Just a minute.

Mr. Rhinehart: I object to that, as to whether he has ever carried them or not.

The Court: I will allow the question.

By Mr. Nies:

30 Q. Did you ever see him carry the cans of paint? A. I did.

Q. How much do they weigh, if you know? A. Well, I would judge they weighed somewhere around fifty to sixty pounds.

Q. And do you know from where to where he had to carry these cans of color? A. Well, they have a spot picked up where all the colors lie; that would be maybe twenty or twenty-five feet away,

40 and in order to bring it over to the scale by the tank where he is going to put it in the tank, he

would have to carry it over to the scales. Naturally, he is the one that actually does it; nobody would carry it for him. He had to bring it over there.

Q. Then what would he do with the cans? A. What would he do with it?

Mr. Rhinehart: I object to that, if the Court please. The question is too general. This man was only a watchman and he was only there a minute. He had to punch one clock. 10

The Court: You can bring that out on cross examination. I will allow the question.

By Mr. Nies: 20

Q. Tell us what he did with the cans? A. What would he do? With the color, you mean? Well, as I say, I saw him—as I say, I would not stay there and watch him. I know what he does because I used to be a mixer. I know all about that.

Q. Well, then, tell us.

Mr. Rhinehart: I object to what this man used to do when he was a mixer.

The Court: It will be stricken. Just tell us what you saw when you made your rounds. 30

The Witness: As I said before, I saw the cans placed on the scale, or sometimes he would be carrying it when I would go through, and sometimes he would not be doing nothing. I just go through there; I didn't have nothing to do with him. I just walked through, punched my key and go through the building. 40

By Mr. Nies:

Q. That particular night, or October 3, 1943, did you see him carry these cans? A. I didn't.

Q. Did you see him in the tech room that night or the following morning? A. Only——

10 Mr. Rhinehart: I object to that.

Mr. Nies: He said before that he saw him up in the tech room.

Mr. Rhinehart: I object to that. I don't understand him to have so testified.

The Court: I will allow the question.

By Mr. Nies:

Q. Did you see him in the tech room? A. As I

20 said before, I was on my second round. As I came up from fourth floor to the fifth floor, one of the men says to me, "Mr. Wehrle"——

The Court: Just a minute. Don't tell us what anybody told you.

By Mr. Nies:

Q. Just tell us what you saw. A. I went upstairs. He was lying on the floor.

30 Q. Where on the floor? A. Tech service floor right by the bench.

Q. Was he alive or dead? A. He was dead.

The Court: Did you see him before that night? Did you see him any time before that night?

The Witness: Only on the what you call it—only on the bus.

The Court: All right.

40

By Mr. Nies:

Q. Did you see this half pint of paint? A. No, I didn't.

Q. Did you do anything for him? A. Well, I looked at him. I was going to give him first-aid treatment but I was—it was too late, so I didn't do nothing. 10

Q. Who came in after that? A. Who came in after that? Well, I continued on my rounds till we got down to the gatehouse where we start from and called up for the boss.

Q. What boss? A. Personnel manager.

Q. Do you know his name? A. Tommy De Castro.

Q. De Castro? A. De Castro.

Q. Did Tommy come in there then? A. He did. 20

Q. Did you talk to him? A. We both talked to him, both watchmen. There is two of us.

Q. What did Mr. De Castro do? A. He had us call up for an ambulance.

Mr. Nies: Cross examine.

Cross examination by Mr. Rhinehart:

Q. Mr. De Castro didn't work nights, did he? A. We called him up at his home.

Q. Did you talk to him over the telephone? A. The other man, the other watchman. 30

Q. An ambulance was called before he came to the plant, wasn't it? A. The other man called for the ambulance before Tommy got there.

Q. These color cans that you say weighed fifty to sixty pounds are kept on the fourth floor? A. That is right.

Q. The mixing room? A. They are on the fourth floor. There is a half floor where the mixtures are. There is the floor where they do the 40

mixing, then there is a half floor. On that half floor is where all the tanks are. That is where they keep the color cans and all that stuff.

Q. They are kept on the same level where they —A. That is right, on the half floor.

Q. In other words, how far were they kept away from the vat itself? A. From the tanks, you mean?

Q. From the tanks, yes. A. I would say about twenty or twenty-five feet.

Q. About twenty or twenty-five feet, on the same level? A. On the same level.

Q. Where was the scale with reference to the tanks? A. The scale is liable to be anywhere, from one of the floors to another.

Q. In other words, you would have the scale where it was most convenient at the moment? A. There was only one scale on that half floor, and there is more than one man has to use that same scale. You might find the scale at one end of the room, it might be in the middle of the room, wherever it happened to be.

Q. Well, Mr. Wehrle was the only one that did that work at night? A. They also used it during the day.

Q. Well, I am not interested in during the day. Mr. Wehrle was the only one that would put color in—that would color the paint at night, A. That is right.

Q. And presumably he would have the scale where it would be most convenient for him? A. I should think so.

Mr. Rhinehart: All right. That is all.

By the Court:

Q. The half floor that you speak of is halfway between the fifth floor and the fourth? A. Well, it is on the—above on the fourth floor.

Q. Is the half floor a little higher than the fourth floor or a little lower? A. It is lower.

Q. It is beneath the level of the fourth floor? A. That is right.

The Court: All right.

Mr. Nies: That is all, Mr. St. Amand. 10

(Witness excused.)

Daniel F. McLearey, called as a witness on behalf of the petitioner, and duly sworn, testified as follows:

Direct examination by Mr. Nies:

Q. Where were you working on October 3, 1943? A. Sherwin Williams. 20

Q. How long have you been working there? A. I am there five years.

Q. What is your occupation? A. Right now I am on the same job Mr. Wehrle was on, but at that particular time I was an oiler.

Q. And how long have you known Mr. Wehrle? A. From the time I came to work, five years.

Q. Do you remember the night of his death? A. Yes, sir. 30

Q. When did you first see him on October 3rd, that Sunday night? A. Well, I was coming off the roof in the paint house where they have machinery in there, coming down into the fourth floor. There is a back stairway there. The light was lit in Bill Graham's office—that is that foreman—and Wehrle was in there and he called me in. So he says he ain't feeling so good tonight, Mac. I said, "What is the matter?" He said, "I got something across in here." 40

Mr. Rhinehart: What is that last, please?

The Witness: He said, "I got something across in here." He says—

The Court: Indicating the chest.

The Witness: Indicating around the chest here (indicating). So I wasn't feel-
10 ing so hot myself, so I told him I didn't feel so hot tonight, if anything breaks down I will be at the gatehouse. "I am going down there for a smoke." So I went down to the gatehouse. It was about fifteen minutes later when this Adam came down; I don't know what is his last name. He was the mill man. He came running in. He was all excited and he started talking——

Mr. Rhinehart: I object to what Adam
20 said.

The Witness: All right.

By Mr. Nies:

Q. Well, then, did you see Mr. Wehrle after that? A. He was dead when I seen him.

Q. Where was he? A. Tech service.

Q. Where is that? A. On the fifth floor.

Q. How do you get to the tech service room
30 where you saw Mr. Wehrle from the fourth floor at the place where they mix the paint? A. Well, there is two ways to get to it.

Q. Do you know—let me ask you this; do you know which way Mr. Wehrle went? A. I would not say positive. I wasn't there.

Q. All right. Which are the ways you can go? A. You can go up through—up past the foreman's office and on the steep incline, but if you go around through the fourteen building you got that break
40 in the stairs. It is not so bad climbing.

Mr. Rhinehart: I can't hear what you are saying.

The Witness: If you go up through that, there is stairs from the foreman's office reaching to the roof. There is a pretty steep incline on the steps. If you go around through the fourteen building there is a break in the stairway, not so bad going up. 10

By Mr. Nies:

Q. Is that where there is a break between the two buildings? A. That is right.

Q. Where was Mr. Wehrle that morning, Sunday morning, after twelve o'clock midnight? A. In the tech room.

Q. Where was he? A. He was lying on the floor. 20

Q. Was he alive or dead? A. Not when I got there.

Q. What is that? A. Not when I got there, I don't believe, because when Adam told me I went up and I took a look. He had a bluish hue to his face. So I went to his tie and collar and belt, I loosened that. So I felt his pulse. I guess I was afraid to take a chance on my fingers. I was nervous myself. I didn't feel anything; I listened to his heart, I didn't feel nothing there. So he had like spit bubbles on his mouth. He was laying on his side; I rolled him on his back. I don't know much about artificial respiration, so I tried to give him artificial respiration, but it still didn't do him any good. We worked on him quite a while. 30

Q. Who came to the tech room after that? A. Al, the watchman.

Q. Anyone else? A. Then Matty came in.

Q. Who else? A. That is about all. The rest of them was there. 40

Q. Was anybody called on the telephone? A. I called Bill Graham.

Q. Who is Bill Graham? A. He is assistant production manager.

Q. Did he come in? A. He came in later on.

Q. When did he get there in relation to the body being removed? Was the body still there? A. The body was removed.

Q. Before Bill Graham got there? A. That is right.

Q. Did you have a conversation with Bill Graham? A. I told him that Smith and Smith—that is the ambulance—was called and Wehrle was on the floor. I said it looks pretty bad, and he said, "What seemed to be the trouble?"

I said, "I don't know. He just went up there. Adam told me he just dropped in his tracks right at the bench." So I says, "You got the men standing there. What do you want to do?"

He told me to shut all the Kemtone down because that is all work with heat.

Q. What do you mean by shut down the Kemtone? A. Well, you have to shut the heat off or else you ruin the whole batch.

Q. When was it started up again? A. It wasn't started that night. It was started the next morning. He told me to instruct the men to come there until he came down, so they stayed there. He came around, I guess, two o'clock; he lives in Westfield.

Q. What did the men do then? A. They just hung around then.

Q. For the rest of the morning? A. That is right.

Mr. Nies: You may cross examine.

Cross examination by Mr. Rhinehart:

Q. You told Bill Graham that Wehrle had collapsed is that right? A. Yes, sir, from what I heard from Adam.

Q. And presumably you told him also that he was dead? A. As a matter of fact, I did tell him I thought he was dead. I didn't say he was dead. I said I thought he was dead. 10

Q. Had you seen Mr. Wehrle that night prior to the time when you went into the foreman's office? A. No, I didn't. I missed him.

Q. Did he say where he was having pain? A. Yes, across the chest, he told me.

Q. He told you? A. He told me that before; that was even before he told me that he was having pains across his chest. 20

Q. Say anything about indigestion? A. That is what he was always hollering about.

Q. When you say "always" what do you mean? A. That he had a pain across here (indicating). He said, "I guess that is indigestion again."

Q. Was that a frequent occurrence? A. That is what he used to take that Eno for; that is the only thing that used to help.

Q. He took that a great deal? A. Well, probably took it once a night, what he told me. I said, "How do you feel?" 30

He said, "I just took a drink of Eno."

Q. Almost every night he would take some Eno, is that correct? A. Pretty near.

Q. Did he say anything about taking Eno on that night? A. Yes. He told me he had Eno and Tums.

Q. He told you he had taken both Eno and Tums? A. That is right.

Q. Did he tell you he was feeling particularly bad that night? A. Yes, yes. He said he was on the bad side that night. I know—— 40

Q. Was he holding on to himself or anything? A. He was sitting in the swivel chair. He was in the front like this (indicating), with his hands across his middle.

Q. Leaning forward? A. Leaning forward.

Q. With his hands against his stomach? A.
10 Just about an arms length of the edge, leaning across there.

Q. Pressing against his stomach? A. That is right, pressing against it.

Q. He was—You don't know how long he had been sitting in that position? A. That I don't know.

Q. You left him in that position, did you? A. I left him in the same position. I was only in there a couple of seconds.

20 Q. What time about was that, do you know? A. I would say around—somewheres around a quarter to twelve, I would say.

Q. A quarter to twelve? A. Something in that neighborhood.

Mr. Rhinehart: That is all.

Mr. Nies: That is all.

(Witness excused.)

30

Matthew Stangreciak, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination by Mr. Nies:

Q. Who were you employed by, Mr. Stangreciak? A. Sherwin-Williams.

Q. How long have you been working there? A.
40 Twenty-six years.

Q. Do you know Mr. Wehrle? A. Yes, I know him since I start to work up there.

Q. Do you remember the night he died? A. Yes.

Q. Did you see him coming to work that night? A. No. The first time I saw him about eleven-thirty.

Q. Where was he then? A. He was in the office. 10

Q. And did you speak to him? A. Yes. I go particular for find out how soon he going to have batch for me ready, because I was fill, only fellow, and he said then take about three quarters of an hour, maybe more, so just start to grind.

Mr. Rhinehart: What was that last part?

Mr. Nies: They had just started to grind.

The Witness: They just start to grind eleven o'clock. 20

By Mr. Nies:

Q. Well, had he finished his work of matching the colors? A. They got to grind first.

Mr. Rhinehart: I object to that, if the Court please.

The Witness: Then mix.

The Court: Just a minute. 30

Mr. Rhinehart: I object to that because from what I have heard the witness wasn't in any position to know.

The Court: Well, I think you should ask the witness whether he saw him mixing colors before you ask him whether he finished it.

By Mr. Nies:

Q. Did you see him mixing colors? A. No. 40

Q. Were the colors mixed, do you know? A. Well, as far as I know, I just went upstairs for I need ticket ready to fill, and I go upstairs to ask him for it. In other words, when he get ready he come down, so I only seen him few times that night.

10 Q. Did you ask him whether he had finished mixing the colors? A. I asked him if he got ready batch for me.

Q. What did he say? A. He said it ain't ready yet, maybe three-quarters hours or so.

Q. Did you ask him anything else or did he say anything else to you? A. Just sit in the chair like that (indicating) by the desk, say, "I feel awfully bad tonight."

20 Mr. Rhinehart: The witness indicates that he was bent over, is that correct, Mr. Nies?

Mr. Nies: I think so.

By Mr. Nies:

Q. Then where did you go? A. I go downstairs.

Q. When next did you see Mr. Wehrle? A. Next there was elevator man coming and say "You know Wehrle died."

30 Q. Where did you go? A. Then I ran upstairs. Bill Stern up there.

Q. In what room? A. On the tech service; that was on the fifth floor.

Q. Where was Mr. Wehrle? A. Was lay alongside the long bench in there, was lay alongside.

Q. Was he alive? A. No. When I go there was pretty late. All the fellows was up there already, was last one.

Q. Did you observe the color of his face? A. When he was——

40

Q. Laying down there? A. Kind of bluish.

Mr. Nies: You may cross examine.

Cross examination by Mr. Rhinehart:

Q. This was in the foreman's office on the first floor—on the fourth floor that you saw him about eleven-thirty that night, is that correct? A. That is right. 10

Q. And he said he was feeling awfully bad? A. Yes, awful bad.

Q. How long were you in the office? A. Well, I was in there for maybe two minutes. I just go in, ask him if he got anything ready for me, then I go out again.

Q. Where were his hands? You say that he was bent forwards. Where were his hands? A. I don't remember exactly. I think his arm in the desk like that, something like that ((indicating). 20

Q. Were his hands against his abdomen or chest? A. I can't remember exactly because I don't remember.

Q. He was leaning over forward against the desk? A. Yes. I know he got elbow right on the desk. He was bending like that (indicating), but I don't see where his hands was.

Q. Did he say anything about he might go home that night? A. He say "If I don't feel any better I go home." 30

Q. If he didn't feel any better, "I am going home"? A. Yes. That is what he said.

Q. Do you know if he took any Eno that night? A. I don't know.

Q. Did he say anything about that? A. He don't say. He don't say anything.

Q. Do you know that he customarily took Eno, frequently had to take it? A. When I see before 40

—I don't see him couple of times a night. I don't know.

Mr. Rhinehart: That is all.

Mr. Nies: That is all.

(Witness excused.)

10 Mr. Nies: Now, the only other item, Your Honor, is the medical end of it. I presume we will carry the case for two weeks. There is one situation that I was wondering whether Your Honor would consider—I think it is important—that Your Honor go to the plant and see how the layout is, the particular stairways that were used, and the location of these tanks on the fourth floor.

20 The Court: Where is the plant located?

Mr. Nies: Newark, on Lister Avenue. It is not too far from here. It will be a good help.

The Court: If there is no objection, I will be glad to do that at the conclusion of the case.

Mr. Nies: Thank you.

Mr. Rhinehart: I will be very happy to have that done, Your Honor,. I haven't

30 been there myself, though Mr. Nies has.

Mr. Nies: No, I haven't.

Mr. Rhinehart: But perhaps after Your Honor has done that we could produce some evidence that the situation is the same, or if it has changed, in what respect it has changed since he was there, and have your Honor describe it.

I do have one lay witness on the way down from the plant. He has not arrived

40 yet.

The Court: Well, inasmuch as you won't be able to finish the case today anyway, and the petitioner has to finish its case aside from the medical testimony, I would suggest that we continue it for two weeks from today, when it will be the first case on the list. 10

Mr. Rhinehart: Very well. In the meantime, if this witness comes in, will Your Honor hear him?

The Court: If you can arrange that with Mr. Nies, that will be satisfactory to me.

Mr. Nies: Your Honor, I just was speaking to Mr. Allbrooks, and there is the possibility of another witness from out of town that I might wish to introduce at the next hearing, if I decide to bring him in. 20

The Court: I will permit you to introduce further testimony at that time if you wish. The case will be number one on the list two weeks from today.

(At this point a short recess was taken.)

John Robak, called as a witness on behalf of the respondent, being duly sworn, testified as follows: 30

Direct examination by Mr. Rhinehart:

Q. You are the elevator operator at the Sherwin Williams plant at Brown and Lister Avenue? A. Yes, sir.

Q. You were in October, 1943? A. Yes, sir.

Q. You worked there—you did that work in October, 1943? A. Yes.

Q. Did you know Charles Wehrle? A. Yes. 40

Q. Senior? Did you know the man that died there on October 4th? A. Yes, I know him.

Q. What was his name? A. Wehrle.

Q. Wehrle? A. Charlie Wehrle.

Q. Charlie Wehrle. Do you remember him coming to work the night he died? A. Yes, sir; I took him upstairs.

Q. You took him upstairs. And when you say you took him upstairs, you mean on the elevator? A. Yes.

Q. What, if anything, did you observe about him on the elevator, and what did he say? A. First time he come in by the elevator was downstairs.

Q. When you say the first time— A. And he said to me, "John, I am very sick, and then take me upstairs second floor." They go medicine box in the room there, get some Eno. That is all he says.

Q. Well, now, that was when, do you know? Do you know if he was on his way to work at that time? A. Yes. He says, "I am all right, I go to work."

Q. My question is had he been working before you took him up to the second floor or was he on his way to work at that time, if you know? A. He going dressing room, dressup and go to work.

Q. In other words, the time you are talking about— A. I can't hear you.

Q. Excuse me. You are talking about the time when he was coming to work in the building? A. Yes.

Q. He hadn't been to work before that time? A. He said, "I going work." That is all.

Q. He was on his way to work? A. Yes.

Q. And his place of work was on the fourth floor, is that so? A. Fourth floor.

Q. Now, aside from the fact that he said he wasn't feeling well, did you notice anything about him? A. Well, I told him, I said, "Charlie, go see the doctor." "Oh," he says, "that is all right."

Q. Well, did he indicate where his body was hurting or what part of his body was paining him?

Mr. Nies: I object. He didn't say of pain. He said he wasn't feeling well. 10

The Court: That is right. That is what the witness said.

By Mr. Rhinehart:

Q. Did he say or indicate how or where he was not feeling well, what was the matter with him? A. His stomach swell up, that is why.

Q. Well, did he say that or did you see it? A. He say like that to me, his stomach fill right up. 20

Q. He said that to you? A. Yes.

Q. And the first-aid room was on the second floor? A. Second floor.

Q. You stopped there? A. Stopping there and wait for him.

Q. What did he do? A. He going in the room, get some Eno.

Q. What room? A. Medicine room.

Q. Medicine room? A. Yes. 30

Q. Then what did he do after he got the Eno? A. Drink that Eno, come back in my elevator, take him upstairs fourth floor.

Q. You took him up to the fourth floor? A. That is right.

Q. Did you see him thereafter while he was still alive? A. I seen him working after a while, and after a while I don't see him no more because he was fifth floor, I think.

Mr. Rhinehart: That is all. 40

Cross examination by Mr. Nies:

Q. Now, did you see him working? A. Yes, he working. He take samples, samples—couple of can samples, go upstairs testing room.

Q. What stairway did he use? A. Fifth floor.

Q. What stairway?

10

Mr. Rhinehart: Are you speaking of this particular night?

By Mr. Nies:

Q. He went from the fourth floor to the fifth floor? A. Yes.

Mr. Rhinehart: I would like to know if counsel is speaking of this particular night?

20

Mr. Nies: Yes. That is what the witness is speaking about evidently.

The Court: All right. Direct your question to that particular night so the witness will not be in any doubt about what you mean.

By Mr. Nies:

Q. That night when Mr. Wehrle died— A. Yes.

30

Q. Did you see him working before he died? A. Yes, yes, that night.

Q. What time of the day? A. Take samples upstairs.

Q. From what floor? A. Fourth floor, take them upstairs fifth floor.

Q. How did he get from the fourth floor to the fifth floor? A. On the steps.

Q. Which steps? A. They got steps the other way.

40

Q. Did he go from one building to the next building? A. No, same building.

Q. Same building? A. One building small bridge to the other building.

Q. He went over the bridge? A. Yes.

Q. Did you see him go over the bridge? A. No, no.

Q. Now, when did he say to you, "Now I am all right"? A. When he come in to work, when he drink that Eno, he says, "I am all right now." 10

Q. And then he went on to work? A. Yes.

Q. About how many times did you see him go upstairs with samples? A. That time once, that is all.

Q. You only saw him once? A. Once. He no come back no more.

Q. When you left him off at the third floor— A. Yes, I wait.

Q. You waited for him? A. Yes. 20

Q. Where did he go? A. In the room, medicine room.

Q. How far away from the elevator is the medicine room? A. About to the corner, there (indicating).

The Court: Indicating a distance of about forty feet.

By Mr. Nies:

30

Q. Was the door closed or open? A. He has key.

Q. After he went in did he lock the door or close the door? A. Yes.

Q. You don't know what he did in the room, do you? A. He have some Eno in cup, little cup.

Q. Where did he have that? A. At night.

Q. Did he have it in his pocket? A. No, little cup.

Q. Where did he get it? A. On the medicine room. 40

Q. Did he take it in with him into the medicine room? A. No.

Q. You left him off the elevator on the— A. Yes.

Q. Second floor? A. Yes.

Q. And you waited at the elevator? A. Yes.

10 Q. Did you stay in the elevator? A. Yes.

Q. He walked forty feet? A. About that corner there (indicating).

Q. He went into the room? A. Yes, sir.

Q. Did he close the door? A. Yes—no. When he go out he closed the door again.

Q. While he was in the room did he close the door? A. No.

Q. Could you, from the place you were in the elevator— A. Yes.

20 Q. (Continuing)—look at the room? A. That is easy; straight, straight door.

Q. Where was the Eno? A. By the closet.

Q. In what kind of container was it? A. Eno?

Q. Yes. A. Bottle, dollar bottle.

Q. Did you see him take it? A. Yes. He take out the bottle.

Q. What did he mix with it, anything? A. Water.

Q. Where did he get the water, in the same

30 room? A. Yes.

Q. Then he came out of the room and locked the door? A. Yes.

Q. What did he say to you? A. He say, "I am all right now."

Q. Then what did he do? A. Go to work.

Q. To the fourth floor? A. Fourth floor, go dressing room and go to work.

Mr. Nies: That is all.

40

John Robak, for Respondent—Re-direct.

Re-direct examination by Mr. Rhinehart:

Q. One thing, Mr. Robak: where were you when you saw him go toward the stairway to go to the fifth floor? A. I work there.

Q. Where do you work? A. On the same floor. I bring——

Q. I thought you were the elevator operator? A. I bring dry stock. 10

Q. What? A. I bring dry stock.

Q. You were on the fourth floor? A. Yes.

Q. When Mr. Wehrle went towards the stairway? A. Yes.

Q. With a little half pint can of paint? A. About pint, half pint,—about pint; take two cans, go upstairs testing.

Q. You didn't see him after that? A. No, I don't see him no more. 20

Mr. Rhinehart: That is all.

Mr. Nies: That is all.

(Witness excused.)

(Whereupon an adjournment was taken to September 28, 1944.)

30

40

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Certificate of Deputy Compensation Commissioner.

I hereby certify the foregoing to be a true and accurate transcript of these proceedings, as taken before me, at the time, place and date hereinbefore set forth.

John M. Kerner,
Deputy Compensation Commissioner.

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Certificate of Shorthand Reporter.

I hereby certify the foregoing to be a true and accurate transcript of these proceedings, as taken stenographically by me, at the time, place and date hereinbefore set forth.

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Jacob Baer,
Certified Shorthand Reporter.

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SECOND DAY.

September 28, 1944.

[APPEARANCES AS BEFORE.]

DR. CARMINE G. BERARDINELLI, called as a witness on behalf of the petitioner, being duly sworn, testified as follows: 10

Direct examination by Mr. Nies:

Q. Doctor, are you a practicing physician? A. Yes, sir; I am.

Q. Do you have a title? A. Yes, sir.

Q. What is it, Doctor? A. Assistant to the chief Medical Examiner of Essex County. 20

Q. And as such did you perform an autopsy upon Charles Wehrle? A. I did.

Q. Do you have the autopsy report with you? A. I have.

Q. When was the autopsy performed, Doctor? A. On the 4th day of October, 1943, at 11:45 A. M.

Mr. Rhinehart: That is the fourth day of October?

By Mr. Nies: 30

Q. Now, you have that autopsy report with you, Doctor? A. Yes, sir; I have.

Mr. Nies: I would like to offer that in evidence. Any objection, Mr. Rhinehart?

Mr. Rhinehart: No objection.

(The article referred to was received in evidence and marked P-1, September 28, 1944.) 40

Mr. Nies: I have a copy of it, Mr. Rhinehart. If there is no objection, I would like to have the Court use that, if you want to.

Mr. Rhinehart: I am supposed to have a copy of it, too, but some of my copy is not particularly clear.

Mr. Nies: This is a typewritten copy. I made the copy in longhand and had it typed in the office and then compared it myself.

The Court: It is in evidence.

Mr. Nies: I only thought you could use the copy and let Dr. Berardinelli have the original to return to his records.

Mr. Rhinehart: I have no objection to that, to the offer of the copy. I would like to see the original before it goes.

Mr. Nies: Yes.

Mr. Rhinehart: In other words, I understand that the copy will be substituted in place of the original in the record.

The Court: The original has already been marked in evidence. I don't know why you need a copy in addition.

Mr. Nies: I thought your Honor possibly could use it.

The Court: If you want to use it for reference, it is all right, but the original has already been marked.

By Mr. Nies:

Q. As a result of making the autopsy, Doctor, what did you find? A. I found hypertensive cardiovascular renal disease.

Q. What were your conclusions as to the cause of death as found by you through this autopsy? A. Heart condition, hypertrophy of the left heart.

Mr. Rhinehart: What is the answer, please?

(The reporter read the last answer.)

The Court: Is that what your answer was?

The Witness: Hypertrophy of the left heart.

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By Mr. Nies:

Q. Now, assume, Doctor, that the deceased, Charles Wehrle, whose age was 61, and his weight 190 pounds, his height 5-11½ inches, was on October 3, 1943, employed by the Sherwin Williams Paint Company as a foreman and shader; that he had worked there for over twenty years; that the plant of the respondent was not in operation on October 3rd, 1943, that being a Sunday; however, he left for work that night at 9:40 P. M. from his home; that he complained numerous times to his wife of pain in his chest; that he had an accident several years before, injuring his ribs, and for several years he had been taking Eno salts and taking Tums at various times; that at about 6:00 P. M. on October 3, 1943, he complained of pains, and this was while he was still at home, and there took a dose of Eno; he laid down until about 9:00 P. M. that evening, and then proceeded to go to work; his wife testified that he always complained of indigestion, and at times when he was suffering from pain he indicated the center of his chest; that evening, on leaving the house she testified he looked white; the petitioner for several years had been on a night shift; that the night shift didn't work on Saturday night, and that it was the duty of Mr. Wehrle, the deceased, to go to the plant on

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Sunday night and prepare the mixtures so that the crew of other workmen could perform their duties; that on Sunday evening, October 3, 1943, the decedent boarded a bus at 10:30 P. M. at the corner of Raymond Boulevard and Park Place, Newark, and proceeded to the plant of the respondent; he arrived there at 10:50 P. M., after walking about one block upon leaving the bus; he proceeded to go to the fourth floor and changed his clothes, and remained there approximately fifteen minutes, and said to a fellow worker "I feel kind of funny today. I got sort of pain around here now and then," and he indicated his chest.

The deceased was obliged to go to the office to ascertain the type of paint to be made, and until he completed his work the remainder of the men would remain idle; there is other testimony to the effect that he complained to fellow workers on arriving at the plant that he wasn't feeling well, and said, "I am not feeling so hot; I have got something in here," and indicated his chest; there is also testimony that the decedent, on arriving at the plant stopped on the second floor and took a dose of Eno, and immediately thereafter said to a fellow worker, "Now, I am all right."

The deceased proceeded to prepare his colors on the fourth floor of the plant; the colors were placed in tanks which are even with the floor; he was obliged to get his colors at the end of the room at a distance of about forty feet; the colors were in five gallon containers, and each weighed approximately 35 to 50 pounds; he carried two containers, one at a time, to the tanks and used a spoon with which to remove the color and place it into the tanks; this was done by bending up and down numerous times, and was described by the witness as dipping the color out of the container

into the mixer; the deceased was then obliged to test the paint in the testing room which was on the fifth floor; this was after a space of twenty-five minutes had elapsed; he went to the testing room twice; on the third time, in order to reach this room, the petitioner was obliged to walk first a distance of about 100 to 120 feet, secondly he had to go around and through a tunnel to the next building, then up a stairway of about six steps to a landing, and then a flight of steps to the fifth floor; then he walked another distance of about 125 feet to the testing room, and that he walked fast when going to this room, and on that occasion walked faster than usual in order to get started so that the other men could start their work; on other nights the tanks were prepared for the workers by the day workers; it was testified to that he ran up and down the stairs; the deceased did all of this work from 11:00 P. M. to 12:05 A. M. on the following morning, when he was found lying on the floor of the testing room, and it was testified that he died at 12:10 A. M., and he had been in the testing room for approximately fifteen minutes before he was found; the deceased was stretched out on the floor, froth was coming out of his mouth, and his face had turned blue.

Now, Doctor, assuming the above facts and those facts and statements contained in your autopsy report, can you say whether or not the work this man did between 11:00 P. M. and 11:50 P. M. on October 3, 1943, which I have just described to you, did it have any influence or relation to and was it the producing cause of his death?

Mr. Rhinehart: If the Court please, I have a number of objections to the question.

The Court: What is your first objection?

Mr. Rhinehart: First of all, as I understand it, Dr. Berardinelli is here as a fact witness rather than an expert medical witness, and as Assistant County Medical Examiner, he must necessarily do so.

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As to the items set forth in the hypothesis, one objection is that after taking Eno on the second floor the decedent said that he was all right, and inferentially made no complaints thereafter. The facts are that he complained thereafter to at least three different people of this pain and distress of his chest and stomach.

Secondly, the question states that the cans of color ran from 35 to 50 pounds and were carried a distance of forty feet. The testimony of the witness—and I am quite sure it is very definite—is that it was a distance of twenty to twenty-five feet.

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Thirdly, it is said that he bent up and down while dipping the color from these cans. The testimony was that he bent over and dipped seven or eight tablespoonsful of color out of them, but not that he went up and down to do so.

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Fourthly, it is said that he went to the testing room on the fifth floor two or three times that night. Now, I must say that there was some confusion on that point. One of the witnesses at first seemed to say that he had gone upstairs two or three times, but on my cross examination and on examination by Your Honor, he stated definitely and positively that the decedent had gone upstairs on only one occasion, and

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after he had been upstairs fifteen minutes on that one occasion he was found dead.

Fifthly, the testimony is not that he walked faster than usual, but that his usual gait was a rapid one, and that on this night he walked with his usual gait. 10

Lastly, there is no testimony that he ran up and downstairs.

The Court: What have you to say, Mr. Nies?

Mr. Nies: As to the distance that this man was to walk, he walked—it is on page 7 of the testimony of Mr. Stern.

"And where did he have to get these pails? Just as I says, like I says, from the distance to the end of the room." 20

And then the Court said, "Indicating a distance of about forty feet."

That is in the record.

Mr. Rhinehart: The witness himself estimated the distance of twenty-five feet.

Mr. Nies: There is nothing in here about twenty-five feet that I have, except that he indicated to the end of the room, and the Court said that it was a distance of forty feet. He was also asked: "How many times did he walk up to that room to test the paint between the time that you say he started and the time of 12:10 when he passed out? He went up twice in that room." 30

Further: "Will you tell us whether or not he was walking fast or slow? He was walking quite fast."

That is what he said.

Mr. Rhinehart: Yes. 40

The Court: The witness, William Stern, testified that this was the first trip he made upstairs, and he never came back.

Mr. Nies: He said that on cross examination but not on direct.

10 The Court: Well, yes, that is right. Is there any other point, Mr. Rhinehart?

Mr. Rhinehart: Well, certainly the statement that the man ran up and down stairs is entirely incorrect.

The Court: He said he was walking quite fast.

Mr. Nies: He was walking quite fast, but there was some testimony, Your Honor——

The Court: He walked a little faster

20 that night.

Mr. Nies: Then on cross examination I think something was said that he ran up and downstairs, if I am not mistaken.

The Court: The testimony further is that the pails were full, that there were two of them, and each weighed forty pounds.

Mr. Nies: Yes. I think on cross examination he said from 35 to 50 pounds.

The Court: He was carrying these pails

30 twenty-five minutes before the witness Stern saw him lying on the floor; that was about ten minutes before he took the small can upstairs, and that was the last time he saw him.

Mr. Rhinehart: On that point, Your Honor, after dipping the color, my recollection of the testimony is that after dipping the color from the five-gallon cans into the tanks of paint, seven or eight table-

40 spoonsful, the decedent went to the fore-

man's office on the fourth floor and there remained for a space of fifteen or twenty minutes, and following that space of time, he took a half-pint can of paint or sample, went upstairs, and fifteen minutes later, which would have been forty or forty-five minutes after carrying the five-gallon cans of paint, at least, that he was found dead. 10

The Court: Well, the witness Stern, on cross examination, testified that ten minutes before he took a small can upstairs and that was the last time he saw him. That is my recollection of the testimony.

Mr. Nies: That is right.

The Court: The testimony of the witness Alphonse St. Amand is that if you go upstairs through the Fourteen Building there is a bridge there, and that the decedent was able to go up those stairs; that there are two ways of going up, and he went up the stairs which connect with the other building by a sort of bridge. 20

Mr. Nies: I also would like to draw Your Honor's attention to the cross examination of Mr. Stern. Mr. Rhinehart said to him, "The hardest thing that Mr. Wehrle had to do was to take a five-gallon can of color and carry it perhaps twenty feet?" The answer was "Yes." 30

"That is the hardest thing he had to do? Well, run up and downstairs. That is a lot of work to do, going up and down." That is what he said about running up and down on cross examination.

Mr. Rhinehart: Of course, that can't be used as a basis for a hypothetical question 40

that he ran up and downstairs that night, because concededly nobody saw him.

The Court: There is no testimony in the case that he ran up and downstairs. The only testimony I recall is that the decedent, 10 on direct examination, said he went up—rather the witness Stern, on direct examination, said he went upstairs twice, that he was walking quite fast. On cross examination he stated that this was the first trip he made upstairs and he never came back.

Are there any other matters that you particularly want to stress, Mr. Rhinehart?

Mr. Rhinehart: Yes, Your Honor. I would like to press my first objection that 20 goes to the affect of the doctor's testimony. I would like to point out that Exhibit P-3 offered at the last hearing is a certificate of death of this deeedent and signed by Dr. Berardinelli, which, under the law, must state not only the cause of death, but contributory causes and the relationship of death to accident or injury, if any, and the death certificate gives the cause of death as hypertensive cardiovascular renal dis- 30 ease, no other conditions or major findings are noted. The questions on the form relating to whether the death was due to external causes, accident, injury or the like are left blank, and under the law and the decisions——

The Court: The death certificate has been marked in evidence and the doctor may take the contents of that into consideration in answering the question.

40 Mr. Nies: Now, Doctor, will you answer the question?

The Court: Have you seen the death certificate which you made out?

Mr. Rhinehart: I should like to have my exception noted. I think the question is being allowed as is.

The Court: The failure of the doctor to answer all the questions on the certificate is not an objection. The hypothetical question is based upon the testimony as submitted, not upon testimony that has not been adduced as to any contributory causes. I will allow the question. 10

Mr. Rhinehart: Your Honor will allow me an exception, please.

The Court: Yes.

By Mr. Nies: 20

Q. Now, Doctor, can you answer the question? Assuming those facts, can you tell us whether or not the work that this man did between 11:00 P. M. and 11:50 P. M. on that day, whether it had any influence or relation to and was it the producing cause of his death? A. Well, I have no evidence of what this man was doing that day, but my autopsy shows that he had hypertension, hypertrophy of the left heart, and people of this condition, with or without any severe or slight exertion, can die suddenly. 30

Q. But assume, Doctor, that this man did this work just prior to his death; would that accelerate his death? A. Any kind of exertion can accelerate his death.

Mr. Rhinehart: What is the answer?

(The reporter read the last answer.)

The Witness: Even without exertion sometimes people die. 40

Dr. Carmine G. Berardinelli, for Petitioner —Cross.

By Mr. Nies:

Q. This man, I take it, Doctor, was suffering from a prior condition? A. I think yes, he did.

Q. In your opinion, was it of long standing? A. Long standing, yes.

10 Q. Can you tell us whether or not bending down increases the blood pressure on the heart and blood vessels? A. Well, it is exertion. Any kind of exertion can—a man can die like that; even a condition the man had, any exertion, slight or severe, can produce death right away.

Mr. Nies: You may cross examine.

Cross examination by Mr. Rhinehart:

20 Q. If I understand you correctly Doctor, you expressed no opinion——. A. No opinion.

Q. (Continuing)—as to what did or didn't happen in this particular case, other than the cause of death as you have reported it? A. Yes.

Q. Is that correct? A. Yes, sir.

Q. So far as the findings on autopsy were concerned, Doctor, was there any finding of occlusion? A. No, sir.

Q. Of any of the coronary arteries? A. Well, 30 there was some arteriosclerosis of the left coronary.

Mr. Rhinehart: What is the answer?

(The reporter read the last answer.)

By Mr. Rhinehart:

Q. Was there an occlusion of any of the coronary arteries? A. Occasional plaque of the intimal sclerosis.

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Dr. Carmine G. Berardinelli, for Petitioner —Cross.

Q. I don't understand you, Doctor. Was there or was there not a coronary occlusion? A. There was some coronary condition, yes.

Q. What is that? A. There was some coronary condition.

Q. Some coronary condition? A. Disease, yes. 10

Q. I am talking about occlusion. A. Not occlusion, no.

Q. There was no coronary occlusion? A. No coronary occlusion.

Q. Was there——. A. But there was coronary damage.

Q. When you say coronary damage, you refer to what? A. To the injury to the intimal of the coronary artery.

Mr. Rhinehart: What is the answer? 20

(The reporter read the last answer.)

By Mr. Rhinehart:

Q. What do you mean by that? A. By disease of the coronary artery; disease of the coronary artery.

Q. Disease of the coronary artery. A. Yes.

Q. Well, there should be a differentiation between injury and disease? A. Well, we call injury even a disease when an organ is—— 30

Q. In other words, when you say that the coronary arteries were injured by disease—— A. By disease, by pathological conditions.

Q. Now, was there any hemorrhage? A. No.

Q. Of the heart or any of its arteries? A. No.

Q. Was there any infarction? A. No.

Q. Was there any aneurysm? A. No.

Q. Was there any rupture? A. No.

Q. Was there anything? A. No. 40

Dr. Carmine G. Berardinelli, for Petitioner —Cross.

Q. About the nature of the condition you found? A. Hypertrophy.

Q. Very well. What is that? A. Hypertrophy of the left heart.

Q. What is that? A. Is the arteries increase in the heart causing hypertrophy of the fibers of the heart.

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Q. What is that due to? A. Due to some disease.

Q. Due to disease? A. Yes.

Q. Was there anything in the nature of the conditions you found in the heart on autopsy—go ahead. A. Yes, there was hypertrophy of the left heart.

Q. Well, I haven't finished my question, Doctor.

Mr. Nies: You told him to go ahead and answer it.

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The Court: Finish your question, Mr. Rhinehart.

Mr. Rhinehart: I didn't want to interrupt him.

The Court: Wait until the lawyer finishes the question, Doctor.

By Mr. Rhinehart:

Q. Was there anything in the condition that you found on autopsy that was not from the hypertensive cardiovascular renal disease from which he was suffering? Was there anything else found? A. No, only hypertension, only hypertrophy of the muscle.

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Q. That is part of the disease? A. Yes, that is part of the disease. It is the disease, not part of the disease.

Q. Well, it is associated with the disease? A. It is the disease. Hypertrophy, that is one condition.

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Q. All right. You say it is the disease? A. Yes.

Q. You are obliged by law to state the contributing causes of death and the relationship to injury, if any, on the death certificate, are you not?

Mr. Nies: I object.

The Court: Objection sustained. The doctor has given what the cause of death is. You may ask him if there were any contributing causes which he didn't include on the death certificate. 10

Mr. Rhinehart: I think that is all.

Mr. Nies: That is all, Doctor.

(Witness excused)

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Dr. Jerome Kaufman, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination by Mr. Nies:

Q. Doctor, you are a practicing physician, are you, and in what capacity? A. I am.

Q. In what specialty? A. Internal medicine with special reference to cardiovascular diseases. 30

Q. You examined the autopsy report on this Wehrle case, Doctor? A. I did.

Q. What conclusions did you arrive at as to the cause of death from the autopsy? A. Well, this man had a long standing hypertensive cardiovascular disease with hypertrophy of especially the left ventricle of the heart and involvement of the left coronary with sclerotic plaques.

Q. Now, Doctor, you were in court this morning and heard Dr. Berardinelli testify, and you 40

heard the hypothetical question propounded to him? A. That is correct.

Q. I think you heard the entire question? A. That is correct.

Mr. Nies: With counsel's consent, we will avoid repeating it.

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Mr. Rhinehart: I have the same objection to this question as I had to the last one.

The Court: If you can't consent to the question we will have to take the time of letting the petitioner's attorney repeat the entire hypothetical question.

Mr. Rhinehart: Let me make it clear. I don't object—I don't insist that there be a repetition of the question. I do want it noted that I have the same objection to the hypothetical question.

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The Court: Will you consent to the question as it has been amended by and added to by the Court in the discussion concerning it?

Mr. Rhinehart: My reaction was that there were some respects in which it was not amended—I mean my objections. There were some amendments made to it, of course, in the course of the discussion, and I don't—I am not insisting that the question be repeated. I just wish my objections noted to those parts of the question which I contend weren't supported by the evidence and which were allowed to remain in evidence.

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The Court: Since the doctor has sat here in the courtroom and heard the question as propounded to Dr. Berardinelli, with the

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amendments and changes that were made to it by the Court, I will allow the question and the respondent may have an exception, the same exception that was granted to the question as propounded to Dr. Berardinelli.

By Mr. Nies:

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Q. Now, then, Doctor, assuming those facts as propounded in the hypothetical question which you heard this morning, and from the facts and statements contained in the autopsy report, can you say whether or not the work this man did between 11:00 P. M. and 11:50 P. M. on October 3, 1943, had any influence or relation to and was it a producing cause of his death? A. In my opinion the work that he did during that approximate hour contributed to his death.

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Q. Doctor, is it your opinion that this man was suffering from a disease prior to his death? A. I believe that this man suffered from a hypertensive disease which involved his blood vessels and heart, which is of long standing, resulting in hypertrophy, thickening, enlargement of the left ventricle of the heart, which is the chamber that carries the load, and that as a result of that and narrowing of the left coronary artery because of sclerosis, he didn't receive a sufficient blood supply to his left ventricle, and that the additional burden of exertion which requires more blood to that particular muscle, the blood vessel was unable to furnish that blood and that this man died as a result of insufficiency of his circulation to his left ventricle.

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Mr. Nies: You may cross examine.

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Cross examination by Mr. Rhinehart:

Q. What is it particularly, Doctor, on the hypothesis given to you that—what act of exertion is it that you think caused his death? A. Well, there is no specific one exertion that one can speak of as causing his death, because we don't know just what he did at the moment he died, but the exertion of climbing upstairs, of lifting pails that weighed, I think, approximately thirty pounds, walking back and forth, the additional necessity of going to the fifth floor. All of this requires that his heart pump harder and that the heart muscle requires a greater blood supply. Furthermore—

Q. Then—

Mr. Nies: Let him finish.

The Witness: Furthermore—

The Court: Let the doctor finish.

The Witness: That this man went to work at a time when he was sick and had a very bad heart, so that the addition exertion need not necessarily be great at that particular time. I believe this man had sufficient exertion, not to say that it was a little exertion; climbing upstairs, bending over, lifting pails is exertion, especially in the presence of a heart which is already badly diseased.

By Mr. Rhinehart:

Q. Do you limit the exertion that was contributing to his death to the approximately fifty-five or sixty-five or seventy minutes that he was at work? Is that the only item? A. Well, the exertion of going to work—maybe things which I don't have in the hypothesis which he did just prior to

going to work, although, if I remember, it did say in the hypothetical question he didn't feel well somewhere around six o'clock and rested up a couple of hours before getting up and going to work. But any exertion could precipitate death in this kind of heart.

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By the Court:

Q. Doctor, does it make any difference as to the length of time which intervened between the time he died and the exertion of carrying the pails? A. Well, I say that if this man had lifted something just prior to the time he died, then fell over with it, one could naturally fix the exact time of his death in relation to the exertion. Here we don't have that factor. Here we have a man, who as far as I know, worked continuously for most of an hour, then was found dead. We can't just say which point in the exertion precipitated it.

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Q. Do you think, Doctor, from the standpoint of reasonable probability that the man would not have died at that time if it hadn't been for the employment which was described to you in the hypothetical question as having been engaged in by the decedent just prior to his death? A. Within reasonable probability the answer to that is yes, he would not have died, because we know this man went along with a heart which was bad for some time doing the necessary things that a man has to do at home, at work, and was able to carry on, although he did this amount of work for that particular period.

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Q. When you say he needed very little exertion to cause the condition because of the bad heart he had— A. That is right.

Q. Would that exertion, Doctor, be sufficient to cause it by the mere fact of him leaving the house

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and going to work? A. He could have died going from his house to work, but in this case he didn't. He got to work, climbed four flights of stairs, did work. Certainly no one can deny that that would contribute to his death and cause his death because of a bad heart. That contribution of work
10 you can't deny.

By Mr. Rhinehart:

Q. Did you say something about climbing four flights? A. He went to work on the fourth floor. I understood that there was nothing in the hypothetical question that he went up in an elevator. In fact, my notes say he walked to the fourth floor, from the fourth to the fifth floor.

Q. Your opinion has been predicated upon that
20 assumption? A. My entire opinion is necessarily predicated upon the hypothetical question. I never saw this man.

Q. Doctor, there is no dispute in the testimony that he went to the fourth floor by elevator, and I would like you to assume that he didn't go up to the fifth floor except on one occasion, and he was found dead there after fifteen minutes, approximately; would that affect your opinion? A. The second half of the question or the first half?

30 Q. I mean that change in the hypothetical question. A. No.

Q. Now, Doctor, you said a moment ago that he did work more than an hour. A. Approximately an hour.

Q. Well, the fact is, Doctor, after spending his time getting the — changing his clothes, during which period he complained not only of distress in his chest, but said that if he didn't feel better he was going home, he wasn't going to work, and fol-
40 lowing that he carried two cans, one at a time, of

the size mentioned in the original hypothesis, a distance of, let us say forty feet, and from that dipped seven or eight tablespoonsful of coloring matter—— I say tablespoonsful because it was described by the witness as being slightly larger than an ordinary household tablespoon; after doing that he went to the foreman's office and there remained and didn't do a single thing, so far as the evidence discloses, except sit in his chair for twenty-five or thirty minutes, so assume as the evidence amply supports, that he didn't do a thing for the next twenty-five or thirty minutes, and then he took one-half pint can of paint and carried it at his usual gait, which was a fast one, according to the testimony of one of the witnesses, towards the stairway to the fifth floor; he wasn't seen going up the stairway, he wasn't seen thereafter until he was either dead or practically so, fifteen minutes later. Now, first of all, that is a different hypothesis from which you have just so far assumed, isn't it? A. Partly different, yes.

The Court: Would that occasion you to give a different opinion, Doctor?

The Witness: No, because I want to know, first of all, why he was sitting in the foreman's office, what his complaints were at that time, and then exactly what he did after that. I understand he walked some distance. He may or he may not have climbed up the flight of stairs. Certainly there was exertion after his rest period. He didn't die sitting in the foreman's office, is that correct?

By Mr. Rhinehart:

Q. Well, if he did die there would it make any difference to you?

Mr. Nies: I object to that, to probabilities.

The Court: I will allow the question.

The Witness: If he had sat in the foreman's office for a half hour doing nothing, complaining of nothing, I might change my opinion. If he was sitting there with complaint, with shortness of breath, and so forth, it may not change my opinion.

By Mr. Rhinehart:

Q. Doctor, heart disease, the same general type that this man suffered, is a cause of a great many deaths? A. It is the most common cause of death.

Q. It is the largest single cause of death? A. That is correct.

Q. There is no question about that, Doctor, that it can and does cause death without the intervention of any exertion or traumatic aspects? A. That is correct.

Q. The fact that the man had been complaining of feeling particularly ill for three days before his demise on the morning of October—on the morning that he was at work would indicate what?

Mr. Nies: I object because there is nothing in the testimony that he was ill for three days before.

The Court: Well, there is testimony that he was taking some medication within a day or a few days before October 3, 1943.

Mr. Rhinehart: I am referring to the testimony of Mrs. Wehrle, which was to the effect that he had been feeling more ill than usual for two or three days before he died.

The Court: Mrs. Wehrle testified that he always complained of his chest every other day or so, and that he complained of pains

that very night. He took Eno at six o'clock that night. He laid down until nine o'clock and got up to go to work, and she noticed he was sick. He complained of pain a few days before. He complained of pains in the chest frequently after that.

Mr. Rhinehart: I am quite sure on cross examination she testified that he had been more complaining and ill than usual for two or three days, and I should like permission to ask the doctor that. 10

The Court: She also testified on cross examination that the decedent was complaining of chest pains for two or three days before October 3rd, and that the decedent pointed to the center of his chest. On that night of October 3rd, the decedent's widow testified that the decedent was white, he didn't eat that night, he went to work by bus, and took some Eno at six o'clock. He had been observed all day since 12:30 when he came home from church. 20

The Witness: Answer that question?

The Court: Yes.

The Witness: Well, that would indicate to me that this man's heart was very bad. He should not have gone to work, he should have been home in bed under treatment. 30

By Mr. Rhinehart:

Q. It would indicate that his heart disease had progressed to the point where he might die from it at any time, is that so? A. He might die from it at any time, that is right.

By the Court:

Q. Doctor, is it your opinion that the greater the exertion that this man experienced immedi- 40

ately preceding his death, an hour or two before his death, that the more likely and more probable that that exertion contributed to his death? A. That is a logical conclusion.

The Court: Is there anything further?

10 By Mr. Rhinehart:

Q. Now, the gravity of his heart disease is, I suppose, also indicated by the fact that that night before he went to work he felt too ill to eat his usual meal, isn't that right? A. Mr. Rhinehart, I have already stated that this man, in my opinion, was very sick. In my opinion he should not have gone to work, he should have stayed home, been in bed where he was for three hours. He should have 20 been treated. I think this man was very sick, and the fact that he died at work carries it out, and the autopsy proves it.

Q. In other words, your opinion is predicated merely upon the fact that he died at work and therefore, no matter what he was doing or how strenuous it might have been or might not have been, it is necessarily related to his work, is that correct? A. I have already said that here is a man that was so sick six o'clock that night before 30 he went to work that he had to rest three hours, that he got up, got dressed, exerted himself, went to work, had further exertion and died. That man for three days or so before complained of chest pains. At autopsy we found a badly diseased heart. There is no question that the exertion of that evening—had he been home hanging curtains he could have died. He didn't hang curtains. He got up and went to work at the time he should have been in bed. That is why he died, in my opinion.

40 Q. Well, can you say that he would not have died that night except for the fact that he went to

work? A. This man had he stayed in bed, been treated, it is a reasonable probability he may have lived longer, a week, or a day, or a month; I can't tell. I don't think he would have died at that time unless he had the exertion.

Q. You think at the outside he might conceivably have lived longer a month in bed? A. He might have lived a day, he might have lived a month, he might have lived a year. That I cannot answer. 10

Q. One further thing: about the autopsy report, Doctor, there is no occlusion therein? A. There is no evidence of a complete occlusion of the vessel. There is narrowing of one vessel due to sclerosis and the formation of sclerotic plaques. There is no evidence of either occlusion or infarction because this man died instantaneously. They don't get infarction by an instantaneous death. 20

Q. There is no evidence of any injury to the heart from external causes or exertion, is that correct, in the autopsy findings? A. There is no evidence of injury to the heart.

Q. There is no evidence, for example, of hemorrhage, is there, that is sometimes found in cases where it is from exertion? A. There is no hemorrhage.

The Court: Does the absence of those findings play any part in your opinion which you gave here? 30

The Witness: No, sir.

Mr. Rhinehart: That is all.

Mr. Nies: Thank you, Doctor.

(Witness excused)

Mr. Nies: That is the petitioner's case, Sir.

(Discussion off the record) 40

(Whereupon an adjournment was taken to 2:00 P. M.)

AFTERNOON SESSION

DR. GEORGE P. OLCOTT, JR., called as a witness on behalf of the respondent, being duly sworn, testified as follows:

10

Direct examination by Mr. Rhinehart:

Q. Dr. Olcott, how long have you been a physician? A. Thirty-five years.

Q. You are a graduate of what institution? A. New York Medical College and University of Munich.

Q. And you were formerly an assistant medical examiner of the County of Essex, is that correct? A. For seven years.

20

Q. What has been your specialty, Doctor? A. Pathology and diagnosis.

Q. And during the course of your experience in the Medical Examiner's office, did you have occasion to examine by autopsy and form opinions as to the causes of death, particularly in heart disease or heart trouble, and the relationship thereof to trauma or injury or exertion? A. I did.

Q. Can you tell us approximately what was the extent of your experience in that regard with the Medical Examiner's office? A. Well, it wasn't strictly limited to that particular job. I have done over two thousand autopsies in my life. In that particular period it was centered more directly on matters of accidental death, death from trauma, and so forth, covering a period of seven years, when I had every death that came into the authority of the department in the twenty odd communities in this county, the west end of the county.

30

40

Q. And would it be fair to say that a large, if not the largest percentage of them were deaths

from heart complications? A. Well, we more or less roughly estimate that all sudden deaths, unexpected deaths, of all of them about 90% are cardiac deaths and the other 10%—most of them were some type of brain hemorrhage, usually apoplexy. 10

Q. Now, Doctor, merely by way of preparation, you never saw or examined the decedent, Charles Wehrle, in his lifetime? A. No.

Q. You have been consulted in that connection purely on the basis of a hypothetical statement of facts which has been propounded to you? A. That is right.

Q. Now, Doctor, I want you to assume that the decedent, Charles Wehrle, was 61 years of age on the date of his death, which was October 4, 1943; 20 six or seven years prior to that date he had suffered an accident, causing an injury to his ribs; ever since that time he frequently complained of pain in his chest, and he frequently used Eno and Tums to help relieve that pain; for two or three days prior to his death on October 4th, he complained more than usual; at the time of his death and for many years prior thereto, he was employed by the Sherwin Williams Company as a night foreman and a shader, which means that he 30 controlled the color or the shade of the paint prepared; for two or three years of his long employment and for two or three years immediately prior to his death, he had worked on the night shift from eleven P. M. to eight A. M. in the morning; he worked every night of the week except the shift from eleven P. M. Saturday night to eight A. M. Sunday morning, which was his regular day off; October 3, 1943, was a Sunday and the decedent hadn't worked the previous night because 40

it was his regular day off; On Sunday, October 3rd, he came home from church at twelve or twelve-thirty P. M. and went to bed during the afternoon; he arose from bed but didn't eat his usual meal because he complained of feeling ill;
10 instead he took some Eno and laid down from six until nine P. M.; he got up at nine P. M. and again complained that he was sick; he appeared pale; he left for work at the usual time, about twenty minutes to ten in the evening, traveling from his home in Irvington to the vicinity of the respondent's plant on Lister Avenue in Newark by bus; he arrived at his place of work about 10:50 P. M., having walked one block from the bus to the plant; the decedent's place of work was princi-
20 pally on the fourth floor of the respondent's building, and he took the elevator to get there that night; on the way in the elevator he complained to the elevator operator of feeling ill, and indicated his chest as the site of his distress; the elevator was stopped at the second floor of the building, where the decedent left the elevator and went to the medicine room located on that level and took some more Eno; he returned to the elevator, said he was all right, and proceeded to the fourth
30 floor in the elevator; the decedent then went to the wash room, where he changed his clothes preparatory to going to work; while changing his clothes the decedent complained to a co-worker that he felt funny and had pains in his chest; he also said that if he didn't feel better he was going to quit work and go home; thereafter he undertook to do his work and he carried two five-gallon pails, one at a time, a distance of approximately forty feet, and placed them on a scale; these pails
40 weighed approximately forty pounds; thereafter

Dr. George P. Olcott, Jr., for Respondent —Direct.

the decedent bent over and took seven or eight spoonfuls of the coloring matter out of the five-gallon pails and put the coloring matter into the tank or vat; these spoons were somewhat larger than the ordinary household tablespoon; the decedent thereafter went to the foreman's office, where he remained for a period of twenty-five to thirty minutes, waiting for the batch of paint in the tanks; he remained in—strike it out. 10

One of the workers went into the foreman's office and the decedent there complained to him again of—strike out the question.

The decedent complained to him of not feeling well, indicating his chest as the site of distress; he seemed to be leaning forward in his chair with his arms on or over his chest or upper abdomen; about 11:30 P. M. another workman went into the foreman's office and inquired of the decedent what time the batch of paint would be ready; the decedant stated that he didn't know, but thought it would be three-quarters of an hour or more; the decedent complained of feeling ill to this person, and this person likewise testified that he appeared to be leaning forward and seemed to be pressing against the desk at which he was sitting; the tanks of paint and the five-gallon can of colored matter were on what was the half floor, which as I understand it, was six or seven steps below the level of the fourth floor itself; after being in the foreman's office for twenty-five to thirty minutes, the decedent went to the tank of paint and took a one-half pint of paint for a sample; he took this paint to the fourth floor level and walked along on the fourth floor level a distance of one hundred to one hundred and twenty-five feet to a stairway on the fifth floor; no one saw the decedent after leaving 20 30 40

the fourth floor until fifteen or twenty minutes later, that is at about 12:05 or approximately 12:05 A. M. on October 4th, when he was found lying on the floor of the paint testing room, on the fifth floor; to get there he would have had to ascend a stairway and on the fifth floor walk a distance of approximately one hundred to one hundred and twenty-five feet; when he was found his face appeared blue; there were some bubbles or froth on his mouth, no sign of breathing, heartbeat or pulse was detected; the decedent was unconscious and gave no evidence of life other than a groan and a stretch, as one witness described it; at most he was dead within five minutes after being found.

Taking those facts into consideration, Doctor—may I have the autopsy—and also taking into consideration the findings on the autopsy report, which I show to you, and it is marked P-1 in evidence—— A. I don't see the death certificate here.

The Court: Here it is (indicating).

By Mr. Rhinehart:

Q. And the death certificate, which is marked P-3 as of 9-14-44, and having in mind those facts and the evidence that appears in those documents that have been handed you, I want you to express or tell us whether you have an opinion, and if so, what it is as to the cause of the deceased's death, and the relationship between his death and the work he had done that night, or his exertions in the course of his employment, if any?

Mr. Nies: I object to it. I think the hypothetical question should also include the

fact that that night this man walked faster than usual. That was the testimony that was offered at the last hearing.

The Court: The testimony is that he was walking quite fast. He walked a little faster that night. That should be included. 10

Mr. Nies: I think that should be included.

Mr. Rhinehart: Well, I believe the testimony—the witness subsequently changed his testimony to say it was his usual gait. I have no objection to the question being amended in that respect.

The Court: Very well, Doctor. You may answer the question.

The Witness: I see no causal relationship between his death and any exertion as described on that night. 20

By Mr. Rhinehart:

Q. Am I correct in saying, Doctor, that you have heretofore seen and examined a copy of that autopsy report. A. I have.

Q. Now, tell us, please, what the considerations are that lead you to that opinion? A. Well, in the first place, there could be no question of the diagnosis substantiated by these autopsy findings as having been death from hypertensive cardiovascular disease. In these sudden hearts — incidentally, this undoubtedly was a matter of long standing and slow progress towards its ultimate fatal termination, which is characteristic of this type of disease. There are many factors involved in the precipitation of a heart death based upon preexisting heart disease, and among those are exertion. About half — when I say exertion I mean 30 40

either mental or physical exertion or emotional stress. Roughly about half of the sudden heart failures under these conditions occur during exertion. The other half occur during periods of non-exertion. Now, when I say exertion I mean visible exertion such as a man undergoes when he does work. I believe that is the only basis on which we can draw a conclusion that exertion is in any particular case a precipitating cause as when the death occurs during the exertion, and I have come to the belief that even a short interval as five minutes would preclude the drawing of such a conclusion that it had occurred as the result of exertion. Furthermore, on the date—the night that this man died he had undergone several exertions quite sufficient to precipitate, in my opinion, cardiac failure in this case. The carrying of forty pound paint pails, the mounting of the stairs, and I believe that if this heart had come to the point, as they do, where it was susceptible to exertion as a precipitating cause of heart failure, it should have given out during one of those periods of much greater exertion than that which, according to what I have heard, existed shortly before he died. I don't believe that alone what I have heard described as his exertion output during the last few minutes of his life was sufficient to precipitate the heart attack. There is no element of coronary here. There has been no coronary attack of any kind as described in the autopsy record and coronary arteries showing occasional plaques of intimal sclerosis—that is a very common thing, but an occasional plaque of intimal sclerosis is not sufficient to in any way impede the circulation — essential circulation through that artery. The condition of the aorta is likewise described as occasional plaques of soft yellowish atheroma. The heart itself shows an en-

larged left ventricle, which is characteristic of this particular situation, and it is due to the fact that that heart has been working against an increased blood pressure for a long period of time and nature, in an effort to compensate for that, has enlarged that left ventricle in order to combat this higher blood pressure. 10

Q. Doctor, have you finished? A. For the moment, yes.

Q. Doctor, what is the significance of the petitioner's complaints before he went to work, which, as I have given them to you hypothetically, seemed to be worse than his usual attacks of pain that he had been suffering for many years? A. I think that very definitely indicates that he was in the terminal stages of this disease, that he was in the situation where the heart could even stop of itself when he was sitting at complete rest. It had gotten to that particular point where it could not have gone any longer. It was giving some evidence for the period prescribed for these few days preceding the fatal attack. 20

Q. As you have already referred to the autopsy report there, just how did his death come about in the absence of any occlusion of the coronary artery, in the absence of any hemorrhage, or in the absence of aneurysm or thrombosis of the vessels? Just how did his death come about? A. Well, the human heart shows remarkable powers of compensation for advancing damage, and it must keep up its work to a full minimum capacity or else death ensues. As a result of that, Nature will keep that heart working until the very last minute, and at that particular time there is nothing left to work with, it stops. Now, it is the inevitable end of these things, and I think that is the only reasonable explanation of these deaths. 30 40

Q. Well, in the ordinary case of death from heart disease where exertion has played a part, am I correct in saying that it is frequently attended with some exertion—with some aneurysm, hemorrhage, occlusion, embolus or thrombus? A. Well, I think this type of case is much less common than those that are the result of coronary trouble of some kind, occlusion, insufficiency, thrombus with infarction. These are much less common.

Q. And is it your opinion that the picture presented in those autopsy findings are typical of a death from hypertensive heart disease alone? A. There can be no question in my mind that it is.

Mr. Rhinehart: Cross examine.

Cross examination by Mr. Nies:

Q. Doctor, in your opinion, does work, strain and stress cause a greater pressure on the heart and blood vessels? A. What kind of strain and stress?

Q. Such as this man was going through the last hour of his life after he got to work, how, as you heard in the question propounded to you that he was obliged to carry two heavy five-gallon cans of paste or color, where each weighed forty to fifty pounds; he carried each about forty feet; he was required to go upstairs to test the paint, and that the distance to the stairway was one hundred and twenty-five feet; then he had to go up the stairway, through a tunnel to another building, then a stairway and walk one hundred and twenty-five feet to the testing room; that he was upstairs for fifteen minutes and further that after he removed these five gallon cans from a distance of forty feet he was obliged to bend down and take spoonfuls of

color and place them in the mixing tanks. Would that, in your opinion, be extraordinary exertion or stress that would cause pressure? A. Some of it would and some of it would not.

Q. Well, isn't it true, Doctor, that in this particular case this work accelerated his death? A. I don't think so. 10

Q. Why not? A. Because he didn't expire during the period of exertion of this effect which I consider sufficient to precipitate a heart attack. He lived through the lifting of the heavyweight, he lived through climbing the stairs.

Q. He climbed the stairs and walked one hundred and twenty-five feet to the tech room, as they called it, the testing room, and was up there for fifteen minutes and was then found on the floor. A. He must have—— 20

Q. From the question that you have had propounded to you, you don't know how long he was on his feet in that room? A. No.

Mr. Rhinehart: Well, of course, I merely wish to point out that it is perfectly obvious he was on his feet long enough after he got to the fifth floor to walk the distance of one hundred to one hundred and twenty-five feet, and if I may supplement the hypothetical question, one of the witnesses testified that the half pint can of paint that he carried upstairs was on the bench there or the can in which the paint had been carried up. 30

The Court: That is included in the testimony, yes.

40

By Mr. Nies:

Q. Now, can you tell us, Doctor, whether you think walking into the testing room accelerated his death? A. I don't think so.

Q. The extra exertion would not do that? A. I
10 don't think that is sufficient extra exertion.

By the Court:

Q. Do you mean, Doctor, if a man collapses where there is an interval of time immediately before the collapse that was not taken up by exertion, that no matter how severe the exertion preceding that lapse of time of such collapse it is not attributable to the exertion? A. That is what I
20 mean, yes, sir.

Q. Regardless of how severe or how light that exertion might be? A. Yes.

Q. If there should be an interval of time between that exertion and the collapse or death? A. Yes.

Q. Is that it? A. That is right.

By Mr. Nies:

Q. If you had been his physician, Doctor, would
30 you have advised him to do that type of work in his position, and knowing his condition? A. I believe if I had been his physician and put that man to bed months and months before he died, if he did come to me and tell me his symptoms and I had suspected a heart condition, which I didn't even directly see, and I had put him to bed and denied him all forms of exertion, including walking around his own home, even going out of his front door, kept him flat on his back in bed, I say,
40 even without bathroom privileges, not even allow-

ing him to sit up in bed to eat his meals, I think the chances are that I might have prolonged his life. I still don't see in this picture any individual exertion that would have changed the picture, including the exertion around his own home which are sometimes more important. I would have cautioned his wife against arousing his ire over little details that cause any emotional nervous—that could put any emotional, nervous or physical strain on him and should be removed for two reasons—well, for three reasons: first, we are not quite sure we are playing safe. Secondly, because any organ that is damaged is obviously going to get the best opportunity to reconstruct its own tissues if it is put at complete rest and has to do absolutely nothing, and third because admitting that at times during large—a considerable exertion the heart will cave in. We don't care to take that particular chance, and there is a fourth reason you might add, which is that ordinarily exertion brings on symptoms that are uncomfortable even though it does not advance the damaging process in that heart at all and the patient is more comfortable.

Q. Well, then, you feel that exertion hastened his death, is that right? A. There is no—certainly no individual exertion, in my opinion.

Q. Well, any exertion would hasten a man's death, that particular man's death if he was suffering from the condition that you have described, isn't that true? A. It could have, but I don't think it did.

Q. But you do subscribe to the fact that exertion can cause strain and hasten a man's death or accelerate it? A. If this man had died carry-

ing the pails or mounting stairs, I would not be testifying on this case.

Mr. Nies: That is all.

Redirect examination by Mr. Rhinehart:

10

Q. Doctor, in a case of death from disease alone, if I understand your previous testimony correctly, the heart reaches a point where it cannot supply sufficient blood for the carrying on of any activity, is that correct? A. Well, I have to go a little further in this—in your answer because we haven't got here a picture of a coronary attack, which is a little bit different in its machinery. You have here a long lasting chronic degenerative disease with a heart working against a high blood pressure, and gradually coming to a point where it can't work any more, and that point is reached invariably and inevitably so with the stopping of the heart in this case, and just as I say, the inevitable point with that heart is ultimately reached regardless of effort or anything else.

20

Q. Doctor, you are speaking of the heart working against high blood pressure. Do you compare the relation—do you compare the relative importance of the strain imposed upon the heart by the high blood pressure and the strain imposed by walking or perhaps even by the effort of just standing erect? Which is correct? A. Well, of course, the work against the high blood pressure is the thing that does the damage. May I enlarge again a little bit? As I was coming to say, in deaths of this type you haven't got an abrupt physiological anatomical change in the structure of the heart as you have with your coronary. You

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have a more complicated picture. You got your nervous mechanism that regulates the beat of the heart. That becomes worn out, the muscle fibers become worn out, the valves become worn out so they can't properly close—control the exit and entrance of blood into the various chambers of the heart. You get—they probably all wear out at the same moment and all quit at the same moment; just which one is preponderant, I don't know, because, after all, we can't look in and see these things. We have to speculate on the basis of autopsy findings and clinical analysis up to that particular point. 10

Q. You say that the—I will withdraw that.

As I understand it, then, just because a man happened to be standing erect instead of sitting down at the time he died from heart trouble, you would not say that because he was standing that exertion caused his death. Is that so? A. No. We have to draw a line somewhere. I don't think it is material to any case whether a man is lifting ten pounds or fifty, but you have got to draw a line somewhere. Obviously lifting a lead pencil off a desk is not sufficient exertion to produce a heart attack, nor is standing still, nor taking—putting on your trousers or taking them off. You have to draw a line somewhere. I think that has got to be determined in each individual case more or less. Does that answer your question? 20 30

Mr. Rhinehart: I think so. I think that is all.

The Court: That is all, Doctor.

(Witness excused)

The Court: Do both sides rest? 40

Mr. Nies: Yes, sir.

The Court: I will reserve decision and announce my decision on Friday, October 6th.

10 (Whereupon an adjournment was taken to October 6, 1944.)

Certificate of Deputy Compensation Commissioner.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of these proceedings as taken before me, at the time, place and date hereinbefore set forth.

20 JOHN M. KERNER,
Deputy Compensation Commissioner.

Certificate of Shorthand Reporter.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of these proceedings as taken stenographically by me, at the time, place and date hereinbefore set forth.

30

JACOB BAER,
Certified Shorthand Reporter.

40

Decision.

THIRD DAY

October 6, 1944.

[APPEARANCES AS BEFORE]

The Court: The burden of proof in this case, as in all compensation cases, is upon the petitioner to establish the essential allegations of her petition by the greater weight of evidence in order to entitle her to an award. 10

After careful consideration of the testimony, the stipulations of counsel and the proofs adduced, I am of the opinion that the petitioner has not sustained the burden of proof with which she is charged, and I find and determine that on the basis of reasonable probabilities the petitioner has not established that the decedent met his death as a result of an accident arising out of and in the course of his employment. Where the medical testimony is in dispute it becomes necessary for me to accept the view and theory which to me appears to be the more reasonable or probable, and viewing the case in such a light I must conclude that on the question of causal relationship the proofs overwhelmingly predominate in favor of the respondent. 20

Therefore the petition is dismissed. 30

Mr. Nies: May I have an exception, Your Honor?

The Court: Let it be noted on the record.

I am returning the autopsy record together with the subpoena to the petitioner's attorney. I am keeping the death certificate in the file.

40

Certificate of Deputy Compensation Commissioner.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of these proceedings as taken before me, at the time, place and date hereinbefore set forth.

JOHN M. KERNER
10 Deputy Compensation Commissioner.

Certificate of Shorthand Reporter.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of these proceedings as taken stenographically by me, at the time, place and date hereinbefore set forth.

JACOB BAER
20 Certified Shorthand Reporter.

30

40

Exhibit P-3.

Form AC 30 10M 7-43 Ham Safety 24 Amber 67

2493

CITY OF NEWARK, N. J.

(Seal)

OFFICE OF

HARRY S. REICHENSTEIN, City Clerk

DEPARTMENT OF PUBLIC AFFAIRS

JOHN A. BRADY, Director

10

I, HARRY S. REICHENSTEIN, City Clerk of the City of Newark, Essex County, State of New Jersey, do hereby certify that the following is a true and correct transcript from the Record of Deaths in my office.

20

1. PLACE OF DEATH
   City of Newark, N. J. No. Sherwin Williams Co. St. Factory

2. FULL NAME Charles Edward Wehrle Sr.
   (a) Residence No. 1157 Clinton St. Ave.
   Length of Residence in city where death occurred yrs. mos. ds. How long in U. S., if of foreign birth? yrs. mos. ds.

30

PERSONAL AND STATISTICAL PARTICULARS

3. Sex—Male. 4. Color or Race—White.

5. Single, Married, Widowed or Divorced—Married. 5a. If married, widowed or divorcer—Husband of Minnie (or maiden name) Wife of Fischer.

6. Date of Birth—Jan. 14, 1892.

7. Age—Years, 51; Months, 8; Days, 20. If Less than 1 day—hrs. or min.

40

Exhibit P-3.

8. Occupation of Deceased

(a) Trade, profession or particular kind of work—Foreman.

(b) General Nature of Industry, business, or establishment in which employed or employer

10 ....

(c) Name of employer..........

9. Birthplace—Newark, N. J.

PARENTS

10. Name of Father—Charles E. Wehrle.

11. Birthplace of Father—Germany.

12. Maiden Name of Mother—Mary.

20 13. Birthplace of Mother—Germany.

14. Informant—Minnie Fischer Wehrle. (Address) above.

15. Place of Burial Cremation or Removal—Holy Sep. Cem. Date Oct. 7, 1943.

16. Undertaker—N. J. License No. 438. (Address) Henry K. Manger.

30 17. Received—10-5-43 19

MEDICAL CERTIFICATION

Date of Death—Oct. 4, 1943.

I HEREBY CERTIFY, That I attended the deceased from...19..to..........19...that I last saw h.. alive on......19...and that death occurred on the date stated above, at.................m.

40

Exhibit P-3.

Duration

Immediate cause of death—Dead on ....

arrival to hospital. ....

Due to Hypertensive cardio vascular ....

Due to renal disease ....

Other Condition.......................... 10

(Include pregnancy within 3 months of death)

PHYSICIAN

Underline the cause to which death should be charged statistically.

Major findings:

Of operations..........

Of autopsy as above. 20

If death were due to external causes fill in the following:

Accident, suicide, or homicide (specify)........

Date of occurrence..........

Where did injury occur?............

(City or Town) (County) (State)

Did injury occur in or about home, on farm, in industrial place, in public place?...........

While at work?......Means of injury.......... 30

Signature C. G. Berardinelli A. M. E. (M. D. or other)

Address 92—8th Ave.

WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said city this 9th day of March A. D. 1944.

(Seal) Harry S. Reichenstein 40

Exhibit P-1.

(9/28/44)

F2 2M 11-42 CME 30599

FROM ST. JAMES HOSPITAL

Oct 4 1943

10

"When in the said county, any person shall die as a result of violence, or by casualty, or by suicide, or suddenly when in apparent health, or when unattended by a physician, or within twenty-four hours after admission to any hospital or institution, or in prison, or in any suspicious or unusual manner, or under any of the above circumstances in any institution located in such county, maintained in whole or in part at the expense of the

20 State or said county, the police department of the municipality in which such person died, or the superintendent or medical director of the institution in which such person died, or the physician called in attendance, shall immediately notify the office of the chief medical examiner of the known facts concerning the time, place, manner and circumstances of such death." Chapter 106, Laws of 1927.

To Chief Medical Examiner of the County of

30 Essex, N. J.

Statement and particulars of the Death of Wehrle, Charles Edward Sr.

Residence—1157 Clinton Ave

Age—51 years....months....days....

Color—W Occupation—Foreman Painter

Single, Married or Widowed—Married

Place of Birth—U. S. A.

40 Father's Name............

Father's Birthplace............

Exhibit P-1.

Mother's Name...........
Mother's Birthplace...........
How long in United States............
How long in State....City....
Nearest Relative—Wehrle
What Relative—His wife 10
Admitted 4th day of Oct 1943
At 1 05 o'clock A. M.
By (State whether by Ambulance or Friends)
Smith & Smith Ambulance,
Joseph Nyman Driver 334 Elm St.
From (State whether from a precinct or a residence, and give the Street and number)
Sherwin & Williams Paint Co.
Brown St & Lister Ave 20
Admitted by Alex Lebo M. D.

Suffering from the following symptoms: (State whether from natural causes or from shock (conscious or unconscious) due to injuries, and if so, give name, place, date, number, character and extent of injuries, always stating where indicated, whether right or left.)

Pat. was dead on arrival to the hospital at 1 05 A. M. Oct 4, 1943. The ambulance driver (name above) & personnel mgr Mr. Thomas De Castro 30 123 Jefferson St Belleville give the information that pat. complained of pain in his heart. He dropped unconscious the manager called Smith ambulance at 12 30 A. M. Pat. has not regained consciousness.

Injuries said to have been received (state when, where, how by what means or persons received; also whether accidental or homicidal; in falls, the distances, location and place, in burns and scalds, the circumstances attending the same, in runover 40

Exhibit P-1.

cases, the line of street car, railroad, or conveyance; in weapons, the character of the same, &c., &c., always giving such information as will lead to an accurate knowledge of the case and facilitate judicial inquiry and justice.)

(State name, date, place, character, and results of
10 any operation or amputation performed.)

Death took place on the 4th day of Oct 1943, at 1 05 o'clock A. M.

The immediate cause of death being...........

Remarks: (State here any important facts not embodied in the above statements)

Alex Lebo M. D.
House Surgeon Physician or Officer of Hospital

20

F 4 5M 5-43

OFFICE OF THE CHIEF MEDICAL EXAMINER
Of the County of Essex, N. J.

Case No. C24-201538

MEDICAL EXAMINER'S REPORT OF AUTOPSY: ("If the cause of such death shall by examination be established to the satisfaction of the medical examiner in charge, he shall file a report thereof in
30 the office of the chief medical examiner. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by the chief or an assistant medical examiner.")

I hereby certify that I C. G. Berardinelli, have performed an autopsy on the body of Charles Edward Wehrle Sr. at Mullin's Morgue on the 4th day of October 1943 (11:45) A. M.—10¾—hours after the death, and said autopsy revealed Dead

40

Exhibit P-1.

on arrival at hospital; hypertensive cardiovascular-renal disease

C. G. Berardinelli, M. D.
Assistant Medical Examiner

Chief Medical Examiner

10

SYNOPSYS OF HISTORY

(If a Medical Examiner's Report of Death is attached do not write in this space.)

PRESENT AT AUTOPSY
IDENTIFICATION

Approximate age: 51 Height: 5′–11½″

Hair: Brown Sex: Male Color: White

20

Weight: Eyes: Grey

Identified as the body of:
By

In presence of:

Specimens taken:

PATHOLOGICAL-ANATOMICAL SUMMARY

PRIMARY CAUSE OF DEATH

30

SECONDARY OR TERMINAL LESIONS

HISTORICAL LANDMARKS

40

Exhibit P-1.

Case No. 30599

AUTOPSY PROTOCOL

A. EXTERNAL EXAMINATION

1. CLOTHING

10 2. FRAME, NUTRITION, SKIN, RIGOR, LIVIDITY, DECOMPOSITION, IDENTIFICATION MARKS MUSCLES, BONES, JOINTS & ANOMALIES

White adult male body, cold, symemetrical, nutrition good, reddish purple postmortem hypostasis; no identification marks; no anomalies; marked cyanosis of face and finger tips; muscles, bones and joints normal; rigor mortis firm.

3. EYES Normal

20 4. MOUTH

Upper teeth replaced by plate; lower teeth mostly all missing. Tongue behind gums White frothy foam in mouth.

5. GENITALS

Normal

6. MARKS OF INJURY

None

30 Case No. 918

AUTOPSY PROTOCOL

B. INTERNAL EXAMINATION

TOPOGRAPHY OF ABDOMEN

7. PANNICULUS, DIAPHRAM, GENERAL ABDOMINAL TOPOGRAPHY AND LESIONS

Panniculus, 1–1½″, dark lemon yellow; diaphragm 4th & 5th topography normal; no

40 lesions

Exhibit P-1.

1. THORAX

8. TOPOGRAPHY
Normal

9. PLEURAL CAVITIES
Left pleural cavity, no adhesions; no fluid
Right pleural cavity, no adhesions; no fluid 10

10. MEDIASTINUM, THYMUS, ETC.
Mediastinum normal, thymus replaced by fat, free and clear.

11. PERICARDIUM
Smooth, glistening, transparent; pericardial fluid increased.

12. HEART, RIGHT SIDE
Distended with dark fluid blood; myocardium, endocardium and valves normal, foramen closed. 20

13. HEART, LEFT SIDE In firm rigor apex of heart is found behind 6th intercostal space, middle axillary line; marked hypertrophy (3 cm. without trabeculae); no dilation; papillary muscles massive and columnae carneae broad and thick; endocardium and valves free and clear; no myocardial scarring; myocardium, in section is dark red in color. 30

14. AORTA Wide and elastic, with occasional placques of soft yellowish atheroma in lower portion of abdominal aorta.

15. CORONARY ARTERIES Open in normal place. Left coronary artery, lumen wide; occasional placque of intimal sclerosis, 1 cm. below orgin of anterior descending branch. Right coronary artery, lumen wide, free and clear.

16. LEFT HILUM—BRONCHI, PULMONARY VESSELS AND BRONCHIAL GLANDS Bronchi, mucosa 40

Exhibit P-1.

pale, free and clear; pulmonary vessles normal; bronchial glands not enlarged, free and clear.

17. Left Lung
Normal in size and conformation; visceral pleura glistening, free and clear; insection pinkish in color and crepitant; cut surface exudes small quantity of non-blood-stained frothy foam.

10

18. Right Hilum
Do

19. Right Lung
Do

20. Thoracic Cage and Parietal Pleura.
Normal; no injuries Parletal pleura glistening, free and clear.

20

11. ABDOMEN

21. Spleen
Large, thick and firm; capsule normal; in section, dark red in color; trabeculae increased and follickes indistinct.

22. Left Suprarenal
Normal

30

23. Left Kidney
Normal in size and conformation, firm; capsuele strips freely leaving moderately scarred, dark red surface; cortex normal thickness, markings mostly indistinct; pelvis and ureter not dilated, free and clear.

24. Right Suprarenal
Do

25. Right Kidney
Do

40

Exhibit P-1.

Case No.

26. Duodenum, Bile Ducts and Pancreas
Duodenum; bile ducts patent, free and clear. Pancreas, well packed parenchynia, free and clear.

27. Stomach and Esophagus
Stomach, distended with cheesy fluid with milk curds; mucosa moderately congested; sour odor.
Esophogus, normal.

28. Liver and Gall Bladder
Liver, normal in size and conformation; Capsule normal; surface smooth, markings well distinct; in section, dark brownish—ochre in color with moderate nutmeg appearance.
Gallbladder, partially distended with light green bile; mucosa normal.

29. Male Gu Organs—Bladder, Prostate, Penis, Tests and Seminal Vesicles
Bladder practically empty; mucosa normal; other structures normal.

30. Female Gu Organs—Bladder, Uterus, Tubes, Ovaries, Vulva and Vagina

31. Abdominal and Pelvic Cavities
Dry, free and clear. Psoas muscles, free and clear.
Peritoneum glistening, transparent, free and clear.

32. Small Intestine
Normal.

33. Large Intestine
Normal; appendix, retrocaecal, free and clear.

10
20
30
40

Exhibit P-1.

III. HEAD

34. Scalp
Dry, free and clear. No injuries.

35. Calvarium
Normal. No injuries.

10 36. Dura Mater
Normal

37. Cerebrum, Pia-Arachnoid, Cortex, Parenchyma, Basal Ganglia, Ventricles and Basal Vessels
Marked pia-arachnoid edema and vessels of leptomeninges engorged with blood; other structures, free and clear.

38. Pons, Cerebellum and Medulla
20 Normal.

39. Skull and Accessory Sinuses
Skull normal; base symmetrical, free and clear; sinuses normal.

40. Spine and Spinal Cord
Normal.

IV. ORGANS OF MOUTH AND NECK

41. Buccal Vavity, Nasopharynx, Pharynx and
30 Esophagus

42. Larynx, Trachea and Thyroid

V. BONES AND JOINTS

43. Bone, Marrow, Bones and Joints

C M E
30599

40

Exhibit P-1.

TOXICOLOGICAL REPORT

Lab No 13598

Case of Charles Edward Wehrle Sr.

Organs used for analysis
Brain

10

Results.

The toxicological examination of the brain, gave the following results.

Brain (500 G. M.)
Ethyl alcohol—*Trace*

E.

Albert E. Edel
County Toxicologist

20

October 15, 1943.

30

40

Opinion of New Jersey Supreme Court

(Filed October 31, 1945.)

NEW JERSEY SUPREME COURT

No. 231—October Term, 1945.

10

Minnie Wehrle,
Petitioner-Defendant,
v.
Sherwin Williams Company,
Respondent-Prosecutor.

20

Submitted October , 1945. Decided , 1945.

On Certiorari

From the proofs in this case submitted, it appears that decedent met his death because of disease and not because of an accident.

For petitioner-defendant, William F. Nies, William L. Vieser

30

For respondent-prosecutor, John W. Taylor

Before Justices Case, Bodine and Perskie

Bodine, *J.* This is a workmen's compensation case. The bureau dismissed the petition because the petitioner had failed to prove that the deceased died of an accident arising out of and in the course of his employment. The Court of Common Pleas reversed and certiorari was allowed.

40

The decision of this case turns upon a finding of fact from the medical proofs. Petitioner first called a physician who had performed an autopsy. The deceased suffered from a chronic disease of the heart. On the night of his death, he performed his usual tasks. He was foreman of a paint plant and a shader of color. Before he went to work he complained of indigestion. He dosed himself with Eno salts and felt better. He repeated the treatment at the plant. Having mixed the color he rested for twenty-five minutes and then went to the testing room. To reach the room he was obliged to walk from 100 to 125 feet, then through a tunnel up six steps to a landing, then up another flight and continue about 125 feet to the testing room. Shortly thereafter, he was found dead with the flask of color to be tested untouched.

This doctor testified that any kind of exertion could have accelerated his death. There was no thrombosis. The only thing found in the autopsy was that he died of cardiovascular heart disease.

Another physician called by the petitioner testified that the work contributed to his death. But on cross examination, he said that the disease was so far progressed that the deceased might have died from it at any time. There was no evidence of any great exertion.

It does not seem to us that there was any evidence of death by accident. The fair inference is that the deceased might have died at any time from disease. The only proof of exertion before the death was walking to the testing room and it occurred before any test was made.

We can only agree with the physician called by the respondent that there was no causal relationship between the death and the employment. The employer cannot be held liable because the employee fails to procure treatment for a chronic heart condition. Death would have occurred without the employment. From the proofs it is a fair conclusion that death was the result of the disease and was not accidental. In fact, there was no accident. 10

The judgment of the Court of Common Pleas will be reversed, and the judgment of the bureau will be affirmed.

Justice Perskie dissents.

20

Order of Reversal and Remittitur

NEW JERSEY SUPREME COURT

(Filed November 8, 1945.)

MINNIE WEHRLE, *Petitioner-Defendant*, *v.* SHERWIN WILLIAMS COMPANY, *Respondent-Prosecutor.*	On Appeal

30

This cause having been duly submitted and argued on Briefs by John W. Taylor, Esq., attorney for Prosecutor, and William F. Nies, 40

Esq., attorney for Defendant, and the court having inspected the record and judgment of the Essex County Court of Common Pleas, and considered the reasons assigned for setting said judgment aside, and being of the opinion that the judgment of the Essex County Court of Common Pleas should be reversed and the judgment of the Workmen's Compensation Bureau affirmed, it is

Ordered that the judgment of the Essex County Court of Common Pleas in this cause be and the same hereby is reversed in accordance with the opinion of this court, with costs; and it is

Further ordered that said record be remitted to the said Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of this court.

Rule entered November 8, 1945

On motion of
John W. Taylor, Attorney for and of Counsel with Respondent-Prosecutor.

Notice and Grounds of Appeal

NEW JERSEY SUPREME COURT

(Filed December 4, 1945.)

MINNIE WEHRLE, *Petitioner-Prosecutor,* *v.* SHERWIN WILLIAMS COMPANY, *Respondent-Defendant.*	On Certiorari

10

To SHERWIN WILLIAMS COMPANY,
Respondent-Defendant,
and
JOHN W. TAYLOR, its attorney:

20

PLEASE TAKE NOTICE That Minnie Wehrle, petitioner-prosecutor, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above stated cause on the following grounds:

1. That the New Jersey Supreme Court erred in reversing the judgment entered in the Essex County Court of Common Pleas and in giving judgment in favor of Sherwin Williams Company, respondent-defendant, and against the said petitioner-prosecutor, whereas, the Supreme Court should have affirmed the said judgment of the Essex County Court of Common Pleas.

30

WILLIAM F. NIES,
Attorney for Petitioner-Prosecutor.

Due and legal service of copy of the within notice and grounds of appeal is hereby acknowledged this 3rd day of December 1945.

40

J. W. TAYLOR
Attorney for Sherwin-Williams Company

New Jersey Court of Errors and Appeals

FEBRUARY TERM — 1946

MINNIE WEHRLE, *Petitioner-Appellant,*	On Certiorari
vs.	On Appeal from New Jersey Supreme Court
SHERWIN WILLIAMS COMPANY, *Respondent-Appellee.*	

BRIEF FOR PETITIONER-APPELLANT

Statement

This is an appeal from a judgment of the New Jersey Supreme Court reversing a judgment of the Essex County Court of Common Pleas awarding compensation to the petitioner as the widow of Charles E. Wehrle, Senior. The Common Pleas in turn had reversed the action of the Workmen's Compensation Bureau in dismissing the petition.

The decedent suffered a heart attack while at work, following physical exertion incident to his employment which aggravated a pre-existing heart condition and culminated in his immediate death. The petitioner filed on behalf of herself and her son.

The Workmen's Compensation Bureau denied petitioner's claim and entered judgment on behalf of the respondent, on the ground that petitioner had not sustained the burden of proving

that the death occurred as the result of an accident arising out of and in the course of the employment.

On appeal the Common Pleas reversed and awarded compensation benefits to the petitioner. In an opinion by Judge Dallas Flanagan (p. 33) the Court held:

> "Decedent's efforts in good faith to discharge the duties of his employment advanced the time of his death and controlled the time and place of its occurrence.
>
> "The question presently presented to the Court may be stated thus: From the rational hypotheses tendered by all the evidence, is it by a fair preponderance of probabilities, according to common experience of mankind, the most probable inference that the effort which decedent made in the discharge of the duties of his employment on the night of his death was a cause contributing to his death to such extent that his death without it would not have occurred at the particular time and place it did occur?
>
> "This question upon all the evidence presented should be answered in the affirmative" (S. C. p. 38).

A writ of certiorari was taken to the New Jersey Supreme Court. In an opinion by Mr. Justice Bodine, that court reversed the Common Pleas.

While the opinion is printed at length in the State of Case, the decision was based upon the finding that "the disease was so far progressed that the deceased might have died from it at any time. There was no evidence of any great exertion. It does not seem to us that there was

any evidence of death by accident. The fair inference is that the deceased might have died at any time from disease."

The opinion further states: "The employer cannot be held liable because the employee fails to procure treatment for a chronic heart condition. Death would have occurred without the employment." Mr. Justice Perskie dissented.

Facts

The decedent was employed by respondent for some thirty years (p. 51), and at the time of his death on October 4, 1943 was a foreman working on the night shift (p. 52). His particular duties required that he mix various colors to produce a pigment of the desired hue and he was known as a shader.

There is no question that decedent suffered from a heart condition of some duration, although he had suffered no previous heart attacks. He had broken his ribs some six or seven years prior to his death (p. 54), since when he had suffered from spells of indigestion which were fairly frequent and for which he was accustomed to take Eno.

The death occurred on a Sunday night (or early on Monday morning), and this was the first working day after the week-end vacation. At six o'clock in the evening he complained of feeling ill and took some Eno (p. 56). He then lay down until nine o'clock (p. 57), and did not eat dinner (p. 60). At 9:40 P. M. he left his home for the purpose of going to work. Some of his fellow-workmen testified that they met him on the bus going to work and that he arrived at about 11 P. M. His activities after he reported for work

at eleven P. M. were testified to by several witnesses. It is undisputed that after he reported to work he proceeded by elevator to the fourth floor (p. 65), then went into the foremen's office, then came out to the washroom to change his clothes (p. 65). Apparently he went into the office for the purpose of taking more Eno (pp. 110-111). After changing his clothes he again went to the office apparently to get orders from his superior as to the night's work, then came out and started to work (p. 66). From the office he proceeded downstairs to the filling department, then came back again and proceeded to get his colors ready (p. 66).

His actual work of mixing and shading colors was done on the fourth floor and is called the "half-floor". After mixing the colors he was required to go to the fifth floor in the next building for the purpose of testing them. The shading of colors was done in tanks set flush with the floor on the fourth floor.

On the night in question, after starting to work at the tanks, the decedent walked some forty feet to the end of the room for the purpose of getting colors. These colors were in five gallon pails of paint weighing from thirty-five to fifty pounds each (p. 67). He carried two of these pails of paint the length of the room, one at a time (pp. 67, 85). He then placed the pails on a scale in order to weigh them and ladled the colors from the pails with a spoon. In order to do this he had to lean over and bend down to the tanks, and he was seen to perform this operation some seven or eight times, if not more (p. 68).

After performing this mixing operation in this manner (p. 86), he waited in the office some twenty-five minutes (p. 86). Then he took sam-

ples of the paint in small half pint cans and went upstairs to the testing room in order to test the paint which he had mixed (pp. 68-69). From the tanks he was required to walk up one flight of steps, then through a corridor approximately one hundred to one hundred and twenty-five feet long, then up another flight of steps, then through another hall about one hundred and twenty-five feet long (pp. 70-71). This course took him through a bridge to the next building where the testing room was located on the top floor. This operation he performed 2 or 3 times (p. 69).

It was testified that he was walking fast at the time (p. 72), and that while he always walked with a quick walk, on this particular night he walked a "little bit faster" than usual (p. 72).

The reason for his haste was likewise testified to. None of the other workmen who were waiting around could start their work until the decedent had completed the shading and mixing of the colors inasmuch as after the week-end lay-off, the tanks were empty and the operations could not be started by the other workmen until the decedent had finished his particular job. Thus, the witness Stern said that he walked faster "so he could get started — so the men downstairs could get started after he gets the batch done — so we get started to work downstairs" (p. 72). He likewise testified that the others could not work until decedent had completed the mixing operation (pp. 72-73).

There is discrepancy in the testimony as to whether decedent went upstairs in this manner only once or more than once, the witness Stern testifying that he went 2 or 3 times. At any rate, after his last trip he was gone about fifteen minutes when he was found lying on the floor

of the testing room stretched out with foam at his mouth and his face blue (p. 77). The can of paint which he had been seen to carry upstairs (p. 115) was found on the bench in the testing room (p. 78). Decedent died within five minutes thereafter, at 12:10 P. M.

The witness Stern was asked whether decedent's work was strenuous. His answer was "Yes, to a certain extent it was — he had to see that all the fellows had work," and that in addition to carrying a five gallon can of paint he had to run up and downstairs — "that is a lot of work to do, going up and down" (pp. 83-84).

The witness St. Amand testified that the decedent was a shader and had to carry pails weighing about fifty pounds for a distance of twenty to twenty-five feet and to place them on scales, as part of his regular duties (p. 95).

The witness Stangreciak saw the decedent at 11:30 P. M. in the office. He went to see the decedent to find out whether the batch of paint was ready for him. Decedent told him it was not ready yet but would be soon. He likewise said that he felt awfully bad. The witness next saw him after he was dead (pp. 106-107).

The witness Robak was the elevator man who took decedent upstairs when he reported to work. He later saw decedent working in the sample room and saw him taking samples to the fifth floor. He testified that decedent took the stairs upstairs (p. 112).

From all of this it is undisputed in this case that the decedent reported for work at eleven o'clock and was not feeling well. Nevertheless he proceeded with his duties which involved carrying pails of paint of some weight for the length of the rooms, placing them on scales, dipping

paint from them into the tanks, bending down and leaning over repeatedly to perform this operation; then later bending down again to take out samples of the paint from the tank, taking these to the testing room on the fifth floor, an operation requiring him to walk a considerable distance and up two flights of stairs. He was walking faster than usual and was under the emotional strain of having to get his own work completed in order that the other workmen could start their night's operation. These workmen, as it was testified, were in fact, waiting for Wehrle to finish and at least one of them prodded him with the question as to when the paint would be ready. It is likewise a fair inference that he was actually in the performance of his duties at the time he was stricken fatally. None of this is disputed.

Dr. Berardinelli, who performed the autopsy, testified that death resulted from a hypertrophy of the left heart and that there was some arteriosclerosis, an occasional placque of the intimal sclerosis, some coronary condition and disease of the coronary artery (pp. 128-131). He likewise said that people of this condition can die suddenly with or without any severe or slight exertion and that bending down is certainly exertion (pp. 127-128).

Dr. Kaufman testified that the decedent had a long standing hypertensive cardiovascular disease with hypertrophy of the left ventricle and involvement of the left coronary with sclerotic placques (p. 131). Answering a hypothetical question embracing all of the facts in the case, the doctor testified:

> "In my opinion the work that he did during that approximate hour (preceding his death) contributed to his death" (p. 133).

Dr. Kaufman stated that the additional burden of exertion which required more blood to that particular muscle created a condition that the blood vessel was unable to furnish that blood, and that this man died as a result of insufficiency of his circulation to the left ventricle (p. 133). The exertion which he says induced the death was "the exertion of climbing upstairs, of lifting pails that weighed approximately thirty pounds, walking back and forth and the additional necessity of going to the fifth floor" (p. 134). He further said that this man went to work at a time when he was sick and had a very bad heart, so that the additional exertion need not necessarily have been so great at that particular time, but that the exertion he underwent in the course of his duties was sufficient to induce his death, especially in the presence of a heart already badly diseased (p. 134). He stated definitely that this man in all reasonable probability would not have died except for the work and exertion which he was required to perform during the hour preceding his death (p. 135), and that while he might have died while going from his home to work, the fact remains that he did not die at that time but only after the exertion of the duties of his job, and "that contribution of work you can't deny" (p. 136). He says further that the man was sick and should not have worked and that if he had stayed in bed and undergone a complete rest he probably would have lived longer (pp. 140-141).

Dr. Olcott, called for the respondent, testified that he saw no causal relation between the death and any exertion as described on that night (p. 147). His testimony, however, leads to the irresistible conclusion that he was applying a test

which was more a legal conclusion than a medical or factual conclusion. Moreover, the legal conclusion which he applied and which forms the basis of his answers, is not in accord with the rule expressed in our cases.

He testified that "roughly one-half of sudden heart failures occur during exertion, the other half occurs during periods of non-exertion" (p. 148).

His testimony contains two contradictory answers as to what he considers to be exertion:

> "Now when I say exertion, I mean either mental or physical exertion or emotional stress" (pp. 147-148).
>
> "Now when I say exertion, I mean visible exertion such as a man undergoes when he does work" (p. 148).

His whole conclusion is based on his own belief that unless the heart collapse occurs simultaneously and during the course of the exertion, it is not a contributing factor to the death and that if any interval of time elapses, the exertion must be completely ignored.

"I have come to the belief that even a short interval of five minutes would preclude the drawing of such a conclusion that it had occurred as the result of exertion" (p. 148). In other words, Dr. Olcott says that the heart should have given out during the period of exertion.

On page 152 he says that what he means is that no matter how severe the exertion, if there is any interval of time before the collapse not taken up by exertion, the collapse is not attributable to the exertion, and he frankly says that if this man had been carrying the pails or walking up the stairs at the moment he col-

lapsed, his conclusion would be different and he would not be testifying in the case (p. 154).

He was asked whether the work or strain which the decedent underwent during his last hour would cause a greater pressure on the heart and blood vessels and he answered "some of it would and some of it would not" (p. 151). He says further that he does not think that there was sufficient "extra" exertion immediately preceding this collapse (p. 151). Yet he testified that if the man had been in bed and had undergone complete rest his life might have been prolonged (pp. 152-153).

We will hereinafter argue that these conclusions drawn by the doctor are not in accordance with the tests applied by the courts. The facts we have recited above, however, are undisputed by any testimony on the part of the respondent.

The Opinion of the Supreme Court

We are constrained to discuss several statements made in the opinion of the Supreme Court as the basis for its decision, and which we submit are not in accordance with the testimony or in harmony with the tests laid down by our cases.

The Supreme Court opinion finds:

> "The only proof of exertion before the death was walking to the testing room, and it occurred before any test was made."

This is not so. As the undisputed facts indicate, and as the Common Pleas found, the decedent before reaching the plant,

> "went about his usual work which was that of night foreman and paint shader. He was

under an urge to hurry as the work of the other men could not proceed until he had obtained the desired shade of color in the vats of paint by adding the necessary amount of color matter and testing the result.

> "After changing his clothes and leaving the washroom, decedent in doing his customary work had to walk from place to place, carry cans of paint weighing about 40 to 50 lbs. some 40 feet and bend up and down in dipping color with a small spoon from a container into a vat."

After this exertion, as the Common Pleas likewise found, decedent had to climb the two sets of stairs to get to the testing room where he was found dead.

> "The walking to the stairs at a rapid rate, the climbing of the stairs (in itself a major effort to one with heart trouble in an advanced and critical stage), the walk from the top of the stairs to the testing room, one effort on top of another, all under an urge to hurry, constituted an extended continuous strain, culminating as a contributory accelerating cause to the decedent's collapse."

We submit that the statement in the Supreme Court opinion that the only proof of exertion was walking to the testing room is not borne out by the admitted facts.

The Supreme Court opinion likewise finds: "There was no evidence of any *great* exertion." That, too, is not in accord with the facts, nor is it the correct legal rule as expressed by our cases. Whatever the degree of exertion, it was

too great for this decedent at this particular time. Our cases are replete with holdings that the degree of exertion is immaterial and compensation has been allowed in cases involving far less physical exertion than the case at bar, and even where there was no physical exertion as we shall hereafter point out.

The Supreme Court likewise found: "that the deceased might have died at any time from disease." We submit that if this is to be the test of liability, compensation would have to be denied in every case involving a pre-existing heart condition. For surely anyone suffering from a cardiac disease, particularly one of long standing, is subject to the ever present possibility that he *might* die at any moment. But that is not the test laid down by our cases. We are dealing in probabilities and not possibilities. The fact is that decedent did not die at any other moment, but only after the admitted exertion which he underwent as the result of his employment, and which was too great for his heart to withstand at that particular moment.

The Supreme Court opinion goes even further and says: "Death would have occurred without the employment." Again we say that decedent probably would have died at some time as a result of his disease, but the only inference possible from the testimony in this case is that he would not have died at this particular time had it not been for the exertion which he underwent. That is established by the medical testimony in the case. Even Dr. Olcott (respondent's witness) said that he could have prolonged decedent's life by prescribing a complete rest, *i. e.,* an absence of exertion. It follows that decedent's death was accelerated and hastened by the exer-

tion. This testimony the Supreme Court had no right to ignore. Both Dr. Olcott and Dr. Kaufman agreed, therefore, that without this exertion of the employment, decedent would not have died at the particular time of his collapse.

Dr. Berardinelli, the County Physician, who made the autopsy, is quoted by the Supreme Court as saying "that any kind of exertion could have accelerated his death." If that be true, though we submit that Dr. Berardinelli was expressing a general opinion not specifically related to the decedent, compensation should be allowed in this case. For if we agree that any kind of exertion could have accelerated his death, then it must follow that it was some kind of exertion that did accelerate his death, regardless of the degree of that exertion, and that is all that we claim.

The Supreme Court to reach its decision disregarded the testimony of Dr. Kaufman and agreed with the testimony of Dr. Olcott. However, Dr. Olcott did not deny that the decedent had undergone exertion immediately prior to his death. His sole conclusion was that some interval of time had separated the exertion and the death, and that the exertion was not simultaneous with the actual collapse. He readily agreed that if the collapse had occurred while decedent was walking up the stairs rather than after he had reached the top, he would then attribute the death to the exertion. That is the testimony adopted by the Supreme Court in reaching its verdict.

POINT I

Decedent's death occurred as the result of an accident arising out of and in the course of his employment.

The legal principles applicable to the within case are firmly established by a wealth of authority in this State and the cases are uniform in holding that the facts above set forth give rise to a compensable injury within the meaning of the act.

Thus it is held that the benefits of the act are not limited to those workmen who have suffered no previous physical impairment, nor is there any implied warranty of health or immunity from pre-existing disease on the part of the workmen. An employer takes an employee subject to his physical condition when he enters upon the employment, and subject to any condition which may develop during the term of his employment.

If a pre-existing condition is aggravated or set in motion by an injury occurring during the course of the employment, it is compensable notwithstanding that the accident is not the sole contributing cause to the injury or death.

Referring specifically to conditions of heart failure, it is well settled in New Jersey that the stirring into activity of a dormant condition of weakness or degeneration, by the performance of manual labor or a strain incident to the employment, as a result of which the culmination of the disease is hastened, is an accident for which compensation may be had.

Nor need the strain or exertion be unusual, or one out of the ordinary. The ordinary labor or the regular performance of duties incident to the employment is sufficient if it induces the final collapse. The degree of exertion has been held to be wholly immaterial and of no consequence, and it has been squarely held that compensation cannot be defeated by the absence of any unusual or extraordinary strain. No matter how greatly degenerated or weakened the heart may be, the test applied is that the exertion however slight, was too much for the heart *at that precise moment* and that it gave way under the strain. Indeed, compensation has been allowed when there was a total absence of physical exertion and the employee was subject solely to mental strain or emotional upset which induced the attack.

Neither need it appear that the collapse be simultaneous with the exertion. Compensation has been allowed where an appreciable interval has elapsed between the exertion or strain and the death from the heart failure.

All of the foregoing statements are culled directly from the cases which we hereinafter cite. Their applicability to the facts we have recited is manifest.

Only by disregarding the force of these decisions and only by ignoring the undisputed testimony in the case, can the respondent's contentions be justified. We submit that the injury is compensable and that the Court below was in error in not so holding.

The Bureau whose decision was upheld by the Supreme Court, misconceived the rule as to the burden of proof required in this case, in finding that the burden had not been met by the peti-

tioner. It is well settled that under the situation here presented the burden of proof was on the respondent to establish that the death occurred through some other cause than the accident established by petitioner's proofs. If the respondent contended that decedent's death was due solely to the degenerative process, and was not hastened or aggravated by reason of the exertion incident to decedent's employment on the night of the accident, that burden was upon the respondent. See *Quinn* v. *Becker,* 19 N. J. Misc. 508, 513; *Golub* v. *Lobel's Kiddie Shop.* 19 N. J. Misc. 648, 654; *Osborne* v. *Belmar,* 21 N. J. Misc. 24.

Many cases are expressive of the rule that the benefits of the Workmen's Compensation Act are not limited to injured workmen who have suffered no previous physical impairment. The Act was intended to apply equally to those who may be in a subnormal state of health and those in normal health, and the provisions of the Act must be extended alike to weak and sick as well as to the strong and able, so long as those of either class sustain a compensable accident. It is no answer to say that the disability might not have occurred to a stronger or more healthy person, or that the death might not have occurred except for the prior condition of poor health. See *Molnar* v. *American Smelting Co.,* 128 N. J. L. 11; *Markiewicz* v. *International Milk Company,* 19 Misc. 57; *Golub* v. *Lobel's Kiddie Shop, supra; Hall* v. *Doremus,* 114 N. J. L. 47; *Hertzberg* v. *Kapel,* 19 N. J. Misc. 201; *Cooke* v. *Cooke and Cole,* 19 N. J. Misc. 581; *Zehrer* v. *Robertson,* 17 N. J. Misc. 53; *Moore* v. *City of Paterson,* 18 Misc. 201; *Geltman* v. *Reliable,* 128 L. 443; *Yawdashak* v. *Somerville,* 20 Misc. 412; *Bernstein* v. *Kelly,* 115 L. 500; *Ciocca* v. *National*

Sugar Refining Company, 124 L. 329; *Riboletti* v. *United,* 18 Misc. 219; *Wallace* v. *American Cyanamid Company,* 20 Misc. 224; *Naemi* v. *Thomas,* 20 Misc. 197; *Brown* v. *Braun and Stuart,* 20 Misc. 404; and other cases too numerous to cite.

Compensation is not based on any implied warranty of health or immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited to activity by accidental injury. An employer takes his employees with their mental, emotional, glandular and other physical defects. See *Gorman* v. *Miner Edgar Chemical Co.,* 16 Misc. 17; *Golub* v. *Lobel's Kiddie Shop, supra; Hertzberg* v. *Kapel, supra,* and other cases hereinabove and hereinafter cited.

Where a diseased bodily condition is aggravated or accelerated by the accident, or where the culmination of the disease is hastened by reason of the accident, there is a compensable injury and an accident within the meaning of the Act. See *Voorhees* v. *Smith,* 86 L. 500; *Bernstein* v. *Kelly, supra; Graves* v. *Burns,* 10 Misc. 667; *Lundy* v. *Brown,* 93 L. 107; *VanMeter* v. *Morehouse,* 13 Misc. 558; *Matthews* v. *Ranallo,* 117 N. J. L. 148; *Doughtery* v. *Miller,* 117 L. 454; and other cases hereinafter cited.

Our jurisdiction is replete with cases holding that where a previous condition of weakness or disease is aggravated or accelerated by a strain, the resulting injury is compensable as an accident. See, in addition to other cases hereinbefore cited — *Cohen* v. *Kafer,* 130 L. 146; *Pisko* v. *Nelson,* 4 N. J. Misc. 154; *Paterson* v. *Smith,* 126 N. J. L. 571; *White* v. *Lareter,* 37 N. J. L. J. 175.

As will be demonstrated through the citation of cases hereinafter, the strain or exertion inducing the injury need not be unusual or extraordinary, nor need it be the primary cause of the disability or death, so long as it contributes to the hastening of the culmination of the disease. It has been repeatedly held that the degree of exertion is wholly immaterial.

The case of *Yawdashak* v. *Somerville Iron Works,* 20 Misc. 412, contains an excellent review of the authorities. The decedent's job was to load bars of pig iron on a truck which he was then required to push along a track to its destination. While so engaged he felt a tightening sensation in his chest. He rested for ten minutes, drank some water, then started to push the truck when he fell dead. Death was found to be due to a coronary occlusion. The Court held that the accident was compensable notwithstanding the respondent's contention that the work done at the time of the accident was not "hard work" or "out of the ordinary" and "not as heavy as work done by the decedent previously." The Court disposed of the conclusion drawn by Dr. Olcott in the case at bar, by saying:

> "The testimony of Dr. J. Allen Yaeger is far from convincing. His attempted explanation that there was no casual connection between the effort expended by the decedent and his death, because the effort was not unusual, has not been held tenuous by our courts. I need hardly cite the numerous authorities which have held that this does not correctly form the basis of compensability."

The true test to be applied in cases of this nature is stated by the Court as follows:

> "The decedent's heart previously weakened by the damage done at the time of the onset was further aggravated and accelerated by his endeavor to complete his daily work. *The effort and strain which he then attempted was greater than that which his heart was, at that moment, able to withstand.* This clearly is a compensable condition."

The Court further held as follows:

> "To attribute the coronary occlusion solely to the degenerative process which, apparently by coincidence, occurred at a time immediately following a considerable degree of physical exertion on the part of the decedent, but, according to the respondent, was wholly unrelated to the unemployment is to ignore the more reasonable and more probable explanation presented by the petitioner's evidence. It is to be borne in mind that the test under our cases is probability and not absolute medical certainty. *Jackson* v. *Delaware, Lackawanna and Western Railroad Co.,* 111 N. J. L. 487; 170 Atl. Rep. 22; *Hercules Powder Co.* v. *Neiratko,* 113 N. J. L. 195; 173 Atl. Rep. 606; affirmed, 114 N. J. L. 254; 176 Atl. Rep. 198. Accordingly, I am constrained to accept the testimony and proofs of the petitioner in this regard."
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> "Nor need there be any exertion or stress out of the ordinary, where the performance of manual labor entails a strain upon an underlying diseased condition of the em-

ployee's anatomy, in consequence of which death occurs, *Molnar* v. *American Smelting and Refining Co.* 127 N. J. L. 118; 21 Atl. Rep. (2d) 213. (Opinion by Case, J.)

"Recognizing, as our cases do, that reasonable probability and not absolute medical certainty is the test to be applied in compensation cases, *Jackson* v. *Delaware, Lackawanna and Western Railroad Co., supra,* and all that is required for the petitioner to prevail is that the claimed conclusion from the facts be a probable or more probable hypothesis with reference to the possibility of other hypotheses, *Belyus* v. *Wilkinson Gaddis Co.,* 115 N. J. L. 43; 178 Atl. Rep. 181; affirmed, 116 N. J. L. 92; 182 Atl. Rep. 873, I am satisfied that the petitioner's evidence in the instant case more than meets the burden of proof which is hers.

"The real question involved in this litigation has recently received the attention of our Court of Errors and Appeals, as well as the Supreme Court. *Molnar* v. *The American Smelting and Refining Co.,* 128 N. J. L. 11; 24 Atl. Rep. (2d) 392; *Ciecwirz* v. *Public Service Electric and Gas Co.,* 128 N. J. L. 16; 24 Atl. Rep. (2d) 394; *Passafiume* v. *H. T. Heinz, Inc.,* 128 N. J. L. 27; 24 Atl. Rep. (2d) 394. Those decisions have reaffirmed the principles enunciated in the earlier cases 'that a compensable accident is made out upon a showing that there was a causal relation between the stress, strain and exertion occasioned by the petitioner's work and his eventual disability or death.' This particularly, where there existed an

underlying diseased or weakened condition of the heart. *Bernstein Furniture Co.* v. *Kelly,* 115 N. J. L. 500; 180 Atl. Rep. 832; *Hentz* v. *Janssen Dairy Corp.,* 122 N. J. L. 494; 6 Atl. Rep. (2d) 409; *Ciocca* v. *National Sugar Co.,* 124 N. J. L. 329; 12 Atl. Rep. (2d) 130. Nor is the degree of exertion of any consequence, so long as the performance of the required work caused a strain upon the heart. *Molnar* v. *American Smelting and Refining Co., supra; Niemi* v. *Thomas Iron Co.,* 20 N. J. Mis. R. 197; 26 Atl. Rep. (2d) 494; *Barcalow* v. *Board of Education of Borough of Caldwell,* 14 N. J. Mis. R. 718; 187 Atl. Rep. 32. However, whether the work the petitioner was doing be characterized as 'effort expended,' or 'extra strain,' or 'exertion of the moment,' so long as there was a causal relationship between the employee's work and his disability, then his disability was the result of an accident arising out of and in the course of his employment. *Ciecwirz* v. *Public Service Electric and Gas Co., supra.*"

In the case of *Ciecwirz* v. *Public Service Electric Co.,* 128 N. J. Law 16, the Supreme Court allowed compensation in a case closely paralleling the facts in the case at bar. The decedent collapsed while shovelling dirt from a trench, which was part of his regular duties. Death was found to result from a syncope due to cardiac disease; myocardial in nature. The argument was made that the decedent would have died in any event from his pre-existing heart condition and that the death could not, therefore, be called an accident.

The Court, in an opinion by Mr. Justice Perskie, held:

"That argument is based on the premise that the probabilities were as consistent with sudden death overtaking decedent at any time or at any place, and the fact that death did happen while he was at work on his job was merely coincidental. The preponderance of probabilities do not in our opinion support the argument made. * * *

"Drs. Sutton and Pavio were of the opinion that Anthony's death could have occurred from causes free from exertion, for examples, 'while he slept,' 'while turning in bed,' while 'sitting in' or 'getting out' of a chair, or while 'reading a newspaper.' Thus Prosecutor contends that 'whatever this man had been doing at the time of seizure the end result would have been the same.'

"If death could have happened under the suppositious circumstances, it could likewise have happened as it did while Anthony was engaged in the laborious and strenuous work of shovelling up soil. * * *

"We need hardly labor the point that we are not primarily concerned with suppositious circumstances under which Anthony could have died. Our primary concern is solely whether under the circumstances here exhibited respondent had properly established by a preponderance of probabilities her claimed right of compensation. * * *

"However the work Anthony was doing be characterized, whether it be as 'effort expended' or 'extra strain' or 'exertion of the moment,' so long as there was as here a causal relationship between his work (shov-

> elling up of soil from deep trench in an atmosphere of escaping gas) and his death, then his death was the result of an accident arising out of and in the course of his employment.''

Mr. Justice Bodine concurred in this opinion. We think the foregoing case controlling on the situation at bar.

In the case of *Cooke* v. *Cooke & Cole Silk Co.,* 19 Misc. 581, the petitioner, while lifting a warp loom into place felt pains in his chest. Sometime afterward he suffered a dizzy spell. The pains continued during that day and during the night. Notwithstanding, he reported for work the next day and during the course of his employment collapsed from a myocardial infarction resulting in his total disability. The Court found that at the time of the attack the petitioner was engaged in the performance of one of his usual tasks which was part of his regular work, and that there was nothing out of the ordinary in the exertion which he underwent.

The Court held as follows:

> ''On the subject of what constitutes an 'accident' within the intendment of the statute, it has been generally held that personal injury by accident may include strain. It seems hardly necessary to refer to citations and adjudications in support of a principle so universally accepted. And in the case of *Bernstein Furniture Co.* v. *Kelly,* 115 N.J.L. 500; 180 Atl. Rep. 832 (opinion by Mr. Justice Perskie in 114 Law 500, unanimously affirmed by the Court of Errors & Appeals in a per curiam opinion), the principle was ex-

panded to include cases involving strain of the heart, holding that an accidental strain of one's heart, even though the heart was previously weakened by disease, is a compensable injury.

"In *Hentz* v. *Janssen Dairy Corp.*, 122 N. J. L. 494; 6 Atl. Rep. (2d) 409, the leading case in New Jersey dealing with coronary occlusion in which recovery was allowed, Mr. Justice Bodine, who delivered the opinion for the Court of Errors and Appeals, cites with approval the case of *Clover, Clayton & Co.* v. *Hughes,* 3 B.W.C.C. 284, in which Lord Loreburn stated the rule as follows: '*I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary.* It is found by the county court judge that the strain in fact caused the rupture, meaning no doubt, that if it had not been for the strain, the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described * * *. *An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health.*"

We point out that the test here applied by Mr. Justice Bodine does not accord with the test applied in his opinion below. The Cooke case continues:

"Applying these accepted principles to the present case, I feel reasonably satisfied that the proofs herein meet with the required tests. While it is true that, at the time of the accident on the morning of April 13th, 1939, *Cooke was engaged in the performance of one of his usual tasks—that of assisting* in the lifting of a 300 to 350 pound warp beam into a loom, *which was part of his regular work, the resulting effect of such lifting on that occasion upon his heart was unusual and constituted an 'unlooked-for mishap or untoward event which was not expected or designed.'* It is of no consequence that the petitioner had lifted warp beams as a daily routine for many years prior to the day in question, some of which warps weighed considerably in excess of 350 pounds; what distinguishes the present lifting from the prior ones is the unusual and unexpected effect resulting therefrom; *the physical strain superinduced by the lifting at that precise moment was more than his heart could withstand.* That which distinguishes an accident from other events is the element of being unforeseen and unexpected. An accident is an occurrence which proceeds from an unknown cause, or which is an unusual effect from a known cause, and hence unexpected and unforeseen." (Italics ours.)

In the case of *Hentz* v. *Janssen,* 122 N. J. L. 494, the decedent was a milk driver who, at the time of his death, was engaged in the usual performance of his regular duties which included walking up and down steep grades in order to make his deliveries. While walking uphill to his truck he experienced a severe pain which was

later found to result from coronary thrombosis. Although he partially recovered, he never completely regained his health and subsequently died. The Supreme Court found that the heart had been weakened by the ordinary strain of work over a long period of time and denied recovery on this ground. The Court of Errors and Appeals in an opinion by Mr. Justice Bodine, reversed this decision, holding as follows:

> "The rule of law which we deem applicable to the situation was stated in *Bernstein Furniture Co.* v. *Kelly,* 115 N. J. L. 500 as follows: 'Suffice it to say that an accidental strain of a heart, even though the heart was previously weakened by disease, may be a compensable injury under our statute when, as in this case, the accident arose out of and in the course of the employment.'
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> "In this case there is no doubt that the deceased suffered an accidental strain of the heart in the course of his employment, and that the strain causing the injury resulted from the employment which happened to be unusually hard on the day in question.
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> "The Supreme Court erroneously considered the circumstance that the heart had been weakened by the strain of work over a long period of time as excluding recovery, but this is a circumstance which under our cases and those decided in England, could make no difference where the accident arose out of and in the course of the employment."

In *Osborne* v. *Belmar,* 21 Misc. 24, the decedent was employed as a superintendent of streets. On the day in question he operated and drove

a tractor for the purpose of removing sand, and in order to demonstrate the method which he desired his fellow employees to follow in doing the work. While driving the tractor he slumped from his seat and died some five or ten minutes later. The death was due to a coronary thrombosis superimposed upon a long standing rheumatic heart condition. The Court followed the ruling of the Court of Errors and Appeals in *Hentz* v. *Janssen, supra,* and proceeds to say:

> *"I am satisfied that but for the employment the death would not have occurred when it did. That, under the statement of principle quoted above, constitutes a statutory accident.* The effort would not have been undue if the man had been in health but it was excessive for the weakened member."

In the same case the Court discussed the burden of proof applicable to the facts under consideration and held as follows:

> "The respondent-appellant contends that the petitioner-appellee did not carry her burden of proof, and that the proof is not at all certain as to the exact cause of decedent's death. In making an analysis of the proof, the question is: did the respondent-appellant introduce evidence of sufficient weight to overcome the proofs of the petitioner-appellee and the inferences to be drawn therefrom, from which it could be said under all of the attending circumstances that the decedent did not die as a result of coronary thrombosis, which was contracted while in the performance of his duties in the course of his employment? I think not."

In the case at bar the point was sought to be made by the respondent that the death or actual heart attack was not simultaneous with the exertion which decedent admittedly underwent. Dr. Olcott's contention was that since decedent did not collapse while he was engaged in lifting and carrying the pails of paint or while he was walking fast for the length of the room or going upstairs and down, that, therefore, his death could not be attributed to the exertion. Such a contention has been effectively disposed of by our cases.

In the case of *Simpson* v. *Seaboard Ice Co.* 21 Misc. 51, the decedent was an employee of an ice house. His job consisted of moving cakes of ice and lifting wooden lids. He was engaged in this work all morning. During his lunch-hour and while eating lunch, he felt ill and thought he had indigestion. Nevertheless he resumed work and some hours later was stricken with an attack, which later developed to be due to a coronary occlusion. He went home and died five days later. It will thus be seen in this case the collapse from heart failure was not simultaneous with the exertion but followed the exertion by some interval. In the cited case the employee was stricken while eating lunch and after the exertion of his morning employment. The Court granted compensation.

The facts in the *Simpson* case are closely analogous to those in the case at bar. Simpson complained of indigestion before being forced to stop work as did the decedent in our case. He nevertheless resumed work as did our decedent. As the Court remarked:

"His subsequent activities clearly demonstrated he had no real appreciation of the seriousness of his injury, but the fact remains under the proofs that an accident did occur while in the course of his employment."

In *Wallace* v. *American Cyanamid Co.* 20 Misc. 224, petitioner worked in a laundry doing physical labor which included pushing a truck. On the morning in question some lint caught in the wheel which necessitated a slight extra effort in pushing the truck. Petitioner suffered a heart attack of some five or six minutes duration, after which he recovered and went home. He had suffered a previous heart attack some months before. The Court held that this was a compensable accident, holding as follows:

> "That physical strain or effort may be a contributing cause in the aggravation of a pre-existing diseased heart would seem no longer open to doubt under our decided cases. *Hertzberg* v. *Kapo Dyeing and Printing Co.* (Department of Labor), 19 N. J. Mis. R. 201; 18 Atl. Rep. (2d) 736. Accord: *Cooke* v. *Cooke & Cole Silk Co.,* 19 N. J. Mis. R. 581; 21 Atl. Rep. (2d) 853.
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> "I am further satisfied that the petitioner's proofs in this case come within 'the settled rule that if the employment "is one of the contributing causes without which the accident which actually happened would not have happened," ' the statutory requirement in this behalf is met. *Geltman* v. *Reliable Linen and Supply Co.* (Court of Errors and Appeals), 128 N. J. L. 443; 25 Atl. Rep. (2d) 894, 897.

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" 'An accidental strain of a heart, even though the heart was previously weakened by disease, may be a compensable injury under our statute when as in this case, the accident arose out of and in the course of the employment.' *Bernstein Furniture Co.* v. *Kelly* (Court of Errors and Appeals), 115 N. J. L. 500; 180 Atl. Rep. 832; *Hentz* v. *Janssen Dairy Corp.* (Court of Errors and Appeals), 122 N. J. L. 494; 6 Atl. Rep. (2d) 409.

"Nor can the claim for compensation be defeated because of the absence of unusual effort or strain. *Hentz* v. *Janssen Dairy Corp., supra; Ciocca* v. *National Sugar Refining Company of New Jersey* (Court of Errors and Appeals, opinion by Mr. Justice Perskie), 124 N. J. L. 329; 12 Atl. Rep. (2d) 130, 133; *Molnar* v. *American Smelting and Refining Co.* (Court of Errors and Appeals), 24 Atl. Rep. (2d) 392, 393, where the court said:

" 'The degree of exertion is of no consequence, so long as the performance of the required work caused a strain upon the heart.'

"If a pre-existing condition is aggravated by an injury in employment, the injury is compensable and it is not necessary that the accident complained of be shown to be the sole contributing cause to the injury of the employee. *Davis* v. *Lotz* (Supreme Court), 126 N. J. L. 615; 20 Atl. Rep. (2d) 602.

"The requirement that the injury arise by accident is satisfied if the claimant discharges the burden of proving that the con-

dition complained of, that is, the injury, is related to or affected by the employment, that is to say, if but for the employment it would not have occurred. *Bollinger* v. *Wagaraw Building Supply Co.,* 122 N. J. L. 512; 6 Atl. Rep. (2d) 396; *Tauzman* v. *Shelton Dress Shop* (Supreme Court), 11 Atl. Rep. (2d) 317.

"As to the nature of the proof required, our courts have held: 'That probability, and not the ultimate degree of certainty, is the test.' *Auten* v. *Johnston* (Supreme Court), 178 Atl. Rep. 187.

"Where the employer seeks to establish the cause of injury as being other than as claimed by the petitioner, the burden of such proof is upon the employer. *Atchison* v. *Colgate & Co.* (Supreme Court), 3 N. J. Mis. R. 451; 128 Atl. Rep. 598; affirmed, 102 N. J. L. 425; 131 Atl. Rep. 921; *George T. Newell, Jr.* v. *Workmen's Compensation Bureau,* 9 N. J. Mis. R. 1123; 157 Atl. Rep. 243."

Another case which is similar to the case at bar, is *Rother* v. *Merchants Refrigerating Co.,* 122 L. 347. There the employee had been engaged in loading trucks with crates of oranges as a part of his regular employment. He was found dead of a heart attack. No one observed his actual collapse and there were no witnesses to testify as to what he was doing, immediately prior to the time of his collapse. The Court, in an opinion by Mr. Justice Perskie, nevertheless, granted compensation, holding that the exertion of employment had aggravated a pre-existing heart condition of long standing, as the result of which decedent died.

In *Nieme* v. *Thomas Iron Co.,* 20 Misc. 197, the decedent was a miner, required as part of his regular job to perform physical labor. He worked all morning in apparent good health. Some five minutes after the lunch hour he was found dead. He had apparently resumed work after lunch, although there were no eyewitnesses to his actual collapse. Death was due to a cerebral hemorrhage with a pre-existing arteriosclerosis as a contributing cause. The Court held that the death was induced by the physical exertion, hastening the culmination of the latent weakness, saying:

> "To attribute the hemorrhage solely to the degenerative process which, apparently by coincidence, occurred at a time immediately following a considerable degree of physical exertion on the part of the decedent, but, according to the respondent, was wholly unrelated to the employment is to ignore the more reasonable and more probable explanation and theory presented by the petitioner's evidence. It is to be borne in mind that the test under our cases is probability and not absolute medical certainty. *Jackson* v. *Delaware, Lackawanna and Western Railroad Co.,* 111 N. J. L. 487; 170 Atl. Rep. 22; *Hercules Powder Co.* v. *Nieratko,* 113 N. J. L. 195; 173 Atl. Rep. 606; affirmed, 114 N. J. L. 254; 176 Atl. Rep. 198. Accordingly, I am constrained to accept the testimony and proofs of the petitioner in this regard."
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> "Nor need there be any exertion or stress out of the ordinary, where the performance of manual labor entails a strain upon an underlying diseased condition of the em-

ployee's anatomy, in consequence of which death occurs."

* * *

"An accident, under our cases, is made out where the reasonable probabilities in view of all of the evidence, indicate that the employee, in putting forth his duties, met his death by reason of the effects of said exertion upon a vital organ already seriously impaired by disease. *Molnar* v. *American Smelting and Refining Co., supra.*"

In *Brown* v. *Brann & Stuart Co.,* 20 Misc. 405, the decedent suffered from spells of indigestion for which he frequently took bicarbonate of soda. (In this respect the facts are greatly similar to the case at bar.) His job entailed strenuous labor. During the afternoon he complained of pain in his side, after which he rested. On his way home he suffered a recurrence of pain which grew worse until his death two days later from a ruptured peptic ulcer. There was no question but what this condition had existed for a long time. The Court granted compensation, reaffirming all of the rules we have hereinbefore cited.

In *Markiewicz* v. *International Milk Co. Inc.,* 19 Misc. 57, the decedent was a manager in a boiler room. While lifting a heavy drum he felt something snap in his abdomen. He died three months later and it was found that he had long suffered from an auricular heart condition and cirrhosis of the liver. The question was whether the death was a natural consequence of the progress of this disease or whether the preexisting condition had been aggravated or accelerated by the accident, the defendant contending that there was no causal connection by rea-

son of the lapse of time. The Court granted compensation and held as follows:

> "If a diseased condition exists at the time of an accident, and the accident accelerates the disease, such acceleration is an injury by accident under the act." (citing numerous cases including those hereinbefore cited.)

The extent to which our courts have gone in holding that a strain or physical exertion need not be out of the ordinary is indicated by the decision in *Geltman* v. *Reliable Linen Supply Co.*, 18 Misc. 423, affirmed in 128 Law 443, in an opinion by Mr. Justice Heher. There a salesman became involved in a verbal argument arising over a traffic incident in the course of which he suffered a heart attack and died instantly. There was no physical exertion of any kind or manual labor. Defendant was seated in his car at the time of his death. The sole inducing cause was the emotional stress induced by the argument which accelerated a condition of arteriosclerosis from which he had long suffered. The Court granted compensation under the principles we have here stated.

In *Golub* v. *Lobel's Kiddie Shop*, 19 Misc. 648, the petitioner was a saleslady of a highly emotional nature and greatly overweight, as a result of an unstable emotional system and an endocrine inbalance or glandular disturbance. She suffered slight external injuries in a fall, but the extreme nervousness and hysteria which followed resulted in her eventual total disability. The Court granted compensation under the rules we have cited. The Court further stated, on the question of burden of proof:

"Where the employer seeks to attribute the disability of the injured employee to causes other than the accident, the burden of proof in that regard is on the employer."

In *Hertzberg* v. *Kapo*, 19 Misc. 201, a production manager of a dye plant was attempting to fill a rush order for goods. Amid much excitement and confusion he grabbed a bolt of yard goods and proceeded to carry it a few steps when he collapsed from a heart attack. There is no question that his heart degeneration was of long duration. The Court granted compensation holding that the statute is satisfied if it appears that the injury, acting as an exciting or provocative cause aggravates a pre-existing diseased condition, and thereby contributes in hastening its culmination in disability or death. In the same case the Court expresses the rule which is dispositive of the determination of the case at bar and which should have been applied by the Court below, as it was by the Common Pleas:

> "True, he could have suffered such an attack in bed or during rest at home. But he did not experience such an attack in bed nor during a period of relaxation away from his job. The evidence points definitely to the fact that he was so stricken while engaged in the work of his employer at a task which subjected his heart and the coronary vessels to a strain beyond their capacity to withstand."

In *Molnar* v. *American Smelting and Refining Co.*, 128 L. 11, decedent was engaged in pushing a heavy iron pot. One of the wheels became

stuck in a crack in the floor and the decedent was required to make some slight unusual effort in order to extricate the wheel. As he did so he suffered an attack which subsequently resulted in his death. The Court granted compensation following all of the cases we have cited, and said, in an opinion by Mr. Justice Case:

> "A wealth of authorities in England and elsewhere are cited in and support those decisions."

The Court further held that

> "The degree of exertion is of no consequence so long as the performance of the required work caused a strain upon the heart."

In *Cavanaugh* v. *Murphy,* 130 N. J. L. 107, the petitioner was engaged in lifting cartons onto a flat truck. This was his regular employment. While doing so, he felt a pain in his chest, commenced to cough and suffered a lung hemorrhage. It was found that he had long suffered from tuberculosis. The Supreme Court, in an opinion by Mr. Justice Donges, held:

> "Admittedly the hemorrhage occurred. Admittedly lifting of heavy boxes was part of the petitioner's work. Admittedly he was at the time of the hearing (he died subsequently) suffering from tuberculosis, and it is established that he had been so suffering and had been unable to work since the time of the alleged accident. The stirring into activity of a dormant condition by a strain incident to work, constitutes a compensable accident."

All of the foregoing elements are present in the case at bar, and clearly the facts in our case come squarely within the application of the rules we have enumerated. The Court in the *Cavanaugh* case follows the rules we have cited and particularly cites the case of *Ciocca* v. *National Sugar Refining Co.*, 124 L. 329, in which the Court of Errors and Appeals (Perskie, *J.*) said:

> " 'We need hardly labor the point that simply because an employee does not in his employment exercise out of the ordinary effort, strain or exertion, or is not subject to greater exposure than that to which other persons generally in that locality are exposed, it does not necessarily follow that the employee cannot otherwise sustain a compensable accident.' " * * *
>
> " 'A compensable accident arises out of the employment when the proofs show that (1) the employment was one of the contributing causes without which the accident would not have happened, and (2) that the accident was one of the contributing causes without which the injury or death would not have resulted. *Funferi* v. *Pennsylvania Railroad Co.*, 117 N. J. L. 508; 189 Atl. Rep. 126. A compensable accident arises out of the employment when the proofs show a causal connection between the employment and the injury or death.' "

The rules in the foregoing cases are not limited solely to heart attacks or to the aggravation of pre-existing coronary degeneration. In *Zehrer* v. *Robertson*, 17 Misc. 58, they were applied to the aggravation of a pre-existing cancerous condition. The opinion in the *Zehrer* case contains

an excellent review of the law applicable to this subject, and cites many other dormant conditions of disease, the aggravation of which has been held to be compensable under our cases.

We have not cited, nor can we do so in the limited space and time permitted by this brief, all of the cases enunciating the rules we have above set forth, nor all of the factual situations to which those rules have been applied. Our cases are replete with a wealth of authority sustaining the propositions we have cited. Throughout these cases it is stressed that the strain or exertion inducing the culmination or hastening of the dormant disease need not be an unusual or extraordinary strain. The degree of exertion or strain is wholly immaterial. It may be the ordinary labor incident to the work required to be done by the employee in his particular job. It need not be the primary cause of the hastening of the disease. Thus, the strain may be that resulting merely from the pulling of weeds in a usual method, causing an arthritic condition to flare up (*Van Meter* v. *Morehouse*, 13 Misc. 558); it may result from shovelling dirt which aggravated an arthritic condition (*Matthew* v. *Rannello, supra*); it may result from the mere stubbing of a toe which excited a diabetic condition and resulted in gangrene (*Cahill* v. *Franklin Trust Company*, 15 Misc. 409); it may be the mere exertion of a milk driver walking uphill in the course of his job as in *Hentz* v. *Jannsen Dairy, supra;* it may result from the labor performed by a carpenter carrying lumber in a usual manner on a hot day, from which he suffered a heart attack (*Schneider* v. *Haerter*, 119 L. 548); it may be the mere strain resulting from a baker lifting a mixing bowl (*Barcalow* v.

Caldwell, 14 Misc. 718); it may be a heart attack resulting while a fireman at a fire is engaged in turning on a hydrant — a regular part of his duties and a task requiring nothing out of the ordinary (*Moore* v. *City of Paterson,* 18 Misc. 201); (Certainly turning on a hydrant is not "evidence of any great exertion" — to use the test which the Supreme Court applied in the case at bar—yet compensation was here allowed); or it may result from no physical effort whatsoever but from the mere excitement and emotional stress incident to work as in *Hertzberg* v. *Kapo,* 19 Misc. 201 and in *Geltman* v. *Reliable,* 128 N. J. L. 443, where the decedent died sitting in his car during the course of a traffic argument.

As our cases have repeatedly held "compensation cannot be defeated by the absence of unusual strain."

Moreover the burden of proof in this case was not upon the petitioner in view of the posture of the proofs, but was upon the respondent. As stated in *Quinn* v. *Becker,* 19 Misc. 508:

> "Basic in our procedure under the Workmen's Compensation Act is the principle that a respondent who attempts to ascribe the disability of an employee to some other cause than the compensable accident, has the burden of proving that contention. *Atchison* v. *Colgate,* 102 N. J. L. 425. Mere conjecture by a medical witness unsupported by any proven fact does not meet and overcome that burden."

The Supreme Court mentions that there was no thrombosis and that the autopsy disclosed only cardiovascular disease. Dr. Kaufman, who

is not disputed, says (on page 133) that the additional burden of exertion which required more blood to that particular muscle created a condition that the blood vessel was unable to furnish that blood, and that this man died as a result of insufficiency of his circulation to the left ventricle. He definitely attributes the death to the exertion immediately preceding the collapse.

The condition which Dr. Kaufman found is almost identical with the condition presented in *Geltman* vs. *Reliable Linen Supply Co.,* 18 N. J. Miscellaneous 423, affirmed in 128 N. J. Law 443, There the Court of Errors and Appeals allowed compensation. Mr. Justice Heher speaking for that court found death to be due to a "fibrillation and impairment of the blood circulation of the heart and acute anoxemia of the heart due to nervous and emotional shock." In other words, as in the case at bar, a condition was created requiring more blood than the blood vessel was able to furnish and death was due to an insufficiency of circulation to the heart.

Nor is thrombosis or occlusion the only heart condition upon which compensation has been predicated. In *Cieciwirz* vs. *Public Service,* 128 N. J. Law, 16, the Supreme Court in an opinion by Mr. Justice Perskie allowed compensation where the death was due to "syncope due to cardiac disease."

In *Bernstein* vs. *Kelly,* 115 N. J. Law, 500, the Court of Errors and Appeals affirmed an opinion of Mr. Justice Perskie allowing compensation. The court remarked that there was no evidence that death was caused by accident or trauma. The cause of death was chronic aortitis brought on by syphilis. Death was due to chronic syphili-

tic aortitis. The testimony was that the decedent just gave a deep sigh and slid to the floor.

In *Rother* vs. *Merchants Refrigerating Co.*, 122 N. Y. Law 347, the Supreme Court in an opinion by Justice Perskie granted compensation where death was due to syncope due to cardiac disease.

In *Molnar* vs. *American Smelting & Refining Co.*, 127 N. J. Law, 118, the decedent some 15 minutes after undergoing exertion incident to his employment, withdrew to the office, threw himself upon the desk and presently rolled therefrom dead.

Mr. Justice Case remarked:

> "We think that only confusion would come from an attempt to compare or to distinguish the various and highly technical medical phrases and hypotheses."

Compensation was allowed on the theory that the exertion induced or contributed to the final collapse of the heart, weakened by a pre-disposing physical condition.

This opinion was affirmed by the Court of Errors and Appeals in 128 N. J. L., page 11, in which the opinion was written by Mr. Justice Bodine. Justice Bodine in that opinion states:

> "The degree of exertion is of no consequence so long as the performance of the required work caused a strain upon the heart."

Yet in the case at bar the opinion of the Supreme Court is based on a finding, among others, that there was no *great* exertion present.

The decedent's heart in this case did not "just fade out." Only by ignoring the undisputed facts

in the case can that conclusion be reached. This was not the case of a man suffering a fatal attack while seated at a desk, or reading, or sleeping. This man had undergone definite physical exertion, performed under an emotional strain, during an hour preceding his collapse, and continuing up to the time of his death. That factor cannot be ignored. As the Court of Common Pleas found in its opinion, "decedent's efforts in good faith to discharge the duties of his employment advanced the time of his death and controlled the time and place of its occurrence."

Applying the force of all this law and all of these decisions to the facts in the case at bar, it is manifest that the Court below was in error in reversing the Common Pleas, and in denying compensation to petitioner.

It is undisputed that the deceased was ill before he went to work and when he arrived at work. Nevertheless he did proceed with the performance of his duties. While it may be argued that the deceased *might* have died at home or under circumstances involving no exertion, yet the fact remains that he did not die at home but that he did die while at work and while performing the duties of his employment, and that his duties on this particular night involved exertion that was too great for his heart to withstand at that particular time.

The proofs are uncontradicted that decedent's duties did involve physical exertion on the night in question. No one disputes this, not even Dr. Olcott, whose only testimony is that the exertion was not extraordinary. The fact remains that decedent did carry two fifty pound cans of paint for a distance of forty feet, one at a time. He lifted and placed these cans on and off scales.

He dipped into them with a ladle, he bent down to the floor level at least seven or eight times in the operation of mixing the paint. After waiting for the paint to mix, he took samples to the testing room, on at least one occasion, and perhaps two or three times. This involved his walking fast—faster than usual, up a flight of stairs through a corridor one hundred twenty-five feet long, up another flight of stairs and along another corridor in order to reach through the bridge or tunnel, the testing room in the next building. All this he did with other workmen waiting on him to finish his job so that they could start theirs. And all of this, moreover, was done in the space of less than an hour after he had reported for work, and continued up to his collapse.

Remembering that the degree of exertion is of no consequence or materiality under our cases, the proof is overwhelming that there was exertion present and that it did immediately precede the death.

The proof is likewise compelling that the exertion was of such a nature that it might have induced the collapse. Probability and not certainty is the test. The ruling of the Court below, therefore, cannot be based upon any finding that there was no exertion present, nor can it be based on a conclusion that the exertion was not unusual or extraordinary or of sufficient degree.

Was the exertion a contributing factor to the death? Respondent's sole argument to the contrary is based on the premise that an interval of time elapsed between the exertion and the actual collapse. Dr. Olcott said, for instance, that if decedent had been stricken while carrying a pail or mounting the steps, he would con-

cede the death to be due to the exertion. But this premise is faulty for several reasons.

In the first place, there is utterly no testimony in the case that any interval of time did elapse between the exertion and the collapse,—and the burden of proving that, we submit, was on the respondent. No one saw the decedent collapse, so we do not know *with certainty* whether he was stricken while walking into the testing room, or while in the operation of testing the paint or while doing some other work requiring exertion. It cannot be denied, however, that he was performing the duties of his job when he was stricken. The very fact that he was in the testing room with the sample can of paint on the testing bench when he was found, proves that. The fact that the sampling operation had not been completed permits the fair inference that he was stricken immediately after he entered the room, after the considerable physical exertion of coming up stairs and walking fast along the corridor into the testing room. The *probabilities* are, and we submit that any reasonable interpretation of the evidence will so indicate, that the exertion and the collapse were simultaneous, for certainly no appreciable interval elapsed before he was found at the point of death. This the Common Pleas recognized in its opinion. The law requires not certainty but probability in reconstructing the hypothesis of fact which induced the death.

Secondly, we submit that there is no condition in our law or expressed in our cases, that the existence of an interval of time between the exertion and the collapse will defeat compensation. Dr. Olcott is entirely in error in applying that test. Our courts have held otherwise. Yet the

Supreme Court agreed with Dr. Olcott's conclusions, and based its opinion thereon, to the exclusion of the other medical testimony in the case.

In *Cooke* v. *Cooke and Cole, supra,* the petitioner first was stricken with pain while lifting a loom. He continued to work, however, suffering a dizzy spell sometime later. He continued even after that and his pains continued all that day and all the following night. Not until the following day did he actually collapse so that the exertion complained of — the lifting of the loom — preceded the collapse by a full day.

In *Simpson* v. *Seaboard, supra,* the decedent worked all morning without ill effects. While eating lunch and in a period of non-exertion, he became ill and suffered the first symptoms of his later collapse. His actual collapse came some hours later.

In the cases of *Rother* v. *Merchants,* and *Niemi* v. *Thomas Iron Works, supra,* the decedent was in each case found dead, as was the decedent in the case at bar. No one saw what the decedents were doing immediately prior to their being found dead. No one could say whether or not they were resting or working at the time of their death, yet all of them had been working during the period preceding their being found dead, and in each case the rule was necessarily applied that in all probability they were engaged in physical exertion at the time of their collapse.

In the case at bar, moreover, we are not dealing with any appreciable lapse of time, if in fact there was any. The death did occur while decedent was at his employment; it occurred while

decedent was undergoing the exertion of that employment or was so closely attendant upon the preceding exertion as to render it highly probable that the exertion was the inducing cause of the death. Dr. Olcott's testimony does not deny this. He says, and the Supreme Court agrees with him, that the exertion was not "extra" or of sufficient degree—a test diametrically opposite to that promulgated by our cases.

Moreover, Dr. Olcott says that all deaths from heart disease fall into two categories. "Fifty percent occur during periods of non-exertion. The others occur during periods of exertion." Now no one pretends that this particular death occurred during a period of non-exertion. There is no testimony to that effect in the entire case. Decedent was working and had undergone considerable exertion and stress. Therefore, it must have occurred during a period of exertion, according to the doctor, who is respondent's sole witness. And if it did occur during exertion, it is compensable, because the degree of exertion, contrary to the doctor's private opinion, is immaterial and because whatever exertion decedent underwent was incidental to his employment.

Finally, the true test to be applied is whether this death would have occurred at this particular time, had it not been for the employment and the duties of that employment on this particular night. As to this, both doctors are in agreement. Dr. Kaufman, for the decedent, definitely stated (p. 135) that within all reasonable probability he would not have died had it not been for the exertion which he underwent on this particular night immediately prior to his death.

Dr. Olcott also says that the man's life could have been prolonged by complete rest—i.e.—an

absence of exertion. *Ergo*—it was the exertion which caused his death. (pp. 152-153.).

All of the tests applied by the cases we have cited have been met by the undisputed proofs in this case. The petitioner more than sustained the burden incumbent upon her, that the dormant condition of this man's heart was aggravated by the physical labor incident to his employment during the hour preceding his death; that the culmination of his disease in his final collapse was induced and hastened by the exertion which he necessarily underwent. These elements were proven in all reasonable probability, and the burden of proof was fully met by the petitioner. If the respondent sought to establish that the death was not induced by the exertion of the employment, but was due solely to the degenerated processes resulting from the heart condition from which this man suffered, that burden was on the respondent. It cannot be pretended that the respondent met such burden, for no proof whatsoever was offered to substantiate this contention other than the testimony of Dr. Olcott, and his testimony, as we have demonstrated, is based upon faulty premises and upon a test which is exactly the opposite of that laid down by our courts. His testimony, moreover, in the case at bar, is quite the opposite of that which he gave in the reported case of *Kattack* v. *Wright Aeronautical Corporation*, 22 Misc. 148. There Dr. Olcott declared that the most common cause which links exertion with death of a person with a pre-existing coronary condition, is a degeneration of the heart muscle from an impoverishment of blood supply, *and that at some moment of exertion the heart suddenly stops.*

Applying the same test to the case at bar, there can be no question that decedent's heart stopped at a moment of exertion. As the cases have consistently held, absolute demonstration is not required of the petitioner. We submit that petitioner has established her case with a high degree of probability and that the respondent has shown no reason, either in law or fact, which would remove this case from the application of the rules we have cited.

If, as we have demonstrated, compensation has been awarded in the many cases whose facts we have related, there exists no reason why compensation should be denied in the case at bar. The opinion of the Supreme Court cannot be reconciled with the settled law of this state, nor with the decisions we have cited.

There is much more to this case than the mere fact that decedent died while at work, despite respondent's labored argument to the contrary. Neither is there any cause for respondent's complaint that no definite line of demarcation exists to guide industry in its liability to employees who suffer from pre-existing disease or impairment. That line of demarcation has been plainly and definitely indicated, and is expostulated in the many cases we have cited.

This decedent would not have died *when he did* but for the exertions incident to his employment immediately prior to his death. The true test was recognized and followed by the Common Pleas in its opinion and judgment below. That determination was eminently correct. The Supreme Court was in error in reversing that determination, and in denying compensation.

For the reasons urged, it is respectfully submitted that the judgment of the New Jersey Supreme Court be reversed in all respects.

Respectfully submitted,

William F. Nies
Attorney for and of Counsel with Petitioner-Appellant.

William L. Vieser,
On the Brief.

For the reasons urged, it is respectfully submitted that the judgment of the New Jersey Supreme Court be reversed in all respects.

Respectfully submitted,

William E. Nash,
Attorney for and of Counsel with Petitioner-Appellant.

William E. Nash,
On the Brief.

New Jersey Court of Errors and Appeals

MINNIE WEHRLE, Petitioner-Appellant, *vs.* SHERWIN WILLIAMS COMPANY, Respondent-Appellee.	On Appeal from New Jersey Supreme Court.

BRIEF OF RESPONDENT-APPELLEE, SHERWIN WILLIAMS COMPANY.

The Facts.

Petitioner-appellant, hereinafter referred to as petitioner, widow of Charles E. Wehrle, Sr., filed a claim petition for compensation with the Workmen's Compensation Bureau, on behalf of herself and Kenneth Wehrle, a son born September 19, 1932. Respondent-appellee, Sherwin Williams Company, hereinafter referred to as respondent, filed an answer thereto (1) denying that decedent sustained injury by accident arising out of and in the course of his employment, (2) denying that decedent's death was causally related to an accident arising out of and in the course of his employment and (3) denying knowledge or notice of the alleged injury by accident within the time and manner prescribed by R. S. 34:15-17 and 18. After hearing petitioner's claim and the evidence thereon, the Workmen's Compensation Bureau entered judgment in favor of respondent, denying compensation benefits to petitioner. In entering judgment, Deputy Commissioner Kerner said:

"* * *: The burden of proof in this case, as in all compensation cases, is upon the petitioner to establish the essential allegations of her petition by the greater weight of evidence in order to entitle her to an award.

"After careful consideration of the testimony, the stipulations of counsel and the proofs adduced, I am of the opinion that petitioner has not sustained the burden of proof with which she is charged, and I find and determine that on the basis of reasonable probabilities the petitioner has not established that the decedent met his death as a result of an accident arising out of and in the course of his employment. Where the medical testimony is in dispute it becomes necessary for me to accept the view and theory which to me appears to be the more reasonable or probable, and viewing the case in such a light I must conclude that on the question of causal relationship the proofs overwhelmingly predominate in favor of the respondent.

"Therefore the petition is dismissed" (S. C., p. 157).

Decedent was 51 years of age and employed as a foreman, in respondent's paint department, on the nightshift (S. C., p. 52).

From petitioner's testimony it appeared that decedent suffered an injury to his chest six or seven years prior to his death (S. C., p. 54), following which and up to the date of his death, October 4, 1943, decedent "always had pains" in "his chest" (S. C., p. 54); during this six or seven year period, following his accidental injury, "He used to take Eno salts and carry Tums with him" (S. C., p. 54); throughout this six or seven year period decedent complained of pain "* * * all through here in his chest" (S. C., p. 55); these complaints were made "every other day or so" (S. C., p. 56); up till his death, on October 4, 1943, decedent complained of the pains, in his chest,

"several times a week. He wasn't really right after that" (S. C., p. 58); during the two or three day period immediately prior to his death, "he had not been feeling well" (S. C., p. 58); "He always felt sick since the accident," but, during the two or three days prior to October 3, 1943, he "seemed to be worse" (S. C., p. 59); decedent described the condition from which he suffered as "indigestion" (S. C., p. 59); aside from his complaints, during these six or seven years, "He wasn't felling well; that we know" (S. C., p. 59); decedent "never wanted to complain that he was sick, but he was" (S. C., p. 59); he would always say, "I got such pains here," indicating "over the heart" (S. C., p. 59).

Petitioner further testified that on October 3rd, a Sunday, decedent was to report for work, as usual at 11:00 P. M., he was to work the night shift of October 3-4; on October 3rd decedent "said he didn't feel well," and took "a dose of Eno * * * at six o'clock" (S. C., p. 56); he said that he "didn't feel good" (S. C., p. 56) and "lied down" until "about nine o'clock, then he got up to go to work. I told him to stay home" (S. C., p. 57); she told decedent "to stay home" but he "said no" (S. C., p. 57); she "noticed that he was sick" (S. C., p. 57); it was unusual for decedent to lie down at 6:00 P. M. and stay in bed until 9:00 P. M., as he did on October 3rd (S. C., p. 60); prior to leaving the house, to go to work, decedent "was white. He didn't really look good at all" (S. C., p. 60); he was "white" at 6:00 P. M. (S. C., p. 60); he did not eat his dinner, on October 3rd, "because he didn't feel well" (S. C., p. 60); he did not work on Saturday night, October 2nd, (S. C., p. 61).

William Stern, for petitioner, testified that he worked for respondent company in October, 1943,

and worked with decedent (S. C., p. 63); decedent had not worked on Saturday night, October 2nd (S. C., p. 64); on the night October 3rd, Sunday, he and decedent took the same bus to work (S. C., p. 64); they had to walk "about a block" from the bus to respondent's plant (S. C., p. 65); shortly after they entered the plant, decedent came into the washroom, to change his clothes, and said, "I don't know, * * * I feel kind of funny today. * * * I got sort of pain around here now and then" (S. C., p. 65); decedent said, if he did not feel better, he was going home (S. C., p. 79) and indicated that his pain was in the left chest (S. C., p. 80); they were in the washroom ten or fifteen minutes (S. C., p. 85); thereafter decedent, as a part of his work, carried, one at a time, two pails weighing 40 to 50 lbs, a distance of approximately 40 feet, which he placed on the floor and then ladled some of the coloring matter therein into a vat, where paint was being prepared—with a spoon approximately the size of a household table spoon (S. C., pp. 67-68, 85-86); some seven or eight spoonfuls were ladled into the vat by decedent (S. C., p. 86); following this decedent went into the foreman's office where he stayed until the vat was ready, remaining there about a half hour (S. C., p. 86); decedent then took a sample, in a half pint can, upstairs for testing (S. C., p. 86), and, in so doing, had to walk 100 to 120 feet (S. C., pp. 69-70), mount a flight of six steps, walk another 100 to 125 feet (S. C., pp. 70-71), and then mount a flight of steps, at the top of which he had to walk another 125 feet, to the testing room (S. C., p. 71); this testing was done about 12:00 midnight (S. C., p. 71); decedent walked fast, as he always had a "quick walk about him" (S. C., p. 72); sometime later, when a man, named Adam, told him that decedent was lying on the floor, he went upstairs and saw decedent "laying

on the floor'' (S. C., p. 75); decedent was then alive but died five minutes later (S. C., p. 75); about 15 minutes had elapsed between the time decedent walked by him, for the purpose of going to the testing room, and the time he saw decedent lying on the floor (S. C., p. 77); the can of paint was ''laying on the desk or bench'' (S. C., p. 78); petitioner made but one trip to the testing room (S. C., p. 87); decedent walked no faster on this occasion than on other days (S. C., p. 88); he could not estimate decedent's height or weight (S. C., p. 91).

Alphonse St. Amand, for petitioner, testified that he, too, went to work, on the night of October 3rd, on the same bus as decedent (S. C., p. 92); decedent ''used to take a lot of Eno, as far as I know'' (S. C., p. 92); while making his rounds, as a watchman, he saw decedent lying dead, on the ''Tech service floor right by the bench'' (S. C., p. 96).

Daniel F. McLearey, for petitioner, testified that he worked as an oiler, for respondent, on October 3, 1943; he saw decedent about 11:45 P. M. (S. C., p. 104), in the foreman's office (S. C., p. 99); decedent then said, ''he ain't feeling so good tonight'' and ''I got something across in here,'' indicating the chest (S. C., pp. 99-100); about 15 minutes later, he went to the fifth floor where he found decedent dead (S. C., p. 100); he then called Bill Graham, assistant production manager, on the telephone and, when Graham arrived and asked what the trouble was, he told Graham, ''I don't know. He just went up there. Adam told me he just dropped in his tracks right at the bench'' (S. C., p. 102); while in the foreman's office, the night of October 3rd, decedent complained of pain ''across the chest'' and said ''I guess that is indigestion again'' (S. C., p. 103);

decedent was "always hollering about" indigestion, took Eno once a night for "indigestion", and also, took Tums (S. C., p. 103); decedent further said, "he was on the bad side that night" (S. C., p. 103); this was about 11:45 P. M. (S. C., p. 104).

Matthew Stangreciak, for petitioner, testified that he worked for respondent on October 3, 1943, and he saw decedent at 11:30 P. M., in the office (S. C., p. 105); decedent then said, "I feel awfully bad tonight" (S. C., p. 106); he was in the foreman's office for about ten minutes with decedent and decedent further said, "If I don't feel any better I go home" (S. C., p. 107).

Dr. Carmine G. Berardinelli, for petitioner, assistant to the Chief Medical Examiner of Essex County, stated that he porformed an autopsy on decedent, on October 4, 1943 (S. C., p. 117), which revealed hypertensive cardio vascular renal disease (S. C., p. 118); the cause of death was "Heart condition, hypertrophy of the left heart" (S. C., p. 119); a person with hypertrophy can die suddenly, without exertion (S. C., p. 127); decedent's condition was of long standing (S. C., p. 128).

On cross examiantion, Dr. Berardinelli said he had no opinion "as to what did or didn't happen in this particular case" (S. C., p. 128); the autopsy showed no evidence of an occlusion, infarction, or aneursysm (S. C., p. 129); autopsy showed only "disease of the coronary artery" (S. C., p. 129); there was no condition, on autopsy, not due to the hypertensive cardiovascular renal disease, from which decedent suffered (S. C., p. 130).

Dr. Jerome Kaufman, for petitioner, in answer to a hypothetical question, expressed the opinion that decedent had "had a long standing hypertensive cardiovascular disease with hypertrophy of especially the left ventricle of the heart

and involvement of the left coronary with sclerotic plaques'' (S. C., p. 131); it was his opinion that ''the work that * * * (decedent) did during that approximate hour contributed to his death'' (S. C., p. 133); he believed that decedent ''suffered from a hypertensive disease which involved his blood vessels and heart, which is of long standing, resulting in hypertrophy, thickening, enlargement of the left ventricle of the heart, which is the chamber which carries the load, and that as a result of that and narrowing of the left coronary artery because of sclerosis, he didn't receive a sufficient blood supply to his left ventricle, and that the additional burden of exertion which requires more blood to that particular muscle, the blood vessel was unable to furnish that blood and that this man died as the result of an insufficiency of his circulation to his left ventricle'' (S. C., p. 133).

On cross examination, Dr. Kaufman stated there was ''no specific one exertion that one can speak of as causing his death'' (S. C., p. 134); ''the exertion of going to work—may be things which I don't have in the hypothesis which he did just prior to going to work * * *. any exertion could precipitate death in this kind of heart'' (S. C., pp. 134-135); his ''entire opinion is necessarily predicated upon the hypothetical question'' (S. C., p. 136); the type of heart disease decedent had ''is the most common cause of death'' and causes death without the intervention of exertion (S. C., p. 136); decedent's complaints of pain in his chest for a long time prior to October 3rd and the taking of Eno indicated ''that this man's heart was very bad. He should not have gone to work, he should have been home in bed under treatment'' (S. C., p. 139); decedent's complaints and physical condition prior to leaving home on Oc-

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tober 3rd indicated that "He might die from it at any time, * * *" (S. C., p. 139); decedent should not have gone to work on October 3rd and died because he should have stayed home in bed (S. C., p. 140); the autopsy record showed no evidence of injury to the heart (S. C., p. 141).

John Robak, for respondent, testified that he was employed as an elevator operator, by respondent on the night of October 3, 1943 (S. C., p. 109); he took decedent upstairs on the elevator and, as he got on the elevator, decedent said, "John, I am very sick, take me upstairs to the second floor" (S. C., p. 110); "this was before petitioner did any work (S. C., p. 110); decedent said "His stomach swell up, that is why" (S. C., p. 111); at decedent's request he stopped the elevator at the second floor so that decedent could go to the "medicine room" and get some Eno (S. C., p. 111); after decedent took some Eno, he took decedent to the fourth floor (S. C., p. 111).

Dr. George P. Olcott, Jr., for respondent, specialist in pathology and diagnosis, testified that he had performed over 2,000 autopsies, in his professional career (S. C., p. 142) and that 90% of these cases involved cardiac deaths (S. C., p. 143); in answer to a hypothetical question (S. C., pp. 143-146-147), he stated that there was no causal relationship between decedent's death and his work of October 3rd (S. C., p. 147); the autopsy record showed that decedent's death was due to hypertensive cardiovascular disease, a condition of long standing, which had slowly progressed toward its characteristic ultimate fatal termination (S. C., p. 147); to associate exertion as a precipitating cause, with such a disease, the death must occur during the exertion (S. C., p. 148); decedent's physical condition, as observed by petitioner prior to his going to work on October 3rd,

definitely indicated that he "was in the terminal stages of his disease, that he was in a situation where the heart could stop of itself when sitting at complete rest. It had gotten to that particular point where it could not have gone any longer" (S. C., p. 149).

At the conclusion of the hearing, Deputy Commissioner John M. Kerner, dismissed the claim petition, concluding that credible proofs had not established a causal relationship between decedent's work and his death.

Petitioner appealed from the judgment of dismissal, entered in the Workmen's Compensation Bureau and, on appeal, the Essex County Court of Common Pleas reversed the judgment of the Bureau, on a determination that, "Decedent's efforts * * * to discharge the duties of his employment advanced the time of his death and controlled the time and place of its occurrence" (S. C., p. 38).

On respondent's application, a Writ of Certiorari was granted by Mr. Justice Parker to review the judgment of the Essex County Court of Common Pleas and on the return of the Writ the matter was heard in the Supreme Court by Justices Bodine, Case and Perskie. By Order entered November 8, 1945 (S. C., pp. 175-176), the judgment of the Court of Common Pleas was reversed and the judgment of dismissal entered in the Workmen's Compensation Bureau affirmed. The Supreme Court in its opinion, by Mr. Justice Bodine, said:

> "The decision of this case turns upon a finding of fact from the medical proofs. Petitioner first called a physician who had performed an autopsy. The deceased suffered from a chronic disease of the heart. On the night of his death, he performed his usual

tasks. He was foreman of a paint plant and a shader of color. Before he went to work he complained of indigestion. He dosed himself with Eno salts and felt better. He repeated the treatment at the plant. Having mixed the color he rested for twenty-five minutes and then went to the testing room. To reach the room he was obliged to walk from 100 to 125 feet, then through a tunnel up six steps to a landing, then up another flight and continue about 125 feet to the testing room. Shortly thereafter, he was found dead with the flask of color to be tested untouched.

"This doctor testified that any kind of exertion could have accelerated his death. There was no thrombosis. The only thing found in the autopsy was that he died of cardiovascular heart disease.

"Another physician called by the petitioner testified that the work contributed to his death. But on cross examination, he said that the disease was so far progressed that the deceased might have died from it at any time. There was no evidence of any great exertion.

"It does not seem to us that there was any evidence of death by accident. The fair inference is that the deceased might have died at any time from disease. The only proof of exertion before the death was walking to the testing room and it occurred before any test was made.

"We can only agree with the physician called by the respondent that there was no causal relationship between the death and the employment. The employer cannot be held liable because the employee fails to procure treatment for a chronic heart condition. Death would have occurred without the employment. From the proofs it is a fair conclusion that death was the result of the disease and was not accidental. In fact, there was no accident.

"The judgment of the Court of Common Pleas will be reversed, and the judgment of the bureau will be affirmed.'

Mr. Justice Perskie dissented.

LAW AND ARGUMENT.

POINT I.

The judgment of the Supreme Court, supported by probable and credible evidence, is conclusive.

Findings of fact by the Supreme Court, on conflicting evidence or on uncontroverted evidence reasonably susceptible of divergent inferences, are conclusive on appeal. *Glanton* v. *Shafto,* 133 N. J. L. 284; *Jones* v. *Court of Common Pleas, Essex County,* 129 N. J. L. 58; *Rotino* v. *J. P. Scanlon, Inc.,* 126 N. J. L. 419; *Alexander* v. *Cunningham Roofing Co., Inc.,* 125 N. J. L. 277.

Mr. Chief Justice Brogan, speaking for this court, in *General Cable Corp.* v. *Levins,* 124 N. J. L. 223, at page 225, said,

> "Now the Supreme Court found the facts. Each fact so found is permanently established here if any legitimate evidence sustains the conclusion."

Thus the determination of the Supreme Court that the deceased workman did not suffer an "accident" or injury or death by "accident" is conclusive and cannot be disturbed by this Court should the proofs be susceptible of such a determination. That they are is *manifest.*

The factual testimony which will be more fully reviewed under Points II and III hereof clearly demonstrates that decedent was suffering acute symptoms of heart disease and was critically ill before reporting for work. Decedent on arriving at work complained of his acute condition to fellow workers. Most of the hour and quarter he was at his place of work, decedent was sitting

in his office. His only activity was to carry 2 cans of coloring matter, one at a time, a distance of 40 feet—this a few minutes after arrival at work—an hour later he carried a half pint can of paint up stairs. Fifteen minutes later he was found dead.

Dr. Berardinelli, Assistant County Medical Examiner of the County of Essex, in his official capacity performed a post-mortem examination. The autopsy revealed hypertensive cardiovascular renal disease (S. C., p. 118) and the cause of death was "heart condition, hypertrophy of the left heart" (S. C., p. 119). According to Dr. Berardinelli, this condition, which caused decedent's death, was of long standing and could cause sudden death without any exertion (S. C., p. 127). Dr. Berardinelli stated that he had no opinion "as to what did or didn't happen in this particular case" (S. C., p. 128). The autopsy showed no evidence of an occlusion, no evidence of an infarction and no evidence of an aneurysm (S. C., p. 129). It disclosed only "disease of the coronary artery" (S. C., p. 129) and disclosed no condition not due to such disease (S. C., p. 130).

Petitioner's remaining medical witness, Dr. Jerome Kaufman, expressed the opinion that decedent "had a long standing hypertensive cardiovascular disease with hypertrophy of especially the left ventricle of the heart and involvement of the left coronary with sclerotic plaques" (S. C., p. 131). He stated that he could point out "no specific one exertion" as the cause of decedent's death (S. C., p. 134) and admitted that "exertion of going to work—may be things which I don't have in the hypothesis which he did just prior to going to work * * * any exertion could precipitate death in this kind of heart" (S. C., pp. 134-135). Dr. Kaufman further stated that the type

of heart disease had by decedent "is the most common cause of death" and causes death without the intervention of exertion (S. C., p. 136). It further appears from Dr. Kaufman that the decedent's heart disease, prior to leaving his home on the night of October 3rd, "had progressed to the point" where "He might die from it at any time, * * *." (S. C., p. 139.)

In addition to the above testimony of petitioner's medical witnesses, which clearly affords a basis for the Supreme Court's determination, there is in evidence a certified copy of the death certificate respecting decedent. The certificate, P-3 in evidence (S. C., pp. 159-163), certifies the cause of death as "hypertensive cardiovascular renal disease" (S. C., p. 161) and by its content *excludes* all other causes, including death by injury or accident. By the terms of R. S. 2:98-14 the aforesaid death certificate is "*prima facie* evidence of the facts therein stated * * *."

In *Aitken* v. *John Hancock, etc., Ins., Co.,* 122 N. J. L. 436, Mr. Justice Parker, for the Supreme Court, said:

> "We have not overlooked the fact that to support a recovery it must appear that death resulted from accident independently of all other causes; but the official certificate stating 'cause of death' as 'accidental injuries received from fall from ladder' without more, should, under the maxim *expressio unius est exclusio alterius* be normally construed as indicating no contributing cause, particularly in view of the statutory provision above quoted, that 'causes of death which may be the result of either disease or violence should be carefully defined'."

Thus, the death certificate is *prima facie* evidence that decedent's death was wholly the result of disease and not "accidental."

All this is in addition to and corroborative of the expert opinion of Dr. George P. Olcott, Jr., who appeared for respondent, that decedent's death was the natural result of his long standing heart disease.

It is respectfully submitted that the determination of the Supreme Court is supported by competent evidence and is conclusive on this appeal, since it is not for this Court to weigh the evidence.

POINT II.

Petitioner failed to establish that decedent suffered "injury", by accident arising out of and in the course of his employment, and that his death was causally related to injury by "accident".

Respondent does not question the claim that decedent died while at work. If that were all petitioner had to establish, she would be entitled to compensation benefits. The law is, however, that petitioner has the burden of establishing, by the preponderance of the credible evidence, that decedent suffered "injury" by accident arising out of and in the course of his employment. Evidence that decedent died of hypertensive cardiovascular renal disease, during his working hours, does not suffice to discharge petitioner's burden.

In *Kramerman* v. *Simon,* 131 N. J. L. 250, Supreme Court, opinion by Mr. Justice Perskie, it was said:

> "Kramerman was unquestionably where he had a right to be at the time of his death. This fact while indeed relevant did not, in and by itself, under the circumstances of the instant case, relieve petitioner from her burden of establishing her asserted claim for

> compensation, 'by a preponderance of probabilities according to the experience of mankind' (Gilbert *v.* Gilbert Machine Works, Inc., *supra,* at p. 538), that her husband had suffered an accident which arose out of and in the course of his employment. We find no such proof. Cf. Nardone *v.* Public Service, etc., Co., 113 N. J. L. 540; 174 Atl. Rep. 745, cited with approval in Armstrong *v.* Union County Trust Co., 14 N. J. Misc. R. 648; affirmed, 117 N. J. L. 423."

In the *Kramerman* case the decedent was engaged in building an extension to a house and, among other things, had to saw "shiplap" boards, passed to him by another man on the ground. These boards were ⅞″ x 10″ x 12″. The decedent worked at his "usual" pace until "about ten minutes of twelve," when his employer took him into a bedroom, in the house, and gave him instructions concerning the work to be done after lunch. "About noon fellow employees found Kramerman dead in that room", or about ten minutes after he had last engaged in the work of sawing and handling "shiplap" boards, in connection with his work as a carpenter. The Workmen's Compensation Bureau dismissed the petition on the ground that the decedent had not died as a result of an accident arising out of and in the course of his employment. On appeal, the Essex County Court of Common Pleas reversed the judgment of the Bureau and allowed the petitioner compensation. The Supreme Court reversed the Pleas and affirmed the judgment of the Bureau, holding that petitioner had failed to establish that her deceased husband had died as a result of an accidental occurrence.

As in the *Kramerman* case, the deceased, in the case at bar, was found lying on the floor, about 10 or 15 minutes, after last observed doing some work.

In *Armstrong* v. *Union County Trust Co.*, 14 N. J. Misc. Rep. 684, affirmed, 117 N. J. L. 423, petitioner proved that her deceased husband was employed as a utility man in respondent's bank, and, at the time he met with his fatal accident, was probably engaged in the work in which he was employed. At the particular time in question he had been directed to go into the cellar of the building to scrape some paint off a glass door and he was found lying on the floor with a fracture of the skull. Compensation was denied for the reason that petitioner offered "no proof of an accident arising out of the deceased's employment."

In *Nardone* v. *Public Service, etc., Co.*, 133 N. J. L. 540 (Supreme Court), opinion by Mr. Justice Perskie, it was held that a mere finding of the body of an employee, in or at the place of his employment, where he had a right to be, does not raise an inference sufficient to sustain an award of compensation against the employer, for it is always the duty on the part of the claimant, in a Workmen's Compensation case, to prove that the death was caused by accident "arising out of and in the course of" the employment. As said by Mr. Justice Perskie,

> "Not even the broad and liberal interpretation given by our courts to the Workmen's Compensation act can justify a judgment based on mere guess or conjecture * * *."

Mr. Justice Heher, for the Supreme Court, in *Schlegal* v. *H. Baron & Co.*, 130 N. J. L. 611, speaking of coronary thrombosis, said,

> "This is a condition that ordinarily ensues from coronary sclerosis or other morbid state. At all events, the presumption is that it was due solely to disease; and the *onus* is on claimant to establish that the asserted accident was at least a contributory cause without which the occlusion would not have occurred."

In the *Schlegal* case, the petitioner, who was employed in the respondent's shipping and receiving department, on his arrival at work complained of symptoms described by Mr. Justice Heher as, "These are what the lay mind regards as symptoms of indigestion." Although the petitioner claimed a blow to his chest, his taking of bicarbonate of soda, was said to be "* * * corroborative of the testimony that claimant himself attributed his condition to indigestion." It was concluded by the Supreme Court that, "The inference that the thrombosis was the consequence of the disease alone is persistent and compelling." As indicated by its opinion, compensation benefits were refused by the Supreme Court and Mr. Justice Heher observed. "It is requisite in those cases that the evidence be carefully scrutinized and assayed * * *; otherwise, disability consequent upon disease alone will ofttimes constitute the basis of an award of compensation."

It is thus recognized that the mere fact that a man has a job does not automatically give him complete health and disability insurance coverage. As recognized in the *Schlegal* case, heart disease can result in disability and death without the interference of employment and where it is evident that the consequences of the normal progression of disease, even though same be fatal, have set in prior to the commencement of work, on a given day, compensation benefits are not chargeable against the employer by reason of the incident tragic on the employers premises, during working hours.

Mr. Wehrle, for the six or seven year period prior to his death on the night of October 3-4, 1943, undoubtedly suffered from heart disease, as evidenced by his constant complaints of pain in

the heart region and by the fact that he took Tums and Eno, for what he thought was "indigestion." As testified by his widow, decedent was much worse during the two or three day period immediately prior to October 3rd, notwithstanding the fact that he had not worked on October 2nd, and, at six P. M. on the afternoon of October 3rd, he found it necessary to take Eno and lie down for three hours, during which time he complained of not feeling well. Petitioner also testified that decedent's face was "white" at this time. On his way to work decedent complained to Stern, and before he undertook any work, he had the elevator man, John Robak, take him to the "medicine room" to get some Eno. As he had to others, decedent complained to Robak of not feeling well, saying, if he did not feel better he would have to go home. Autopsy by Dr. Berardinelli showed no evidence of a coronary occlusion, no evidence of a coronary thrombosis, no evidence of a coronary infarction, no evidence of a coronary hemorrhage, and, as testified by Dr. Berardinelli, the assistant county medical examiner, who has no interest in the outcome of this case, autopsy showed only evidence of decedent's long standing cardiovascular renal disease.

POINT III.

Petitioner failed to establish that decedent's death was causally related to his employment.

It is respectfully requested that the arguments under Point II be considered in relation to this issue.

The fact that a heart may *be strained* by effort does not avail petitioner. It is not enough that an injury "could have been" the result of an acci-

dent. Likewise, it is not enough to prove that an injury "may be" the result of an accident. *Calicchio* v. *Jersey City Stock Yards Co.,* 125 N. J. L. 112 (Supreme Court); *Reimers* v. *Proctor Pub. Co.,* 85 N. J. L. 441 (Supreme Court).

There must be something more than the mere incident of death, during the working hours, to warrant an award of compensation benefits. As pointed out in *Molnar* v. *American Smelting and Refining Co.,* 127 N. J. L. 118, by the Court of Errors and Appeals, "The heart action did not merely fade out; *it was stopped by forces accompanied by terrific pain.*" In the instant case there is no evidence other than that decedent's heart merely did "fade out."

There is no proof that any of the work alleged to have been performed by decedent strained his heart, made decedent breathe heavily, or gave him any difficulty beyond that which he had prior to leaving his home on the evening of October 3rd. Petitioner cannot sustain the burden of proof by the citation of cases, where such proof was offered.

Decedent's co-workers, who appeared on behalf of petitioner, were more than willing to testify favorably in her behalf, yet, not one indicated that decedent, while at respondent's plant during the last hour of his life, manifested any symptoms or signs of discomfort beyond those suffered and manifested by him prior to leaving his home and while on his way to work. Decedent was last seen by Stern, carrying a half pint can of paint; he then apparently walked up a flight of steps and after reaching the fifth floor level, walked a distance of 100 to 125 feet. Nothing untoward occurred to him in that space of time or distance. He was not stricken at, on or near the stairway. The half pint can of paint was on the bench, where

it was supposed to be. The lack of any derangement of the testing room, the absence of any outcry or call for help, the autopsy findings, which are negative with respect to any evidence of heart damage other than that consistent with his long standing cardiovascular renal disease, when taken into consideration with decedent's long history of heart condition, plus the acute symptoms manifested during the 24 to 48 hour period prior to and including October 3rd, all point to the fact that decedent was overtaken by the tragic terminal stage of the disease, which had distressed him, "every other day," for the preceding six or seven years.

As against the theory advanced by Dr. Kaufman, who merely appeared to answer the hypothetical question put to him on behalf of petitioner, there is the death certificate, made by Dr. Berardinelli, based on the autopsy made by him as a public official. The death certificate, Exhibit P-3 (S. C., pp. 159-163), certifies the cause of death to be "hypertensive cardiovascular renal disease" (S. C., p. 161). On the form of the death certificate there are spaces provided for answers to the following questions: "Other condition," "If death were due to external causes fill in the following: Accident, suicide, or homicide (specify)—Date of occurrence—Where did injury occur? * * * Did injury occur in or about home, or in an industrial place, in public place?— While at work?— Means of injury—." All these spaces were left blank by the medical examiner.

Respecting certificates of death, R. S. 26:6-7 (20) provides the certificate shall contain.

> "Cause of death. The course of disease or sequence of causes resulting in death, giving first the name of the disease causing death (primary cause), *and the contributory* sec-

> ondary *cause,* if any, and the duration of each, and whether attributed to dangerous or insanitary conditions of employment.
>
> "Causes of death which *may be* the result of either disease or violence *shall be carefully defined;* and if from violence, the means of injury shall be stated and whether (probably) *accidental,* suicidal, or homicidal."

Death certificates, made in accordance with the statute, are "prima facie evidence of the facts therein stated in all courts and places." R. S. 2:98-14.

In *Aitken* v. *John Hancock, etc., Ins. Co.,* 122 N. J. L. 436, Mr. Justice Parker, for the Supreme Court, said:

> "We have not overlooked the fact that to support a recovery it must appear that death resulted from accident independently of all other causes; but the official certificate stating 'cause of death' as 'accidental injuries received from fall from ladder' without more, should, under the maxim *expressio unius est exclusio alterius* be normally construed as indicating no contributing cause, particularly in view of the statutory provision above quoted, that 'causes of death which may be the result of either disease or violence should be carefully defined'."

Thus, the death certificate is prima facie evidence that decedent's death was wholly the result of disease and not "accidental."

Even more important than the death certificate, Dr. Berardinelli, for petitioner, refused to ascribe decedent's death to the alleged exertion (S. C., pp. 109-110). While he conceded that a diseased heart *may be* strained and further injured by exertion, he *would not* express an opinion that decedent's death was causally related to his employment. This, as reflected by the death

certificate, was his conclusion at the time of autopsy and at the time he certified the results of his *official* inquiry respecting the cause of decedent's death. Surely an opinion deserving of more weight than one expressed by an *expert* for purposes of litigation.

A petitioner must do more than prove that the injury *may have been caused* by accident. In *Hahne & Co.* v. *Guenther,* 114 N. J. L. 571, it was said:

> "There is no reason why the court should have found that the insanity was due to a vague hypothesis without supporting foundation, where by the clear weight of the evidence the subsequent trouble could have been caused by an existing condition which was perfectly unrelated to the minor hand incident."

In *Ridgeway* v. *Real Estate, etc., Co.,* 15 N. J. Misc. Rep. 477, the Supreme Court said:

> "The petitioner did not show by the burden of proof that the death was the result of an accident. 'The petitioner must do more than show that the injury could have been the result of an accident'."

In *Sulmonetti* v. *American Cyanimid Co.,* 18 N. J. Misc. Rep. 693, it was said:

> "*Such burden of proof,* (petitioner's burden), however, *is not discharged if the evidence is as consistent with the theory that death was due to natural causes, as that it was due to an accident.* An award of compensation cannot rest upon imagination, surmise or conjecture, or upon a choice between two views equally compatible with the evidence. The court cannot speculate as to which of several causes might have produced the death of an injured employee. See, Curran *v.* Newark Gear Cutting Machine Co., 37 N. J. L. J. 21."

And, at page 697:

> "*Proof of disability or death overtaking a workman at his work is insufficient*, in and of itself, *to constitute an accident* within the intendment of a statute. An accident cannot be inferred simply from the injury or death. See Armstrong *v.* Union County Trust Co., 14 N. J. Misc. R. p. 648; 186 Atl. Rep. 522; affirmed 117 N. J. L. 423; 189 Atl. Rep. 138."

Where one of the two medical witnesses produced by petitioner refused to ascribe decedent's death to the alleged exertion, it cannot be said that petitioner carried the burden of proof or established facts more consistent with the theory of accidental causation. This is particularly so when the medical expert who refused to express an opinion as to accidental causation was the one who saw decedent immediately after his death and certified the cause of death. Dr. Berardinelli, as Assistant County Medical Examiner of the County of Essex, had the duty, as a public official, to truly and correctly ascertain the true circumstances leading to decedent's death. There is nothing to suggest that he did other than perform his duty, in all respects, and nothing to suggest that the death certificate represents facts other than those ascertained by Dr. Berardinelli, in the course of his official inquiry, prior to the institution of litigation.

The death certificate and Dr. Berardinelli's testimony are not alone in indicating that decedent's death was due to the normal progression of his long standing heart disease. The testimony respecting decedent's long medical history and the acute condition which developed 24 to 48 hours prior to death and continued thereafter more than corroborates Dr. Berardinelli's conclusion. Even, Dr. Kaufman conceded that decedent's heart was

"very bad" and that "he might have died from it at any time." Dr. Kaufman's theory is a simple one—decedent died at work, therefore his death is related to his work. To suppose that decedent would have lived, had he not gone to work on the night of October 3rd, is a speculation which may not form the basis of a judgment in a court of law.

Dr. Kaufman admitted that decedent could have died while going from his home to respondent's plant because of his acute condition, yet, because decedent did not die until an hour and ten minutes after he reached the plant, Dr. Kaufman concluded that decedent's death was due to his work of that hour and ten minutes. To predicate an opinion of causal relationship, as Dr. Kaufman did, notwithstanding the fact that decedent's symptoms at work were no different in kind and severity than those had at home and on the way to work, was to indulge in the realm of fancy—a field of mental gymnastics not recognized by the law.

Interestingly enough, Dr. Kaufman, in *Hochberg* v. *Belmar,* 22 N. J. Misc. Rep. 402, testifying for the employer, testified, "There was no causal relationship." In that case, the decedent, with an old heart disease, complained of discomfort and pain in his chest on July 18th but nevertheless reported for work the next morning. He complained of not feeling well while at work on July 19th, when he collapsed. Dr. Kaufman stated "that undoubtedly the coronary occlusion started the night of July 18th, when he had precordial pains and it *was* a *continuous* process, not in any way affected by his employment. * * * *There was no doubt in his mind that the man's illness and death followed the classical or typical picture of a coronary occlusion progressing naturally from*

*condition in * * * decedent's heart and blood vessels* on and prior to July 19th.''

Yet, the same expert, in the instant case, offers the opinion that decedent's death was due to the last hour and ten minutes of his life—because he was on his employer's premises and not at home. What price experts!

The Court of Errors and Appeals very aptly stated, in *Shoemaker* v. *Elmer,* 70 N. J. L. 710:

> ''Expert evidence should be carefully guarded. It is sufficiently dangerous when carefully circumscribed; it becomes altogether too unreliable when the basis of it is indefinite.''

In refusing compensation, the court in *Hochberg* v. *Belmar, supra,* said,

> ''* * * by the admission of the petitioner's experts, the pain in the chest and the weakness and discomfort, suffered by the decedent at home on the evening of July 18th, were the onset or prodromal symptoms of precordial pain signifying the beginning of the end in the long chain of cardial vascular degeneration resulting in the * * * inevitable result.
>
> ''In this posture of affairs we have the onset of the precordial pain, or prodromal symptoms, which occurred in the *Schlegal* case (Schlegal *v.* H. Baron, 130 N. J. L. 611; 34 Atl. Rep. (2d) 132) prior to the arrival of the decedent at his place of employment, and *we are not allowed to 'speculate' money out of the respondent's* pocket, as was said in the *Kramerman* case (Kramerman *v.* Simon, 131 N. J. L. 250; 36 Atl. Rep. (2d) 132).''

There is no difference of moment or distinction, between the case at bar and the one above cited, except for the difference in opinion recorded by Dr. Kaufman.

The recent determination by the Supreme Court in *Grabol* v. *Borstein,* 68 N. J. L. 94, 23 N. J. Misc. Rep. 245, is helpful. There, some weeks prior to decedent's death, while at work, decedent had manifested an "auricular fibrillation". Affirming the dismissal entered in the Bureau, affirmed by the Pleas, it was said,

> "This court is of the same mind as the tribunals who heard the matter before. *Nothing untoward or out of the ordinary was proved as having occurred at or just preceding the time when decedent died.* To conclude otherwise would be sheer speculation.
>
> "The decedent died while in the course of his employment. Neither his employment nor the duties performed were factors in his untimely death."

Respondent sincerely urges that a line of demarcation be drawn within which industry can, with reasonable assurance, safely hire workingmen, who have pre-existing disease without incurring the danger of being required to pay substantial sums in compensation should such employees succumb to the inevitable terminal result of disease on the employer's premises, rather than on the public street, or at home. To charge industry, in these days of post-war employment upheaval, with compensation liability for the inevitable effects of disease will necessarily compel the rejection from the employment market of the thousands of persons who are diseased or otherwise physically handicapped.

As stated by Mr. Justice Perskie, in *Richardson* v. *Essex National Trunk, etc., Co., Inc.,* 119 N. J. L. 47 (Errors and Appeals),

> "It requires no extended discussion to demonstrate the obvious hardship following from a requirement which compels an employer to pay for a disability * * * which is in nowise related to or connected with the employment."

In considering the determination of this issue the court will be interested in the special report of the Department of Commerce, Bureau of Census, issued April 24, 1945, entitled "Deaths from each cause United States 1940-1943". Out of 1,459,544 deaths in 1943, 426,391 were due to heart disease; out of 1,385,187 deaths in 1942, 394,915 were due to heart disease; out of 1,397,642 deaths in 1941, 386,141 were due to heart disease; and in 1940 out of 1,417,269 deaths, 385,191 were due to heart disease. The statistics also show that for every 100,000 population, in 1940, 291.9 died of heart disease; in 1941, 290.2; in 1942, 295.2; and in 1943, 318.3 persons died of heart disease.

POINT IV.

Respondent had no knowledge or notice of any injury suffered by the deceased, by reason of an accident arising out of and in the course of his employment, within the time and in the form required by R. S. 34:15-17 and 18.

R. S. 34:15-17 provides:

> "Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee, * * *, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such knowledge is given or knowledge obtained * * *. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed."

Respondent had no knowledge of the alleged occurrence and injury of the evening of October 3-4, 1943, and the evidence demonstrates that respondent had no notice of same, within the time limited by Section 17.

The statutory language is clear and, as stated by the Court of Errors and Appeals, in *Hercules Powder Co.* v. *Nieratko,* 114, N. J. L. 254.

> "The obvious purpose of a notification is that the employer may in the absence of knowledge receive written notice that a claim is presented for an injury received by an employe in the course of employment while engaged in his work, in a place at a time designated in the notice. This being in writing, it becomes a permanent record as between the parties, definite in character; a record that can be preserved for future reference, thus avoiding controversy or dispute between the parties as to the information thus conveyed, and leaving nothing open in the subject of future misunderstanding. It is thus for the protection of both the employer and the employed.
>
> "Nor can we assume that this important requirement is directory merely and may be complied with or not as the claimant may chose. It would see mto be a condition precedent to the enforcement of any claim."

R. S. 34:15-18 requires the notice to advise the employer that its employee received an injury in the course of his employment, on or about a specified time, at or near a certain place.

Respondent, in its Answer to petitioner's Claim Petition, denied that decedent had suffered an injury, by accident arising out of and in the course of his employment, and denied knowledge or notice thereof, within the time and manner prescribed by the statute (S. C., pp. 21-22). At the hearing, in the Workmen's Compensation Bureau, Deputy Commissioner Kerner asked what facts could be admitted for the record (S. C., p. 47) and respondent's counsel stated that, among other things, respondent denied "that we had any notice or knowledge of an injury by accident prior or within the time prescribed by law" (S. C., p. 48).

Although petitioner in her formal claim petition alleged that respondent had notice and knowledge of the alleged occurrence of October 4, 1943, no evidence supporting the allegation was offered.

In *Reilly* v. *Crucible Steel Co. of America*, 132 N. J. L. 273 (Supreme Court), opinion by Mr. Justice Case, the petitioner suffered a paralytic stroke, on February 7, 1942, while employed by the Crucible Steel Company. Petitioner was employed as an inspector of metal shell casings; after reporting to work on February 7, 1942, he was found, some three hours later, in a state of collapse in the men's room; he had a paralysis of the left side, attributed to either a cerebral hemorrhage or thrombosis. Petitioner's testimony was that, shortly before the sensation of illness, he was engaged in inspecting a tray of casings; that the casings weighed from 40 to 50 lbs. each; that he undertook to pull out one of them from a tray and it took from a half to three-quarters of a minute to pull the casing out; that in so doing he "felt a very sharp, severe pain in the right side" of his head; that, within ten minutes later, he told his instructor that it was "tough job" and was going upstairs to rest, whereupon he went to the men's room, was later given medical care and taken to the hospital. The medical witnesses attributed the cerebral hemorrhage or thrombosis to the alleged unusual strain of petitioner's work. With respect to the question of whether respondent had notice or knowledge of petitioner's illness, it was said:

> "Respondent had such knowledge of petitioner's illness as came to it from the fact that petitioner, while assisting in the punching of numbers in the casings by means of metal dies and a hammer, stated that he would go upstairs and rest for a few minutes and from the fact that a paralysis presently ensued. Beyond those incidents and the

filing of the petition and the subsequent examination by Dr. Dowd, petitioner never gave notice of any sort. Respondent had no notice of the alleged causative incident upon which petitioner's case hangs * * *."

In *Korman* v. *Hygrade Food Products Corp.*, 130 N. J. L. 468; affirmed 131 N. J. L. 188, the decedent was struck on the head while at work and the evidence indicated that he was not able to do his usual work for the remainder of the day and complained of headaches. Three days later decedent reported to his foreman that he did not feel well and wanted to go home early, which he did. The following morning, at home, a seizure caused him to fall. Determining the question of knowledge and notice, the Supreme Court, in an opinion by Mr. Chief Justice Brogan, said:

> "The extent of the employer's knowledge was that the decedent reported that he was sick on the evening of October 27; that he didn't return to work on the 28th and later received information that he was suffering from cerebral hemorrhage. The inquiry therefore comes down to this: Did the employer at any time within the limitations of R. S. 34:15-17 receive notice or, in lieu of notice, possess knowledge of the occurrence of the injury? There is no competent proof that it did, save only knowledge of the fact that Korman had suffered some injury or illness without the employer knowing when, where or how it occurred."

Conclusions.

It is, therefore, respectfully submitted that the judgment of the New Jersey Supreme Court should be in all things affirmed.

Respectfully submitted,

John W. Taylor,
Attorney for and of Counsel
with Respondent - Appellee,
Sherwin Williams Company.

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New Jersey Court of Errors and Appeals

FEBRUARY TERM — 1946

MINNIE WEHRLE, *Petitioner-Appellant,* *vs.* SHERWIN WILLIAMS COMPANY, *Respondent-Appellee.*	On Certiorari On Appeal from New Jersey Supreme Court Sat Below: Bodine, Case, Perskie, JJ.

REPLY BRIEF FOR PETITIONER-APPELLANT

The brief of the respondent-appellee raises two arguments which were not the subject of discussion in our original brief. We, therefore, deem it necessary to file this reply brief.

POINT I

The judgment of the Supreme Court is not conclusive upon this Court.

Under Point I of respondent-appellee's brief, it is urged that the judgment of the Supreme Court is conclusive upon this Court and that it is not for this Court to weigh the evidence. In support of this argument, counsel cites the well established rule that findings of fact by the Supreme Court on conflicting evidence, or on uncontroverted evidence reasonably susceptible of divergent inferences, are conclusive on appeal.

Respondent's argument is effectually disposed of by the cases we shall hereafter cite. We do not here seek a reversal on the facts, but rather upon the application of an erroneous principle of law. The facts in this case were not in dispute. Neither were they susceptible of divergent factual inferences. Our sole contention is one of law, as we have heretofore urged.

We think the rule expressed by Justice Minturn in *Higgins* v. *Goerke-Kirch Co.,* 91 N. J. Law, 464, is dispositive of this argument:

> "The testimony on behalf of the defendant presented no substantial variation from that offered by the plaintiff . . . Since there is in the record no dispute upon the material facts, the case does not come within the rule that this court will not on appeal review the facts, where the only contention is the rule of law applicable to the conceded facts."

In the case of *Ciocco* v. *National Sugar Refining Co.,* 124 N. J. Law 329, this Court held:

> "It is urged that since both the Pleas and the Supreme Court found as a fact on the evidence adduced that there was no causal connection between the employment and the prostration, such a finding should not be reconsidered by us; that it is binding upon us. This is not so. True, we do not disturb factual conclusions based upon competent proofs in support of conclusions so reached. But it is equally true that we unhesitatingly reverse where there is no competent evidence to support a fact conclusion, and we reverse when the fact conclusion rests upon an erroneous premise.

We are entirely satisfied that the result reached by the court below is based upon an erroneous principle of law. It, therefore, disregarded the pertinent plenary proofs here summarized, most of which were uncontradicted, supporting the claim of the widow that her husband's employment contributed to his death . . ."

In the case of *Cirillo* v. *United Engineers,* 121 N. J. Law, 511, which was an appeal from the Supreme Court's judgment in a compensation case, this Court held that it would reverse a judgment not sustained by competent evidence.

It follows that the cases cited by respondent impose no restraint on the power of this Court to ascertain whether the finding below is consistent with the facts and is based upon a proper conclusion of law. The cases we have cited are peculiarly pertinent in the case at bar, since none of the three tribunals before whom this case has been presented, concurred in their findings. Each has reached a different legal conclusion, although all agree upon the facts. The Bureau reached its determination on one theory of law. The Common Pleas reversed. The Supreme Court reversed the Pleas, but upon a different theory than that followed by the Bureau. We reiterate that the facts in this case have never been in dispute. It is solely a question of the legal principle to be applied to those facts.

We submit that the judgment of the Supreme Court is not binding upon this Court and that the reasons we have advanced, constitute a proper challenge to the judgment below.

POINT IV (Respondent's Brief)

The respondent had notice and knowledge of the accident.

Respondent contends that it had no notice of the injury as required by statute and cites two cases in support of this contention. We submit that neither case is applicable and that respondent not only had actual knowledge but was given formal notice within the ninety day period prescribed by the statute. This point was not passed upon by the Supreme Court.

In the *Crucible Steel* case (132 N. J. L. 273) cited by the respondent, the decision was not based on any lack of formal notice or knowledge, but upon a complete disbelief on the part of the Court that any accident had occurred. Certainly no facts were proved which would have warranted the employer or any one else in assuming that the petitioner had sustained an injury during his employment. The facts indicated that petitioner reported for work for the first time on February 7th. He worked only an hour or two when he felt a pain in his head, but admittedly he said nothing to any one at the time; so that no one had any notice or knowledge that he had suffered such a pain. Ten minutes later he remarked to his foreman that it was a tough job, and said that he was going upstairs to rest. Later he was found in the men's room in a state of collapse. That was the extent of the proofs and even so much the Court was inclined to disbelieve. There was utterly no indication to

anyone from anything that happened or anything that petitioner said or did that the petitioner had suffered any injury, and the Court rightly held that the employer had no notice or knowledge of an injury.

Similarly, in the *Korman* case (130 N. J. L. 468) all that the employer knew was that the decedent reported he was sick on the evening of October 27th; that he failed to report for work on the 28th; and that thereafter information was received that he was suffering from a cerebral hemorrhage. Here again, there was no indication to the employer that any injury had been sustained during the employment.

In the case at bar, however, the decedent was stricken, and died immediately, while on the job and during the course of his employment. His fellow workers, and more important, his superiors, were present at the time and at the place where the injury occurred and had immediate and direct notice and knowledge of the injury. The "manufacturing manager" and the personnel manager, both of them decedent's immediate superiors, were immediately apprised of the accident and came to the scene of the accident, and they knew all that had happened (pp. 76-77). At the direction of the "boss", Mr. DeCastro, an ambulance was summoned to take the decedent away (p. 97). There is also testimony that Mr. Graham, a foreman, was immediately notified of the occurrence (p. 102).

It is well settled that actual knowledge of the occurrence of an injury is sufficient to comply with the statute. Such actual knowledge need not have produced the same information as formal notice would have furnished and any par-

ticularization or specification of the nature of the injury is unnecessary (*General Cable Corporation* v. *Levins,* 122 N. J. L. 383).

Knowledge by a foreman of facts such as to indicate to a reasonably logical individual that an employee had received an injury due to excessive heat while working is imputable to the corporation and meets the statutory requirement that the employer had knowledge of the accident (*Merritt* v. *American Stevedores,* 15 N. J. Misc. 710).

It has also been held that first-hand knowledge by an employer is not required, but it is sufficient if an employer is in possession of what is called knowledge in common parlance, such knowledge as most men are confined to in the daily affairs of life (*Brown* v. *Brann and Stuart Co.,* 20 N. J. Misc. 405).

In *Bobertz* v. *Hillside Township,* 18 N. J. Misc. 399, a case clearly in point with ours, it was held that evidence that an employer had knowledge of the absence of an employee from his work, caused by typhoid fever which was allegedly contracted by the employee as a result of a compensable accidental injury, and further that the employer made no point on the question of notice either in the Compensation Bureau or on appeal, established that the employer had legal notice of the injury.

We submit that within the meaning of the statute the employer had actual and immediate notice and knowledge of the occurrence of this injury. Furthermore, the respondent had formal notice through the filing of the petition within the 90-day period. The accident and death occurred on October 4, 1943. The petition for com-

pensation was filed on December 29, 1943 so that complete notice was given within the 90-day period.

We respectfully submit that there is no merit to this contention of the respondent.

It is therefore respectfully submitted that the judgment of the New Jersey Supreme Court be reversed, as urged in our main brief.

Respectfully submitted,

William F. Nies,
Attorney for and of Counsel with Petitioner-Appellant.

William L. Vieser,
On the brief.

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