INDEX

TESTIMONY BEFORE DEPUTY COMMISSIONER.

For Petitioner.

WRIT OF CERTIORARI.

NEW JERSEY, *ss.*

The State of New Jersey to the Court of Common Pleas in and for
(SEAL) the County of Hudson, and John J. McGovern, Clerk of said Court, and Henrietta Wilhelmi, GREETING:

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 6th day of January, 1928, by the Honorable Daniel O'Regan, Judge of said Court of Common Pleas in and for the said County of Hudson, in a certain proceeding brought on behalf of Henrietta Wilhelmi, petitioner, against the American Railway Express Company, respondent, for the determination and recovery of compensation under an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, we command you, the said Court of Common Pleas in and for the County of Hudson and John J. McGovern, Clerk of said Court, that the said determination and judgment together with a transcript of the evidence and all proceedings for the making of the same and all things touching and concerning the same as fully and entirely as before you they remain, or are in your custody and control, you do certify and send together with this writ, to our Justices of our

Writ of Certiorari.

Supreme Court of Judicature at Trenton, on the twenty-eighth of January, 1928, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, the HON. WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court at Trenton, this 17th day of January, 1928.

EDWARD J. KELLEHER,
Clerk.

HARLEY, COX & WALBURG,
Attorneys.

Allocatur.

This writ is allowed. Let it be sealed. January 14, 1928.

JAMES F. MINTURN,
Justice of Supreme Court.

Filed, Clerk's Office, January 18, 1928, Hudson County, N. J.

RETURN TO WRIT.

Filed January 28, 1928.

The answer of Daniel T. O'Regan, Judge of the Court of Common Pleas in and for the said County of Hudson, and John J. McGovern, Clerk of said County and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, we certify and send to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed as within we are commanded.

DANIEL T. O'REGAN,
Judge.

Attest:

JOHN J. McGOVERN,
Clerk.

(SEAL)

Defendant's Claim Petition for Compensation.

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

Defendant's Claim Petition for Compensation.

HENRIETTA WILHELMI, *Petitioner,* vs AMERICAN RAILWAY EXPRESS Co., *Respondent.*	*Claim Petition No.....* *January 5th, 1926.*

Attorneys for petitioner, O'Brien & Tartalsky, 1 Exchange Place, Jersey City, N. J.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent? Frederick Wilhelmi.

2. Where did decedent live? 988 First avenue, New York City.

3. Sex of decedent. Male.

4. Date of birth of decedent. September 12, 1871.

5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

Name of each dependent. Henrietta Wilhelmi.

Age at last birthday. 46.

Defendant's Claim Petition for Compensation.

Date of birthday. January 8, 1879.
Relation to decedent. Widow.

6. By whom was decedent employed at the time of accident?—(give name and business address)—American Railway Express Co., 169 Montgomery street, Jersey City, N. J.

7. What was the business of the employer? Express.

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.

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? August 4, 1925.

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

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Harness maker; repairing harness of the employer.

15. When did the accident happen? August 4, 1925.

16. Where did the accident happen? 169 Montgomery street, Jersey City, N. J.

17. What was the nature of the accident, and how did it happen? While repairing some harness with a needle the needle penetrated to the umbilicum of the decedent causing wound and injuries from which he died.

18. Did deceased work any after the accident? Yes.

19. If so, give date he was compelled to stop work. About September 15, 1925.

20. Give date of death. October 1, 1925.

21. Were his wages fixed by piecework? 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. 8 hours.

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

26. State the amount of weekly wages. $36.00.

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?

30. Was medical aid required? Yes.

31. If so, was this service furnished by the employer? No.

32. What other sum did you expend for medical, surgical or hospital service? $210 for doctors and hospital, but there were other additional fees for doctors the amount of which cannot now be furnished.

33. Give the name and address of physician and hospital. Dr. James Coughlan, 176 81st street, New York City; Dr. L. R. Von Roueder, 32 West 87st street, New York City; Dr. Harry Greenstein, 307 E. 57st street, New York City; St. Francis Hospital, Brook avenue and East 142nd street, New York City.

34. What other facts are there which you believe important? At the time of the occurrence of the accident, the decedent considered the injuries suffered inconsequential and it was not until about six weeks after the injuries that the seriousness of injuries became apparent whereupon advice of a physician he was taken to the hospital, operation performed and on October 1st, he died.

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? The respondent has refused to pay compensation and we therefore request an official hearing.

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 4, 1911, and the acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

(Signed) HENRIETTA WILHELMI,
(Petitioner).

288 First Avenue, New York City.
(Address)

Defendant's Claim Petition for Compensation.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

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

(Signed) HENRIETTA WILHELMI,
(Petitioner).

Subscribed and sworn to before me, this 5th day of January, 1926, at Jersey City, N. J.

(Signed) JOS. ROSTHAL,
Attorney-at-Law of New Jersey.

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

TO THE RESPONDENT.

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

We hereby notify you that unless an answer shall, within seven days from the date of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted

and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU,

Secretary.

10

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

W. E. STUBBS.

Filed, Clerk's Office, March 14, 1927, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

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

Respondent's Answer to Defendant's Claim Petition.

HENRIETTA WILHELMI, *Petitioner,* *vs* AMERICAN RAILWAY EXPRESS Co., *Respondent.*	*Claim Petition No.....* *January 5th, 1926.*

Attorney for respondent, William B. Harley, 571 East 24th street, Paterson, N. J., and 46 Trinity Place, New York, N. Y.

In answer to claim petition filed in this cause:

1. What was decedent's name? Frederick Wilhelmi.

2. Where did decedent reside? 988 First avenue, New York, N. Y.

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. We do not question the dependency of Henrietta Wilhelmi.

6. Was the decedent in your employ at the time of the accident? Was in our employ, but there was no accident resulting in death.

7. State your business. Express business.

8. Did you receive written notice from the decedent at the time of hiring, or later, that the

Compensation Law was not to apply to him? No.

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

10. When did you first have knowledge of this accident? There was no accident.

11. Did you receive notice of this accident from the petitioner? We received notice of his disability about two months after the alleged accident.

12. If so, on what date? September 24, 1925.

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

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Harness maker. We have no actual knowledge of an accident, except as claimed in petitioner's petition.

15. When did the accident happen? There was no accident resulting in death of decedent.

16. Where did the accident happen? See 15.

17. What was the nature of the accident, and how did it happen? There was no accident resulting in death of decedent. He died from natural causes.

18. Did the decedent work any after the accident? Decedent worked up to September 16, 1925, although claiming an injury on August 4, 1925.

19. If so, give date he stopped work. September 16, 1925.

20. Give date of death. October 1, 1925.

21. Were his wages fixed by piecework?

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.

26. State the amount of weekly wages.

27. How much have you paid as compensation (not medical aid), since the accident? None. There was no accident.

28. Have you promised to pay compensation? No.

29. If so, how much? There was no accident.

30. Was medical aid required? Not that we know of.

31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness. No.

32. Between what dates was service rendered?

33. Give name and address of physician and hospital rendering service at your direction. None.

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. Decedent died as the result of natural causes in no way connected with the alleged occurrence recited in the petition.

(Signed) AMERICAN RAILWAY
EXPRESS CO.,

By W. B. HARLEY,
Attorney.
571 East 24th Street, Paterson, N. J.
and
46 Trinity Place, New York, N. Y.

Respondent's Answer to Def'ts Claim Petition.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC. } *ss.*

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

(Signed) W. B. HARLEY,
Attorney of American Railway Express Co.

Subscribed and sworn to before me, this 9th day of March, 1926, at 46 Trinity Place, N. Y.

(Signed) DANIEL R. HODGINS,
Notary Public of New Jersey.

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

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

W. E. STUBBS.

Filed, Clerk's Office, March 14, 1927, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU.

JERSEY CITY, HUDSON COUNTY DISTRICT.

21210

HENRIETTA WILHELMI,
Petitioner,

vs

AMERICAN RAILWAY EXPRESS Co.,
Respondent.

Transcript of stenographic notes of testimony taken in the above-entitled matter before Hon. Charles E. Corbin, Deputy Compensation Commissioner, at the Department of Labor Building, 571 Jersey avenue, Jersey City, New Jersey, on the 19th day of November, A. D. 1926, at 11:15 A. M., in the forenoon.

Appearances:

S. Tartalsky, Esq. (O'Brien & Tartalsky, Esqs.), for the petitioner.

William B. Harley, Esq. (Harley, Cox & Walburg, Esq.), for the respondent.

HENRIETTA WILHELMI, the petitioner, sworn.

Direct examination by Mr. Tartalsky.

Q *Mr.* Wilhelmi, you live at 988 First avenue, New York City? A Yes.

Henrietta Wilhelmi, direct.

Q Your husband was Frederick Wilhelmi?
A Yes.

Q He died on October 1, 1925, didn't he?
A Yes.

Q Where did he die? A In St. Francis' Hospital.

Q New York City? A Yes.

Q At the time of his death or before, had he lived at 988 First avenue, New York City? A Yes, sir.

Q He was working for the American Railway Express Company, wasn't he? A Yes.

Q He was a harness maker, wasn't he? A Yes, sir.

Q He had worked there for a number of years? A Yes.

Q Do you know what his wages were? A $36 a week.

The Court: Is that agreed?

Mr. Harley: I think so, that is all right.

Q Your children are over 18 years of age, and over 16, aren't they? A Yes.

Q What was the condition of your husband's health so far as you know before August 4, 1925?
A He was in good health.

Q Now, on August 4, 1925, did he come home in the evening? A Yes, he came home in the evening and he complained—

Q Just answer the question, when he came home was there anybody there besides you? A Yes, my children.

Q How many children have you? A Two.

Q Did you have supper together? A Yes, sir.

Q Did he say anything to you?

Mr. Harley: I object to what he said, he is deceased and this woman is a party in the action.

Mr. Tartalsky: That is true, but the Court is not bound by the rules of evidence and this is laying a foundation.

The Court: Objection sustained. I am hearing this case in accordance with the rules of evidence as I hear all cases before me.

Q Without telling the conversation, did he complain of anything? A Yes, he had pain—

Mr. Harley: Now, if the Court please, the same objection stated is put to any transaction with the decedent by a party to the action.

The Court: Objection sustained.

Q That day, where did he work? A In the American Express.

Q The same place that he always worked? A Yes.

Q That night did he go anywhere? A Yes, he went to a doctor.

Q What doctor? A Dr. Greenstein.

Q Did he visit Dr. Greenstein more that once as far as you know? A Yes, a couple of times.

Q He went to work for a while, didn't he? A Yes, he did.

Q On September 16th he stopped working? A Yes.

Q Now, did he also have a Dr. Von Roder treat him? A Yes.

Henrietta Wilhelmi, direct.

Q Did Dr. Coughlin *operated* on him? A Yes.

Mr. Harley: I object to that unless she was present.

Q Do you know what doctor operated on him? A Dr. Coughlin.

Q Did any other doctor operate on him? A No.

Q Did you receive any bills from any other doctor? A No.

Q Did you visit your husband while he was in the hospital? A Yes, sir.

Q While he was there was any letter written to the American Railway Express Company? A Yes, my husband wrote a letter to Mr. Stroub.

Q Who was Mr. Stroub? A I guess the foreman.

Q Did you mail that letter? A Yes, sir; I did.

Q Did you put a stamp on it and deposit it in a mail box? A I did.

Q Do you remember where you mailed it? A Where the hospital is, 143rd street, and it was around there I mailed it.

Q Where was it sent to? A To Mr. Stroub.

Q In Chicago, New York or Jersey City? A Jersey City.

Q Do you remember about when the latter was written? A Yes, I seen it.

Q Do you remember about when was it, in August or September? A It was the 23rd of August.

Q August or September? A Of September.

Q 1925? A Yes.

Mr. Tartalsky: I call upon you to produce that letter (addressing Mr. Harley). (Counsel for the respondent produces letter and hands it to Mr. Tartalsky.)

Q Do you recall this as being the letter. Was it written in English or German? A German.

Q Do you recall this as being the letter? A I guess so.

Mr. Tartalsky: I offer that in evidence. It will have to be translated. Just mark it for identification.

(Letter above referred to marked Exhibit P. 1 for identification.)

The Court: You can offer it in evidence as far as being in German, and then have it translated later.

Mr. Tartalsky: All right. We will offer it in evidence.

Mr. Harley: Subject to the translation, of course.

The Court: Then you will have to put in the translation in evidence later.

(Letter above referred to and marked for identification marked in evidence and marked Exhibit P. 1.)

Q Do you know whether there were any doctors there from the American Railway Express Company to see your husband while he was in the hospital? A Well, I heard so.

Q Do you know of your own knowledge? Is there any doubt about it, Mr. Harley?

Mr. Harley: Yes, there is doubt about it.

Henrietta Wilhelmi, direct.

Q Well, I will show you then Dr. Wolfe's Industrial Service—

Mr. Harley: We don't want that, we want the case proved legally.

Q You didn't see the doctor there, did you? A No, sir.

Q Did you pay Dr. Coughlin? A Yes, I paid everything for my husband.

Q I show you this receipt and ask you if you paid that bill to Dr. Coughlin? A Yes.

Mr. Tartalsky: I offer that in evidence, $115.

The Court: Any objection?

Mr. Harley: Yes, there is, it doesn't show for what.

Mr. Tartalsky: I have the doctor here. I will offer it for identification then.

(Bill referred to above marked for identification Exhibit P. 2.)

Q I show you the bill of St. Francis' Hospital dated October 1st, $82.70. Did you pay that bill? A Yes, sir.

Q Was that for hospital service while your husband was there? A Yes.

Mr. Tartalsky: I offer that in evidence. There is no question about that, is there Mr. Harley?

Mr. Harley: Just a moment. No objection.

(Bill referred to above entered in evidence and marked Exhibit P. 3.)

Henrietta Wilhelmi, cross—re-direct.

Q Did you see your husband—you saw your husband on the night of August 4th, you say, didn't you? A Yes.

Q Did you see his body? A Well, I saw a little mark.

Q Where did you see that little mark? A In the belly button.

Q At the belly button? A Yes.

Q What did it look like, what kind of a mark? Can you tell? A A little red, I guess.

Mr. Tartalsky: That's all, cross examine.

Cross examination by Mr. Harley.

Q All you saw was a little red mark as you say on the belly button? A Yes.

Q That's all you saw? A Yes.

Q Just on the skin? A No, inside.

Q Inside of the belly button? A In the belly button.

Q Inside the belly button? A Yes.

Mr. Harley: That's all.

Re-direct examination by Mr. Tartalsky.

Q Did you see that mark before? A No.

Q Did your husband complain about that before? A No.

Mr. Harley: Wait a minute, this is not re-direct examination.

Mr. Tartalsky: This is merely re-direct, with the Court's permission we would like to ask it.

The Court: Go ahead.

Henrietta Wilhelmi, re-direct.

Q Did you see that mark at any time before? A No.

Q Did your husband complain or say anything about it prior to that time? A No.

Mr. Harley: I object to what he said or complained of.

The Court: Objection sustained.

Mr. Harley: Did he show you this belly button every night? A Not every night.

Mr. Harley: All right, that's all.

(Witness excused.)

Mr. Tartalsky: We have agreed upon a translation of the letter marked in evidence P. 1, addressed to Mr. Henry Straub whom I think it is admitted was superior or foreman of the employees. The letter dated September 22, 1925. "Worthy Mr. Straub, simply want to notify you that I arrived at St. Francis' Hospital and will probably be operated on Thursday. I write you today so that you can report me sick to the company because I received my sickness at that place and it will be some time before I can work again. Will write you particulars a few days after the operation. Hope these lines will find you well. Very respectfully, Fred Wilhelmi, 988 First Ave., New York City." "Regards to the wife and children and Molli. Excuse my writing with a lead pencil because I have no ink."

Q Is there any objection to putting in this translation?

Mr. Harley: No.

(Translation above referred to entered in evidence and marked Exhibit P. 4.)

Dr. Harry Greenstein, direct.

DR. HARRY GREENSTEIN, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Tartalsky.

Q Dr. Greenstein you have your office at 707—57th street, New York City, is that right? A Yes.

Q You had your office there in August, 1925? A Yes, sir.

Q How long are you practicing, doctor? A 27 years.

Q What college are you a graduate of? A New York University.

Q You are in general practice? A Yes, sir.

Q Do you recall being called upon by Frederick Wilhelmi? A Yes, sir.

Q Did he call at your office for treatment? A At my office.

Q When did he call there the first time? A August 4, 1925.

Q What did he say to you regards to his history?

Mr. Harley: I object if the Court please. I object to this testimony, the man is dead.

The Court: He can give his history if he treated him.

Mr. Harley: He can get what he found, not what the dead man told him.

The Court: The history he took, he can testify to his history.

Mr. Harley: This is a conversation with the dead man.

The Court: He has the right to testify as to the history he took.

Mr. Harley: I object and ask an exception be noted.

The Court: Surely.

Q What did he tell you, doctor? A The man came into my office on August 4, 1925, in the evening complaining of pain in his abdomen. He held his hand on his abdomen and told me while he was working on a harness a needle had penetrated it, that is, the abdomen.

Q Did he tell you when it happened? A He told me it happened while he was working and from work he came to my place.

Q That day then? A The same day.

Q Did you examine his abdomen? A I did, sir.

Q Did you find any marks there? A A mark that appeared to me something sharp had penetrated it around the navel.

Q Did you give him any treatment? A I wrote him a sedative and told him to go home and rest.

Q At that time did you think there was anything serious in connection with this? A No.

Q Did you feel any lump at his navel? A On his examination all I could find out was something had penetrated it.

Q Did you tell him whether or not he could continue his work? A I told him to see me again, he came the next day, he came again, the 10th of August and at that time I advised him to see a surgeon.

Q The last time you saw him was the 10th day of August? A I seen him since then but I have no record of that.

Q The last time your record shows is about the 10th of August? A Yes.

Dr. Harry Greenstein, cross.

Q From your examination of him and the diagnosis and history he gave you, did it seem possible that the injury or what he was complaining of was caused by a needle?

Mr. Harley: Wait a minute. There is no evidence what the man died of.

Mr. Tartalsky: We will connect it up; this is only one doctor; we have three.

Mr. Harley: This doctor doesn't know.

A You haven't asked me yet.

Q After you took his history, doctor, and he told you that while working on that day he injured his abdomen with a needle— A Yes.

Q You examined him and found that he had been injured with a sharp instrument? A Something sharp had penetrated, probably a needle.

Q You saw that, didn't you? A I saw a mark where something sharp had entered.

Q From your diagnosis was it probable that what he complained of was caused by a sharp instrument? A Positively.

Mr. Tartalsky: Cross examine.

Cross examination by Mr. Harley.

Q You are refreshing your recollection from a record you have there? A My record.

Q When was that made? A That record is copied from the original.

Q Where is the original? A The original was on scraps of paper and then it was copied afterward and placed on file.

Q Is that the way you keep your records, on scraps of paper? A I take them on scraps

of paper as they come in and then place them afterwards on another paper.

Q Do you keep them for years that way? A I keep them two years.

Q You didn't think it was necessary to bring your original as well as these copies? A No, because when I originally diagnosed the case, I didn't think it was important, I put it away as something from which something might happen.

Q You treated this as any skin injury, didn't you? A Yes.

Q Did you probe to see how deep it was? A No.

Q Then you don't know how deep the wound was? A To me it appeared like a puncture wound of the skin and the facea underneath.

Q That's all you know about it? A That's all I know about it.

Q Was there any tenderness or rigidity of his abdomen when you examined it? A At the time I examined him he complained of pain as I pressed. He complained of tenderness. The next day he complained of a pain there again. Meanwhile I gave him a sedative to quiet it.

Q You didn't give him anything for the wound itself, did you? A Nothing at all.

Q You don't know how far the wound penetrated? A No.

Mr. Harley: That's all.

Re-direct examination by Mr. Tartalsky.

Q Doctor, you have come here from New York at our request to testify today? A At the request of the attorney.

Q Do you make a charge for your appearance here today? A Yes, sir.

Q What is your charges? A $50.00.

Q Is that a fair and reasonable charge for being away from your office for this time? A I get that for other cases.

Mr. Tartalsky: That's all.

Mr. Harley: That's all.

(At this point the case was adjourned until 2 P. M.)

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2 P. M.—Afternoon Session.

DR. LUDWIG R. VON ROEDER, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Tartalsky.

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

Q How long have you been practicing? A 26 years.

Q You practice in New York City? A I do.

Q In general practice? A Yes.

Q What college are you a graduate of? A Cornell.

Q Are you connected with any hospital? A Not at the present time.

Q Were you connected? A I was.

Q With what hospital? A St. Francis' Hospital, New York Polyclinic.

Q Did you teach or lecture in any of those in any branch? A No more.

Q You did? A I did.

Q Where did you teach, doctor? A New York Polyclinic.

Q You also were in the government service, were you, during the Mexican War? A I was.

Q What was your position there? A I was a lieutenant attached with the 7th Regiment, Medical Corps.

Q You saw Frederick Wilhelmi for treatment, didn't you? A I did.

Q He called at your office? A He called at my office.

Q When did he call at your office for the first time? A He called at my office for the first time September 12th.

Q 1925? A 1925.

Q Did you get his history? A I did, sir.

Q What did he say to you about it?

Mr. Harley: My objection to this history is the same objection. I repeat it and ask an exception.

The Court: You treated him, didn't you?

A I did, sir.

The Court: All right.

Q Give the dates you saw him and what he said. A Give the history?

Q Yes. A On September 12th, late Saturday afternoon or evening, he came to my office complaining of very severe pain in the middle of his abdomen and gave the history of having received an injury there while repairing collars, a large needle he was using penetrating his abdomen. He gave the history that he had seen other doctors but they couldn't give him any relief and some patient of mine had referred him to me. I examined him carefully and found that he had a mass in practically the middle of

the abdomen and the umbillicus. I told him at the time the only cure for him would be operation, prescribed medicine for his stomach, put him on a rigid diet, and ordered bowel irrigations to relieve the pain. He came back on the 17th and there was no relief of the pain from the treatment I had given him, and the strict diet I had put him on and the bowel irrigation, so I told him again he had a large mass there would have to be removed and the only thing to do would be to be operated on. He said he would speak to his family and be back soon, so on the 21st, on a Monday, he was the first patient at my office and he said he was ready now to go to the hospital and I gave him a slip to St. Francis' Hospital to Dr. Coughlan, James H., and I told Dr. Coughlan I was.

Mr. Harley: You can't tell us what you told Dr. Coughlan.

A All right, I sent him with the diagnosis of cancer for an operation.

Q What was your diagnosis that this mass came from? A He had this mass there which from these symptoms and all made me make a diagnosis of cancer.

Q From his history that he gave you? A From the trauma, that certainly had started it.

Q Did you diagnose it came from the injury? A The symptoms all dated from the time of the injury.

Q Is it possible from your experience as a doctor such a mass will come about by an injury from the needle? A It can.

Q Is there any doubt about it in this man's case? A There is no doubt about it, the cancer was there.

Dr. Ludwig R. Von Roeder, cross.

Q Is there any doubt about it that it came from the injury in your opinion? A In my opinion the injury was the starting point.

Q Doctor, you sent him to Dr. Coughlan? A I sent him to Dr. Coughlan, yes, sir.

Q Do you know whether he operated on him, do you know whether Dr. Coughlin operated on him? A I know Dr. Coughlin operated on him from his report. I didn't see the operation.

Q Did you ever hear of Dr. Cramp or anybody else operating?

Mr. Harley: I object, if the Court please, as immaterial.

Mr. Tartalsky: I think I am anticipating the defense.

Mr. Harley: The defense is set up in the answer.

The Court: That is hearsay.

Q Do you know whether Dr. Cramp operated on him? A Dr. Cramp didn't operate on him.

Q Do you know whether or not Dr. Cramp is in Belgium? A Dr. Cramp at the present time is not in Belgium.

Q When did you last see him? A Yesterday.

Q Where? A Manhattan Square Hospital.

Q New York City? A New York City, 36 West 77th street.

Mr. Tartalsky: Cross examine.

Cross examination by Mr. Harley.

Q Do you mean to say a cancer, such as was there, would form from August 4th to September 12th? A I do say.

Dr. Ludwig R. Von Roeder, re-direct.

Q Were you present at the operation? A I was not.

Q You don't know anything about what they found, do you, from your own knowledge? A From personal knowledge, no.

Q As far as you are personally concerned, inasmuch as you were not present at the time of the operation, you don't know what this mass consisted of of your own knowledge? A No, sir, only the report of the pathologist.

Mr. Harley: That's all.

Re-direct examination by Mr. Tartalsky.

Q Doctor, there are several kinds of cancer, aren't there, what you call quick and slow cancer, aren't there? A That is going into pathology and you can have twenty teachers and twenty teachers will give you twenty different classifications.

Q I mean just your opinion. A I know some cancers are very, very rapid and some are very, very slow, from my twenty-six years' experience in medicine.

Q From the present knowledge of the cause of cancer, what are some of the causes? A One of the causes is irritation, constant irritation, that is supposed to be the main factor, that causes the cancer.

Q You are familiar with what the duties of a harness maker are? A Yes, sir.

Q From the work they do, do cancers come about?

Mr. Harley: I object to that if the Court please.

The Court: Objection sustained.

Dr. Ludwig R. Von Roeder, re-cross—re-direct.

Q Cancers come from injuries, too, do they? In addition to constant irritation? A Constant irritation.

Q Do they come from abrasions or punctures? A Plain abrasion or puncture, no.

Q What about a puncture from a needle in the abdomen, such as this man had?

Mr. Harley: He already said they don't come from punctures.

The Court: I will allow the question.

Q You said on direct examination that this mass came to this man, your diagnosis was from the injury he received on August 4th? A Yes, sir.

Mr. Tartalsky: That's all.

Re-cross examination by Mr. Harley.

Q You said that it couldn't come from a puncture or an abrasion of the skin tissue? A Yes, but this is more than that; the man had to continue work and the constant irritation of his working, pressing on that, is enough to cause it. That is the primary exciting cause of it.

Q Then the piercing of the skin by the needle would not cause it? A If there was no other irritation.

Q Then, it would be due to the occupation? A The occupation, occupation cancer, if you want to put it that way.

Re-direct examination by Mr. Tartalsky.

Q The primary cause, you say, was this puncture? A The injury.

Dr. James Coughan, direct.

By Mr. Harley.

Q Did you say it was or it might be? A It was the injury; yes, sir.

Q It didn't produce a cancer, did it? A The irritation never produced it; it is exciting.

DR. JAMES COUGHAN, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Tartalsky.

Q Dr. Coughan, you are a practicing physician and surgeon in New York City? A Yes.

Q How long have you been practicing? A Fourteen years.

Q What college are you a graduate of? A Long Island College Hospital.

Q Are you connected with any hospital? A I am on the staff of St. Francis' Hospital and on the teaching staff of the Polyclinic.

Q You have your office at 178 West 81st street, New York City? A 176 West 81st street.

Q 176 West 81st street. Did you know Frederick Wilhelmi in his lifetime? A Yes, I know him.

Q Did he call at your office or did you find him in the hospital? A I found him in the hospital; he was sent to the hospital to me.

Q Do you know who referred him to you? A Dr. Von Roeder.

Q What was he referred to you for? A He was referred to me for a carcinoma of the umbillicus.

Q Was he sent to you for treatment, operation, or what? A He was sent to me for operation.

Q Before you operated, did you ask him his history? A Yes, I did.

Q When did you first see him? A I saw him on the 23rd of September, 1925; he was admitted to the hospital on the 22nd.

Q What did he say to you about his history?

Mr. Harley: Subject to the same objection, if the Court please.

A I asked how he got it.

Q How he got what? A He got this mass in the region of his umbillicus.

Q The umbillicus is the navel, the belly button, is that it, in plain English? A Yes. He said around the first part of August, I don't remember the exact date, at his work, he struck himself in the umbillicus with a needle and that he was a harness maker or repairer and worked along that line.

Q What did you find; did you make an exterior examination or did you cut him up, doctor? A First, on the 23rd, I examined him, then there was found there was a mass involving the navel, and then I verified Dr. Von Roeder's diagnosis.

Q What was the diagnosis you verified? A Carcinoma of the umbillicus.

Q What is that? A A cancer, a malignant growth.

Q Caused by what in this instance, in this case? A I attributed the cause to the stab wound, the penetrating puncture wound.

Q Did you then operate? A I operated the following day, the 24th.

Q What did you find then? A I found that it was a cancer, and all I done, as is the purpose of my operation, is to excise it. Then when I

went into the abdomen I found there were numerous nodules in the omentum and also a growth in the gall bladder, so I excised the gall bladder.

Q From your observation and examination, what opinion did you draw as to the cause of his condition? A Why, I considered that he had a primary carcinoma of the umbillicus with secondary growth in the gall bladder and omentum.

Q What caused a primary carcinoma, in your opinion? A That I traced back to the puncture wound.

Q Did you find—did you examine his stomach? A I did examine the stomach; the stomach was normal.

Q What did the stomach; being normal, what inference did you draw from that? A That none of those growths were connected with the stomach.

Q Now, doctor, it was testified that this man had visited Dr. Greenstein on August 4, 1925, and on August 4th there was no lump or mass and that Dr. Von Roeder testified when he examined him about September 15th there was a mass, what inference do you draw from that, doctor? A That the mass developed.

Q Would it develop from this puncture? A That was my opinion, that it did develop from the puncture.

Q He remained at the hospital for about a week later, didn't he? A He died on October 1st.

Q He died as the result of what? A As the result of the carcinoma of the umbillicus and secondary carcinoma of the gall bladder and omentum.

Q Doctor, do you know Dr. Cramp? A Yes, sure; we work on the same service.

Dr. James Coughan, direct.

Q Did he operate on this man? A No.

Q Was there anyone other than you operated on this man? A No, I operated on him.

Q Is Dr. Cramp in Belgium? A No; I saw him two days ago.

Mr. Harley: I guess that is all immaterial, but I don't care.

Q You are sure, however, there was no other doctor who operated on this man? A I am positive; I am responsible for the operative findings; I dictated them.

Q I have the card here. I show you that card and ask you if this is in your handwriting, doctor? A Yes, it is.

Q This is a receipt for $115.00 signed by you, isn't it? A This is a receipt for $115.00, yes.

Q What was that for? A That was for the operation of Frederick Wilhelmi.

Q Who paid that? A I believe the boy paid me; his son.

Q Was that your charge, $115.00? A I think I made a fee of $125.00, and that was all he had, or something like that.

Q Is that a fair and reasonable charge? A I consider it so for people of that type.

Q You came here today from New York to testify at our request? A Yes.

Q What did you say your charge would be? A I said it would be $50.00.

Q Is that a fair and reasonable charge? A If you will allow me to say so, I don't think so. I spent already too much time here.

Q You mean it is less than reasonable? A Sure

Q Your charge will be $50.00? A Sure.

Mr. Tartalsky: By the way, Mr. Harley; I didn't know Dr. Von Roeder was in a hurry, but it is the same; we promised him also $50.00 each. I didn't get an opportunity to ask it of Dr. Von Roeder.

Mr. Harley: When we come to that the Commissioner will decide it in his own good judgment; he will know whether it is reasonable anyway.

By Mr. Tartalsky.

Q This bill is dated October 1st, doctor? A Yes.

Q The date of October 1st, that is the date he died isn't it? A That is the date he died; I don't recall whether it was paid that day or not; probably that is the date I sent it out.

Q You sent it out the same day he died? A Well, it was sent from my office. I suppose it may have been sent a day after or the day before he died; I don't remember exactly.

Mr. Tartalsky: Doctor, do you remember whether anybody representing the American Railway Express Company came to the hospital while you were there, any doctors?

A I didn't see anybody; nobody talked to me.

Mr. Tartalsky: That's all.

Cross examination by Mr. Harley.

Q You testified there was a mass in the region if the umbillicus; where was the main part of that mass? A It was in and around the um-

billicus. I should say most of the mass projected a little bit toward the right.

Q About how big was it? A I should say approximately it was that size (indicating).

Q Indicating about the size of a silver dollar? A Yes, probably a little larger; it was also thick.

The Court: Indicating about two inches in diameter.

Q Most of it on the right side? A Most of it on the right side.

Q The skin wasn't involved? A Well, that is hard to say; I assume that all the structures of the abdomen were.

Q Was it or was it not? A I will answer that by saying yes.

Q Was it bound fast to the underlying mass? A The skin, yes, on the navel it was.

Q It always is, isn't it? A Well, yes, or not; I have got to qualify my answer.

Q All right; let's qualify it. A The skin bends into the navel, and this was a mass that caused some retraction of the navel toward the right, so that the skin was incorporated in this tumor.

Q Is the navel naturally always pulled to the right? A It is pulled to the sides.

Q More often to the right than any other direction? A I wouldn't say so, no.

Q As a matter of fact, isn't it attached to the ligament at the bottom of the navel and naturally pulled to the right? A No, the ligament at the bottom of the navel doesn't project toward the right; it goes straight down and up.

Q It goes to the liver, doesn't it? A Well, that is up above.

Q That is on the right side, isn't it? A The liver is mainly on the right side, yes.

Q What is the ligament the remains of? A I am not going to answer that question, for this reason, I am not testifying here as an anatomist. I am testifying to the man's surgical condition.

Q You are a surgeon, doctor, aren't you? A Yes, I am.

Q You cut this very place, didn't you? A I didn't cut the ligament; that had nothing to do with that.

Q It was exposed, wasn't it? A That ligament is atrophied; everybody knows that.

Q You saw that when you opened him? A No, it was intimately associated with the mass.

Q You didn't cut it? A I had to cut all the structural parts of the navel to remove this mass.

Q What is your objection to telling us about it? A I haven't any.

Q Why don't you tell us? A Tell you what?

Q What was it the remains of? A It is the remains of an old ligament.

Q Is it the remains of the urekus? A Which?

Q The round ligament? A Which one?

Q The round ligament of the liver, the one we have been asking about. A The one above or below?

Q Below. A No, the round ligament of the liver is above.

Q How about the upper one? A What about the upper one?

Q How about the ligament? A What do you want to know about it?

Q What is it the remains of? A That is the round ligament of the liver, the upper one, the lower one is the remains of the urekus.

Dr. James Coughan, cross.

Q You did find a carcinoma of the gall bladder? A That's right.

Q What is the physiological connection between the umbillicus and the gall bladder, if any? A Physiological relation?

Q Yes. A Just what do you mean by that?

Q Just trace any direct connection between the two, if there is any. A There is always a connection between the lymphatics and the blood supply, which one do you mean?

Q The blood supply. A May I state my answer, I don't consider that a fair question, that involves the structure of the human body, that has nothing to do with the operation at all, he might ask me the circulation of the foot.

Mr. Tartalsky: Well, answer it to the best of your ability.

A All the structures of the body are related to the blood vessels and lymphatics.

Q You said this carcinoma was primary in the umbillicus and secondary in the gall bladder? A That's right.

Q Why couldn't it be primary in the gall bladder? A Because the history of the penetrating wound, the size of the mass, the fact he had several other nodules in the omentum, also in the gall bladder, makes me feel and believe and know that the growth is primary in the umbillicus.

Q Now, then, do you attribute the condition of the gall bladder in anywise to the condition of the umbillicus as you found it? A Certainly, the growth in the gall bladder was secondary to the growth in the umbillicus.

Q Then there must have been some penetration of the carcinoma condition of the umbillicus

into the gall bladder wasn't there? A Well, not in that way, an infection or growth here may extend anywhere just as a growth there may extend anywhere.

Q Then, did it, as a matter of fact, in your opinion? A It did extend from the umbillicus to the gall bladder.

Q Just state the extension of it for us. A It just extended through the lymphatics.

Q Where is the lymphatic connection between the skin and the gall bladder? A They are all over through the skin and through the underlying tissues.

Q How are the lymphatics going to drain from the skin into the gall bladder? A Through the skin and through the underlying tissues.

Q How do you get them into the omentum? A Well, the omentum is in contact at times with the undersurface of the abdominal wall. And you can get a growth by contact.

Q Then won't you have adhesions? A Not at all.

Q Under what other circumstances would you find this condition? A By contact, I say, they are layer on layer, like that.

Q You mean to say it goes right through one blood vessel to another? A Certainly, it can go through any structure.

Q Without having any anastimosis? A What do you mean by anastimosis?

Q Connection between the blood vessel. A It varies so widely almost any rule can apply. Can travel through the blood vessels, through the lymphatics, or through contact.

Q How often does it travel through contact? A Nobody knows that.

Dr. James Coughan, cross.

Q How many times have you been struck while you were operating for cancer, in the hand? A How many times have I been what?

Q Stuck with the needle while operating with a cancer case? A I can't recall any.

Q Have you ever? A I can't recall any particular cancer case, no.

Q You don't remember any if you have stuck your finger with a needle? A I have been stuck lots of times, yes.

Q In cancer cases? A I don't recall.

Q Of course, you haven't got cancer? A I haven't got cancer that I know of.

Q Is it a fact that cancer of the gall bladder or the intestines is developed through the portal circulations? A Well, that is problematical, that is theoretical, anybody may assume that or may not.

Q Is it not an accepted fact? A What?

Q That it is transmitted through the portal circulation? A I don't think it is.

Q Don't the best medical authorities so hold? A I don't know of anybody who does, they may for all I know, some of them, some of them profess anything.

Q You made a record in the hospital, didn't you, of the various stages? A I don't make any records. I gave all the dictation regarding what I find, I just read off to my record, I dictate on the history sheet.

Q You also gave the cause of death? A Yes, I did.

Q That was carcinoma of the gall bladder? A No, it wasn't. It was carcinoma of the umbillicus with secondary involvement of the gall bladder and omentum.

Q And you didn't say anything about an accident as being the cause of death, did you? A How do you mean, say anything about it?

Q Put it in the record? A I inserted it in the record of the hospital myself.

Q What? A That the man gave the history, or I told the interne to do it.

Q Would you say that this is the history that you gave in the hospital "injury to toe 5 years ago, his symptoms were of 10 weeks duration, he had epigastric pain, vomiting, and lost about 20 pounds. Physical examination revealed tenderness in the epigastrium. Operation was performed by—

Mr. Tartalsky: Is that the record, "blank?"

Mr. Harley: That is the record, it says Cramp, I will say that is wrong.

"Operation reveals injuries in omentum and so forth, also on the gall bladder. Gall bladder was removed and drain inserted." Would you say—

A That is not the correct record.

Q How long does it take for a cancer to develop in the gall bladder? A That you can't tell, nobody can answer a question like that, there are slow growing and rapidly growing cancers.

Q What do you you mean by rapidly, how rapid would be the most rapid one you ever heard of? A Well, I think about six weeks is the most rapid that I have known of.

Q What did that involve? A Well, that was a cancer of the breast following an operation.

Q What was the operation of the breast for in that particular case? A A primary cancer.

Q A cancer was the cause of the operation, I understand in this particular case? A The primary cancer was the secondary growth.

Q How long does it take to get a metastatic growth in the omentum following a growth somewhere in the gastric intestinal tract?

(Question repeated by the reporter.)

A Well, you have to qualify your answer to that dependent on the type of cancer, some are rapid growing and some are slow growing.

Q You never seen any more rapid than six weeks? A Well, you asked me what case I recalled and this is the case I cited as recalling.

Q You have never seen any of this type result in less than six weeks, have you? A What type?

Q The type involved in this case. A I have never been able to ascertain the time.

Q In the cases that you have handled you have gotten a history of intestinal disturbances? A Yes.

Q How long has that been, how long prior has the disturbance been going on in the history of the case you have handled? A What type of case?

Q Gastric intestinal? A Cancer?

Q Yes.

(Former question repeated.)

A Well, I don't get the meaning of that question.

Q When you have had cases of cancer you have gotten a history— A Where?

Q Of the gastro-intestinal disturbance? A I get a history, yes.

Q Did that history indicate that there had been a disturbance there for any period of time in the majority of cases, or are they short and if so, what was the shortest period? A I have seen cases up to the hospital for admission who didn't know they had cancer, didn't know they had trouble, except they weren't feeling well, they were weak and we diagnosed them when they didn't know they had any trouble.

Q How long would they be weak according to their history? A Some cases would come in and say they were weak a few weeks, some months.

Q Cancer doesn't develop rapidly, does it? A No, it is a slow going type, a malignant type of disease that breaks down the structures, but the disease is slow growing type, though some grow faster than others.

Q That in the maximum would be six weeks? A I wouldn't say that, because I don't think I am qualified to answer a question like that, I am citing one case in my experience.

Q You are not a cancer expert, are you? A No. I don't qualify as a cancer expert.

Q You are just a surgeon? A A surgeon.

Q Do you know of any case or have you seen a case of carcinoma of the umbillicus with a secondary cancer of the gall bladder with a cancerous condition otherwise than in this case, that has developed in the same time that it is claimed this did? A No, I consider this case in itself. Every case is a case in itself.

Q Had you ever heard of one before? A Well, I can't put my finger on the case and state what journal I read it in, but I have an idea that there are such cases because a man reads so many journals he can't keep track of them.

Q But you have no distinct recollection of anything in medical literature? A I know there is such, yes, I can't put my finger on where it is, though. I might add, if you want some additional information that this case was brought up at the meeting because this was an unusual case and at that meeting we agreed that it was an unusual case to have a primary cancer of the umbillicus with secondary nodules elsewhere.

Q And it was agreed this was an old condition? A It was not considered so.

Q All those experts you discussed this case with agreed it was most unusual? A Yes, no doubt about it.

Q In contrary to all medical precedents and experience? A No, it is not.

Q It might be possible this was an old condition? A No, I think not, I haven't any idea it was at all.

Q You cannot swear it wasn't? A You can't swear to anything in medicine.

Q Why are you positive it is a new case? A Because I have considerable confidence in the man who sent him to me. The fact the growth was large in the umbillicus and the secondary growth was small. The fact as far as I could logically deduce was no other way to think.

Q Do you remember in a history of this case that you made that those pains had been in the duration of 10 weeks before you saw the man? A No, I didn't make any statement about his pain at all.

Q Did you order the X-rays that were taken at St. Francis' Hospital as shown in this bill marked P. 3 in evidence? A I must have.

Q What were they for? A To find out whether the man had any involvement of the stomach or intestine.

Q That picture showed the intestinal tracts? A Well, I don't remember it, but I suppose it did, that was the object of having them ordered.

Q Why did you suspect the intestinal fact if you had already made a diagnosis? A Because carcinoma of the stomach in men is the most common cite.

Q But you are positive it was in the umbillicus, that primary condition? A Absolutely, but we do all these things for elimination, process of elimination.

Q Isn't it a fact when you get a cancer of the gall bladder you always suspect it travels from the stomach by the portal system? A That isn't so, I say it is definitely known cancer may come by continuity, by contact.

Q What is the stomach drained by, if not the portal? A What has that to do with it?

Q That is the extension through the blood stream? A I am not saying anything about the blood stream, I say the thing came from contact.

Q When it became necessary to take this X-ray, what preparation did you have to make in order to have the negative show? A That is in the hands of the X-ray man in the hospital.

Q There is only one way to do it, though, isn't there, Bismuth? A There is another way.

Q Berian? A That's right.

Q Now, if there was a penetration, traumatic— A Of what?

Q Of the abdominal wall or the intestines, you couldn't possibly use that, could you, use Bismuth or Berian for fear of the consequences? A It depends where you wanted to get your picture. If you wanted to get a picture above the penetration you could get it all right. If you want

it below the penetration everybody knows you can have a point of traumatic injury shown lower. Of course, the Bismuth or Berian would have to go through the intestinal tract to be eliminated? A Yes, but the Bismuth or Berian coats over the intestinal tract. That enables you to take the picture above the point where it might rotate, or below. You could put it in below when you wanted the picture there.

Q Can you tell us what was the condition of the round ligament leading from this mass to the liver? A I can tell you the condition of the part that was involved in the operation.

Q All right, what was it? A That means all the structures entering into the navel and umbillicus. The navel, the umbillicus, were carcinomatous. The carcinoma that involves the navel involves the structures surrounding it.

Q Do you know the condition the liver was in? A The liver was negative except the gall bladder.

Q By negative you mean there was no growth in the liver? A No growth that I could find by examination.

Q And you examined him very carefully? A By the gall bladder.

Q The X-rays shown here were taken in St. Francis' Hospital? A I assume so, that is the bill.

Q Do you remember ordering them? A I suppose I did order them really, I should have anyway.

Q That would be taken by the radiographer at St. Francis' Hospital? A Yes.

Q Do you know who he is? A There are two, Dr. Carroll is in charge of the place and there is a Mr. Hildebrand, the technician.

Dr. James H. Brothers, direct.

Q Do you know Dr. Carroll's first name, doctor? A I don't recall, however, that is easy to find, I think he is on 145th street, West.

Q C-a-r-r-o-l-l? A Yes.

Q Of course, these are a part of the St. Francis' Hospital records, aren't they, these X-rays? A Oh, yes.

Q Were there any adhesions around the gall bladder, doctor, as you remember? A No, there were not, that I do remember.

Q Did you see this patient after you operated, at any time? A Sure, saw him every day.

Q When is the last time you saw him? A October 1st, the day he died.

Q What time in the day did he die, do you remember? A I don't remember.

Q You weren't present? A Probably not.

Q The last time you saw him he was alive, wasn't he? A Yes, sir.

Mr. Harley: That's all.

Mr. Tartalsky: That's all. I understand they are going to call Dr. Brothers. We have no objection if they put him on out of order.

DR. JAMES H. BROTHERS, a witness on behalf of the respondent, produced out of turn by consent of counsel, sworn.

Direct examination by Mr. Harley.

Q Doctor, where do you reside, Dr. Brothers? A 128 Broad street, Newark, New Jersey.

Q Where do you practice medicine? A Newark, New Jersey.

Dr. James H. Brothers, direct.

Q Where have you been practicing medicine? A Since I came back from the war I have been practicing in Newark, graduated in 1914.

Q Where did you graduate from? A College of Physicians and Surgeons, Columbia University.

Q Were you associated in any way with any hospitals? A Post Graduate, I taught surgery there about a year.

Q Were you associated with any other physicians? A In New York?

Q Yes. A Dr. Albee, Dr. Robert P. Morris, Dr. Dwyer.

Q Are you connected with any institutions in the State of New Jersey? A St. Barnabas' Hospital, in Newark.

Q Have you operated on cancer cases in your experience? A Yes, sir.

Q Is your principal occupation a surgeon? A General surgeon.

Q Given the conditions of a cancer of the umbillicus with a cancer of the gall bladder what would you say was the relationship between the umbillicus and the gall bladder, if any regarding the transmission of the cancer? A As far as the cancer being primary in the umbillicus, I can't see any connection as to how you could get a secondary in the gall bladder.

Q Why? A Because your blood strain is not in direct contact with the portal circulation excepting the under portion of the abdominal wall. A secondary cancer in the gall bladder, of course, is the usual type seen. You rarely see primary in the gall bladder, but they usually come from the gastric intestinal tract, through the circulation, the blood streams, which is a more direct way of transmission, or through the lymphatics.

Dr. James H. Brothers, cross.

Q Now, where there is a case in which the primary cancer of the umbillicus is claimed with a cancerous condition also in the gall bladder with the finding, with the negative finding in the liver, what would that indicate to you as to which was primary or secondary? A I couldn't see the connection without any growth in the liver. There must have been some growth in the liver.

Q If there was not? A If there was not you have got to consider it primary carcinoma in the gall bladder itself, which are rare, but which do happen.

Q In attempting to check that in an operation they would excise the gall bladder, wouldn't they? A That's it.

Q What is the medical term used for excision of the gall bladder? A Colisytectomy.

Mr. Harley: That's all.

Cross examination by Mr. Tartalsky.

Q Doctor, medicine is certainly not an exact science, is it? A It is not, surgery usually is.

Q Nothing is more interesting than the human body, is that so? A That is a fact.

Q And every person's body is different from the other man, isn't it? A Very little; there are some slight changes like Aberant vessels, namely, vessels which do not follow the usual course.

Q You are always learning and always experimenting, aren't you? A I don't know when I experiment, I am trying to learn.

Q The purpose of the profession is to try to experiment and learn? A We are trying to learn, we don't experiment.

Dr. James H. Brothers, cross.

Q You don't experiment? The medical profession doesn't experiment at all? A Not on a human being.

Q I didn't ask you that. A Certainly, on certain animals; we have drugs and we try on certain animals how they can get along without certain organs, and try to feed them certain drugs to enable them to get along without those organs, experiments of that type.

Q What affects one person in one way may affect another person in another way. A That is absolutely true. A dose of morphine in one person puts him to sleep and in another person makes him wild.

Q So it depends on the individual case and the individual doctor treats him? A As to what?

Q As to the treatment for the man? A As to what? I don't understand you.

Q If a man is a practicing physician, examines a particular individual, based on his actual observation and diagnosis, isn't his opinion worthy of greater respect than a man who never saw him? A As to what, a hypothetical question or a condition?

Q As to the condition of that man. A He certainly ought to know more about that particular man.

Q If you never saw him, you don't know anything about the case, is that so? A I know from the testimony I heard and reading the case, I can make a hypothesis on that.

Q You say you based it on the history of the case? A Yes, sir, presented to me by the side I am employed by.

Q What facts do you take into consideration? A A certain record was shown to me of a man

puncturing the skin of the abdomen with a needle, working, walking around a period of two or three weeks, seeing a doctor who didn't treat that wound at all but gave him a sedative, then saw another doctor, who sent him to a surgeon, sent him to the hospital, who operates and finds a cancerous mass, at the omentum, metastatic nodules in the omentum and so-called secondary growth in the gall bladder.

Q In other words you read these facts from the record presented you by the American Railway Express Company? A No, I read some of them. The others I gleaned in the court.

Q You heard the testimony here today, didn't you? A I incorporated that in the answer.

Q You read in the report that the man stuck himself with a needle and suffered an injury, didn't you? A Is alleged to have stuck himself, I don't know, I am making my hypothesis on what other people told me. One doctor testified there was a reddish mark about the navel but he didn't probe it, and he don't know how deep it went.

Q You are basing your opinion on what this man had absolutely on what you heard here today and what you read? A Absolutely, the same as the judge here is going to do.

Q You would say that the men who treated him and operated on him were wrong? A I am not saying anything of the kind, I am only giving my view.

Q Do you agree with the operating doctor's diagnosis? A That he has a cancer, absolutely right.

Q In your opinion will you accept the fact that from the injury he suffered there was a primary carcinoma of the umbillicus? A I will not accept any such fact.

Q Why not? A Because it is against all the teaching I have had and my own experience.

Q If you saw such a case, of course, it would change your experience? A Not necessarily, not when I went into the abdomen and found metastatic growth in five or six weeks from the alleged injury, that has no direct connection with the other parts connected.

Q What would you say as to the connection between the conditions? A I would say it was not connected at all with the thing on the outside and the thing on the outside was connected with the old growth inside, from what your own doctor already testified, from the omentum pushing up against the wall and causing the secondary growth in the umbillicus.

Q You say it was a secondary growth in the umbillicus? A Yes, from the primary growth, and the nodules in the omentum.

Q In other words, you differ from Dr. Coughlan and from Dr. Von Roeder? A I do in that respect, yes, I think that he had the primary thing in the gall bladder, that he got through the blood stream or the lymphatics, and the secondary growth in the omentum, which is the usual case. If he got it in the manner he would have an acute obstruction from the matting up of that omentum. That he got that secondary growth in his umbillicus through the old disbanded urekus, or feeding tube, which the child, when carried in the utera uses, which is in later life the umbillicus.

Q What are you basing your theory on, doctor? A I am speaking from my operative experience and my reading and other facts I have observed.

Q You differ from them when they say the primary cause was in the umbillicus and follow-

ing a wound and the secondary cause was in the gall bladder. You differ from that? A I do differ from that because of the blood supply and anatomical construction.

Mr. Tartalsky: That's all.

Mr. Harley: That's all.

DR COUGHLAN, recalled.

Direct examination by Mr. Tartalsky.

Q He died on October 1st, didn't he, doctor? A Yes.

Q You saw him shortly before his death, didn't you? A Yes.

Q In your opinion, based upon your observation and treatment of that man, what did he die from? A Carcinoma of the umbillicus.

Q Caused by what? A I assume it was due to the trauma.

Q What is that? A Injury from a penetrating wound.

Mr. Tartalsky: That's all.

Cross examination by Mr. Harley.

Q You only assume then that it was? A I believe that.

Q The last time you saw this man he was alive? A Yes.

Q You never saw him dead, did you? A No.

Q Any information you are giving us on that fact is hearsay somebody told you? A It is

better than hearsay; you have got to go on the record of your hospital, on the men who work under you, who are your representatives.

Q You don't know, of your own knowledge? A That he was dead? I didn't see him die.

Q You didn't see him die? A No.

Q The last time you saw him he was alive? A Yes.

By Mr. Tartalsky.

Q What was his condition when you last saw him, was he dying? A He was dying, yes.

Mr. Tartalsky: That's all.

BEITRICH HARTMAN, a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Tartalsky.

Q Mr. Hartman, did you visit the American Railway Express Company after the death of Mr. Wilhelmi? A Yes, three days after he died I went over with Fred and got his tools.

Q Did you meet anyone when you were over there? A I was introduced by Fred to Mr. Straub.

Q Did you have a conversation with him at that time? A Fred had the conversation.

Q Were you there when he had the conversation? A Yes.

Q What did Mr. Straub say to Fred? What was the conversation you heard?

Mr. Harley: I object to this testimony if the Court please; the conversation was not with this witness.

Frederick Wilhelmi, Jr., direct.

Q Did you hear what was said by Fred and Mr. Straub? A Yes.

Q You heard all the conversation, didn't you? A Yes.

Mr. Harley: You have here present the man who had the conversation.

Mr. Tartalsky: Yes; I have him here.

Mr. Harley: It isn't the best evidence. I object to it.

The Court: Objection sustained.

(Witness withdrawn.)

FREDERICK WILHELMI, Jr., a witness on behalf of the petitioner, sworn.

Direct examination by Mr. Tartalsky.

Q Did you go to the plant of the American Railway Express where your father had worked? A Yes, I did.

Q When did you go there, after your father died? A October 5th.

Q What did you go there for? A To get my father's tools.

Q Did you talk with anybody while you were there? A Mr. Straub.

Q Is that the foreman there? A Yes, sir.

Q What did you say to Mr. Straub and what did he say to you? A I was directed upstairs to Mr. Straub.

Q Just tell what you said to Mr. Straub and what he said to you.

Mr. Harley: I object to what he said to this man on the ground that any employee

is not employed to make admissions but to do particular work. Therefore, any admission if it is an admission is objected to.

Mr. Tartalsky: He is a general foreman of the place. He is the man to whom the letter was addressed.

Mr. Harley: I object to any testimony as to admission made by an employee. It is contrary to the cases in New Jersey.

The Court Well, we will see what the testimony is.

Q What did you say to Mr. Straub and what did he say to you? A I told him who I was and that I came up for my father's tools and he in return shook hands with him and told me he was very sorry for what had happened and I introduced my uncle to him, and then I said that he knows the reason why he was operated on and why he died, and he said he didn't think a needle could do that.

Mr. Tartalsky: That's all.

Mr. Harley: I ask this be stricken out. Of course, it is not proper evidence.

The Court: I will allow it. It is a statement made by the foreman of the plant.

Mr. Harley: I ask an exception. That's all.

Mr. Tartalsky: That is the petitioner's case, if your Honor please.

Mr. Harley: Now, if the Court please, I ask for a dismissal of the petition on the ground that there is no evidence of an accident arising out of and in the course of the petitioner's employment. There is no evi-

dence to support the cause of action alleged in the petition. There is no evidence sufficient to show that the cause to which the petitioner's decedent was alleged to have died was the result of a traumatic injury and, furthermore, there is no proof of the death—

The Court: I shall deny your motion at this time and let you put in your case. You may, at that time, renew your motion. Also, I might say that you both might come prepared at that time to argue on the question of how far a history taken by a doctor for treatment is binding as evidence to prove an accident. Particularly, the only evidence of an accident.

(Further discussion between counsel.)

The Court: I will deputize Mr. Stahl to take the testimony required outside of the State.

I hereby certify that the foregoing is a true and accurate transcript of the above-entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

WILLIAM C. O'BRIEN,
Court Reporter.

Dr. Henry Greenstein, recalled, direct.

Transcript of testimony taken in the above-entitled matter before Charles E. Corbin, Deputy Compensation Commissioner, at the Department of Labor Building, Jersey City, N. J., on the 15th day of December, 1926.

DR. HENRY GREENSTEIN, already sworn, recalled.

Direct examination by Mr. Tartalsky.

Mr. Harley: I want to enter an objection to this line of testimony on the ground that it is immaterial, irrelevant and incompetent.

Q Dr. Greenstein, you testified at a previous hearing that on August 4, 1925, you were consulted by Frederick Wilhelmi, the deceased in this case, for treatment; that he came to your office. That's right, isn't it? A Yes, sir.

Q Will you tell us what time in the evening he came? A It must have been close in to eight o'clock.

Q Now, you made an examination of him and you testified that you found "a mark that appeared to me something sharp had penetrated it around the navel." That's right, isn't it? A Yes, sir.

Q And you also testified that "something sharp had penetrated, probably a needle"? A Yes, sir.

Q Now, in your examination of that, doctor, could you draw an opinion or an inference as to when that injury occurred?

Mr. Harley: Yes or no.

Q Just say yes or no? A Yes, sir.

Dr. Henry Greenstein, recalled, direct.

Q And you could arrive at that? What opinion did you draw as to the occurrence of that injury?

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

The Court: You should lay a better foundation for it.

Q Doctor, on August 4, 1925, you were consulted by Frederick Wilhelmi for treatment? A Yes.

Q You testified about that? A Yes.

Q You testified you took this history, didn't you? A Yes.

Q And you have testified that you made a physical examination of the injury, haven't you? A Yes, sir.

Q Could you from the examination of the injured person and the part of the body of which he complained, draw an opinion or inference as to the probable time of this occurrance?

Mr. Harley: I object to that.

A Not the exact time.

Q Could you gather or infer or draw an opinion as to the probable time? A Yes.

Q Approximate time? A Approximate time.

Q Now, based upon your examination at that particular time of that particular portion of the anatomy, what inference or opinion did you draw as to the probable or approximate time of the occurrence?

Mr. Harley: Object to that as incompetent, immaterial and irrelevant.

Dr. Henry Greenstein, recalled, direct.

The Court: Question allowed.
Mr. Harley: Exception.

A That the injury had taken place some time during that day.

Q Could you say it had occurred within two hours or one hour or ten hours?

Mr. Harley: My objection is the same.

Q In other words, what was the shortest time in which it could in all probability have occurred from its appearance?

Mr. Harley: I object to that.
The Court: Objection sustained.
Mr. Tartalsky: Question withdrawn.

Q You said, doctor, that it occurred that day?
A Yes, sir.

Q Could you say anything with any degree of definitness or approximation as to when on that day prior to the time that you had seen him? A That is a rather vague question, because I could not give you the definite hour.

Q I don't mean definite—approximately?

Mr. Harley: I object to that.

Q I mean based upon your observation of that man, the examination of that particular portion of the anatomy? A Then my answer is the same, that it occurred sometime that day.

Q Well, then, doctor, could you tell from your examination of that man whether it occurred five minutes before or five hours before?
A Yes, sir.

Q How could you tell that? A Well, within five minutes to an hour before there would be a bleeding point at the point of entrance of that object that entered the body.

Q Was there a bleeding point there? A No, sir.

Q What would be the inference you would draw, doctor? A That it must have taken place a few hours beyond that.

Q A few hours beyond the time that he has seen you? A A few hours before he had seen me.

Q When you say a few hours, can you say how many hours? A I could not say.

Q Would you say two hours or three hours? A I could not say.

Mr. Harley: The doctor has said he could not say.

A (Continuing.) If you put me down two or three hours, it will be just as well as five or six.

Q It might just as well have been five or six. A Yes.

Q And in all probability, based upon your observation of that man, it did have the appearance that it occurred five or six hours before he had seen you? A Yes, sir.

Cross examination by Mr. Harley.

Q It might have occurred at lunch hour—might have occurred between twelve and one? A From the history.

Q You saw him at 8 o'clock, and it might have occurred at lunch hour? A It might have occurred then, yes.

Dr. Henry Greenstein, cross.

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

Q And do you know that it is the duty of every physician who has a case which results in death from traumatic injury to make a report, doctor? A Yes, sir.

Q Were you the attending physician at the time the gentleman died? A No, sir, not at the time of his death.

Q Do you know who the reports are made to when the death results from traumatic injury? A Our reports in New York, no matter what the injury is, is reported to the Department of Health on a death certificate.

Q Is there a special report to the medical examiner where death is the result of traumatic injury? A If there is any suspicion, we notify the department and ask the department what to do.

Mr. Harley: I would like to offer at this time an exemplified copy from New York City of the death certificate.

Mr. Tartalsky: I object. I am not objecting to the form, but I am objecting on the ground that it is not an accurate record of the man's death because the physician who operated testified that it wasn't; further, on the ground that this appears to be a transcript of a record of a man who is an architect. This man is not an architect. The evidence was that he was a harness-maker, and it was so testified; further, the cause of death is not the cause as given by the doctor who treated him; further, it is made by some doctor J. F.— I can't read the name—Williams—F. S. Williams, and he was not the man who operated on the deceased.

Mr. Harley: It is exemplified, and of course the Court is entitled to take it for what it is worth.

The Court: I shall allow it, but of course you have a right to put in such evidence as to meet that.

(Death certificate marked Exhibit R. 1.)

RESPONDENT'S CASE.

DR. JAMES EWING, sworn on behalf of the respondent.

Direct examination by Mr. Harley.

Q Where do you reside, doctor? A 103 East 29th street, New York City.

Q Are you a practicing physician? A No. I am a pathologist.

Q You are licensed to practice medicine? A Yes.

Q How long have you been licensed to practice, doctor? A Since 1891, thirty-five years.

Q And at the present time are you specializing in any particular branch of medicine? A I am professor of pathology at Cornell Medical School and director of cancer research at the Memorial Hospital in New York.

Q Have you written any textbooks on the subject of cancer? A Yes, sir, entitled: "Neoplastic Diseases"—a Treatise on tumors.

Q Is that volume used in medical universities and medical colleges in the United States? A Yes.

Q And in any other country? A Yes.

Q In Great Britain? A Yes.

Dr. James Ewing, direct.

Q How long have you been specializing in this particular branch of medicine, doctor? A Twenty-five years.

Q Assuming, doctor, that on August 4, 1925, a man in good health showed evidence of a small wound in the umbillicus which had evidently been made by a small, sharp instrument penetrating the skin and fascia of the umbillicus, and that on September 12, 1925, five weeks and four days later, he went to a physician who examined him and found a mass in practically the middle of the umbillicus; that said physician prescribed medicine for his stomach, put him on a rigid diet and ordered bowl irrigation to relieve the pain; that as the result of the aforesaid treatment there was no relief of pain; that on September 24, 1925, he was operated on by a surgeon at St. Francis' Hospital for a cancer of the umbillicus, which was excised; that there were numerous nodules in the omentum and also a growth in the gall bladder, and the growth in the gall bladder was excised during this operation; that the man died on October 1, 1925. Assuming those facts, doctor, can you say with reasonable probability whether or not the cancer of the umbillicus and the cancer of the gall bladder were caused by the wound in the umbillicus which was—

Mr. Tartalsky: I object to that question on the ground that it does not place all of the facts embraced in the evidence before the doctor. I have no objection to placing the hypothetical question before the doctor if it embraces all the facts. First, it doesn't state that the first doctor who examined him on the first day he suffered the injury found no mass at the umbillicus; second, it doesn't

state that the second physician, six weeks after, discovered the mass and diagnosed it as primary cancer of the umbillicus; third, it doesn't state that the surgeon who operated on him made an examination and verified that diagnosis, and that then, upon operating, he discovered the condition.

Mr. Harley: I would be glad to include that.

Q You have in mind the statement of Mr. Tartalsky? A Yes, I can answer that.

Q Your answer is that you can testify with reasonable probability based upon that? A I have given that answer.

Q Well, doctor, in your opinion, as an expert, could the wound referred to in the hypothetical question have caused the cancer referred to in the hypothetical question? A It could not.

Q Why not? A I have studied this case carefully, naturally, before coming here, and weighed the evidence from a medical standpoint, and now I believe—the main reason for my opinion is the time is too short. It is about from—the dates were—the date of the wound, August 4, 1925; the date of his death, October 1, 1925—too short. Assuming that the wound did produce cancer of the umbillicus, it could not have reached the stage that was found at the operation in that period—entirely contrary to all that we know about the possible progress of a carcinoma of the umbillicus. The second reason is the anatomy of the disease.

Q Where did you get that statement as to the anatomy, from the death record? A No, from the copy of the surgeon. He discovered a cancerous mass in the region of the umbillicus,

he describes the carcinoma in the omentum, and a cancer mass in the gall bladder for which he excised the gall bladder. Now, that is not the course of cancer of the umbillicus if the needle caused the wound in the umbillicus. It would be a localized process, which would spread on the skin and umbillicus. Whereas this is a deep type. It has grown deep into the abdomen, and extended over the omentum and extended into the gall bladder. That is not the appearance or the effects of a carcinoma primary in the skin of the umbillicus. This point that I am just making is one that I believe is sound argument, but I don't feel that it is as certain as the first point made. Then, it is possible that he had a very unusual type of carcinoma of the umbillicus which did wholly different things than those that we know this type of disease to do, and that possibility I cannot eliminate, although I think it is so improbable as to be an unreasonable assumption. Now, the third reason is from the description of the surgeon. This condition appears to me to indicate very clearly that the man had a primary carcinoma of the gall bladder and it extended over the broad round ligaments of the liver to the umbillicus and over the omentum as described. It is the common type of carcinoma, and while extensions to the navel are not very common with gall bladder carcinoma, they do occur. I have seen them. Therefore, for these three reasons I conclude that the wound described did not and could not be the cause of the condition described. Of course, the immediate cause of the man's death was the operation, but he had a disease which was in its terminal stages, which would have probably caused his death very soon without the operation.

Dr. James Ewing, cross.

Cross examination by Mr. Tartalsky.

Q Well, doctor, you mean that if he had this disease, that this wound would aggravate and advance the death?

Mr. Harley: Just a moment, doctor. I object to that question on the ground that there is no evidence here of a primary condition. The testimony is that he was in good health.

Mr. Tartalsky: Question withdrawn.

Q Doctor, after all, it is a matter of opinion, isn't it, as to the existence of the carcinoma in this particular man? In other words, you are stating your opinion from the facts that you read? A Not as to the existence of this condition, no. That is a matter, I should say, of obvious fact.

Q But as to the cause of it? In other words, you are stating your opinion that the wound was not the cause of the primary carcinoma? A Yes.

Q And, of course, that is all you could give us, that is, your opinion based upon the testimony in this case that you read? A Yes, but, of course, that opinion was naturally based upon experience with the disease first hand, and literature. It is not a decision which I arrived at by—

Q In other words, doctor, you would consider then, if it were a fact, a usual case? A If what were a fact?

Q If the primary carcinoma of the umbillicus was caused by a wound suffered on August 4th, and the death was caused by a primary carcinoma of the umbillicus, caused by a penetrating wound, followed by a second growth in the gall bladder,

you would consider that a usual case, wouldn't you, doctor? A I would consider it one of the mysteries of medical literature.

Q Would it interest you to know, doctor, that that is just what the surgeon who operated did consider it? A I read his statement and was very much amazed to learn that such an opinion could be reached by any man carrying a medical degree.

Q You don't know Dr. Coughlan? A I do not.

Q And you don't know Dr. Von Roeder? A I do not.

Q Now, doctor, from the knowledge of cancer as it exists today, it is a fact, isn't it, that most cancers are caused by trauma? A No, it isn't a fact.

Q Well, do traumas cause cancers? A Rarely, might be a cause of sarcoma.

Q For instance, a blow to a man would produce cancer—

Mr. Harley: I object. There is no evidence of a blow in this case.

Mr. Tartalsky: Question withdrawn.

Q It is possible, isn't it, doctor, and probable, that traumas do produce cancer, or the primary condition of cancer?

Mr. Harley: I object to that, if the Court please. What kind of trauma? We are trying the case upon the needle. Let him ask him in this particular case—could it occur that way?

The Court: Question allowed.

Mr. Harley: Exception.

Dr. James Ewing, cross.

Q Doctor, your first reason for disagreeing with the diagnosis of the various doctors in this case is that in your opinion the time was too short? A Yes, that's the main reason.

Q Now, doctor, suppose—and that, too, is your opinion, isn't it, doctor? A Surely.

Q Doctor, suppose that a man in good health came to your office—had never complained of pain in the umbillicus—came to your office and told you that he came from his work, and that during the day he suffered a penetrating wound in the umbillicus with a needle, and that at that time there was no mass in the navel or umbillicus, and six weeks after, or approximately six weeks after, the presence of a mass in this very place is found. What inference would you draw from that? A I would look first for inflammatory reaction following a wound, but I would be very loath to consider that trauma process had followed this within six weeks after the needle puncture.

Q Well, doctor, if there was no mass there shortly or immediately after the happening of the injury and there was a mass there six weeks after, and the man had been in good health, what possible inference would any reasonable man draw from that, except that it developed within the six weeks? A The only reasonable inference for a doctor to draw was that something had happened, the nature of which he didn't understand, and which was, in this case, disclosed by the operation.

Q But we haven't yet come to the operation, doctor. Until that time before the operation, what inference would you draw? A I repeat, I would draw the inference that something had happened the nature of which I could not determine.

Dr. James Ewing, cross.

Q If the man told you that it had happened as the result of the penetration of the needle, wouldn't that help bring about that condition? A Certainly not.

Q Well, what could have brought about that condition, if the mass wasn't there and there was no penetration there? What could have brought that condition about except the injury? A Why, we know what brought it about. We know that the man suffered from a carcinoma of the abdomen and gall bladder which extended along the round ligament of the umbillicus.

Q You say you are now in a better position than the man who examined him because the man wasn't operated on— A I have answered that as far as I am able, that I would draw the conclusion that something had happened, the nature of which I could not understand as a physician.

Q I will read this testimony of Dr. Von Roeder. You don't know him, doctor? A No.

Q He was a man who was a physician for twenty-six years and he was a graduate of Cornell. He was connected with St. Francis' Hospital—he taught there. This was his evidence: He said: "On September 12th, late Saturday afternoon or evening, he"—he, referring to the deceased—"came to my office complaining of very severe pain in the middle of his abdomen and gave the history of having received an injury there while repairing collars, a large needle he was using penetrating his abdomen. He gave the history that he had seen other doctors but they couldn't give him any relief and some patient of mine referred him to me. I examined him carefully and found that he had a mass in practically the middle of the abdomen and the umbillicus. I told him at the time the only cure

for him would be operation, prescribed medicine for his stomach, put him on a rigid diet, and ordered bowel irrigations to relieve the pain. He came back on the seventeenth and there was no relief of the pain from the treatment I had given him, and the strict diet I had put him on and the bowel irrigation, so I told him again he had a large mass there would have to be removed and the only thing to do would be to be operated on. He came back on the twenty-first and I sent him with a diagnosis of cancer for an operation.'' Do you disagree with that doctor's conclusions up to that point? A No. He felt the solid mass there and he drew the correct conclusion that there was a cancer there.

Q I asked him: ''What was your diagnosis that this mass came from?'' Answer: ''He has this mass there, which from these symptoms and all made me make a diagnosis of cancer.'' You agree with that? A Probable diagnosis, yes.

Q ''From his history that he gave you?'' Answer: ''From the trauma, that certainly had started it.'' Do you disagree with that? A Most surely.

Q In other words, you are believing your opinion as against this gentleman's opinion, who was the man who treated him and examined his anatomy? A Yes.

Q Medicine is not an exact science, is it, doctor? A In some respects it is pretty exact, and in others it is not.

Q Don't conditions vary with the particular individual who is being examined and treated? A Yes.

Q And doesn't it largely depend upon the good judgment of the man who is treating him and to whom he comes for relief, who should

after his years of experience have the ability to properly diagnose his disease?

Mr. Harley: I object to the last part with regard to the doctor's ability. I certainly do think that is a matter which this Court would not care to pass upon. Therefore, I object to it.

The Court: You mean as to the years of experience?

Mr. Tartalsky: I will withdraw that part of it.

The Court: Reconstruct the question.

Q Doesn't the particular diagnosis of a particular condition of a particular individual largely depend on the opportunities which the particular doctor has to make a diagnosis? A Each diagnosis that a doctor makes depends on that, yes, and knowing the condition which he is attempting to diagnose. He may be wrong. In this case the doctor was wrong. He thought he had a primary carcinoma in the umbillicus—a very natural error—proved to be wrong by the observation of your surgeon.

Q You have made errors, too, haven't you? A Oh, yes, but not as grave a one as that.

Q Doctor, would you come into court with a man not confronting you and charge that two doctors, one who had been practicing for twenty-six years and the other doctor who had been practicing for fourteen years, made a wrong diagnosis of a particular man whom you never saw?

Mr. Harley: I object to that question on the ground that the witness is asked to reflect upon the testimony of other witnesses. It is immaterial and incompetent.

Dr. James Ewing, cross.

The Court: Objection sustained.

Mr. Harley: I move that it be stricken out.

Q Under ordinary circumstances, doctor, shouldn't the practicing physician who is examining a particular person be in a position to better diagnose his condition that one who never saw him and who answers a hypothetical question?

Mr. Harley: I object to that, unless it is confined to this particular case.

Mr. Tartalsky: I withdraw the question.

Q In other words, doctor, you have given us your opinion, in which you might be right, and you disagree from the conclusions of the doctors which you have read?

Mr. Harley: I object to that on the same grounds as stated before, that the witness is asked to reflect upon the testimony of other witnesses in this case.

Mr. Tartalsky: Question withdrawn.

Q After all, in the final analysis, all you have done is given us your opinion from the reading of the testimony in the case and the hypothetical question asked you? A Yes.

By Mr. Harley.

Q Mr. Tartalsky read to you from the record of Dr. Von Roeder. Dr. Von Roeder testified before on page twenty as follows: "Do they come" —meaning cancers—"from abrasions or punctures?" Answer: "Plain abrasion or puncture, no." Is that correct testimony? A That is held by many pathologists.

Dr. James Ewing, cross.

Q And you agree with Dr. Von Roeder in that respect? A Yes.

By Mr. Tartalsky.

Q Do you also agree with this made by the same doctor: Question: "You said that it couldn't come from a puncture or an abrasion of the skin tissue?" Answer: "Yes, but this is more than that, the man had to continue work and the constant irritation of his working, pressing on that, is enough to cause it. That is the primary exciting cause of it."

Mr. Harley: I object to that, because it was objected to in the record, and sustained at that time.

Q Do you agree with that answer, doctor? A I followed that part of Dr. Von Roeder's testimony, and apparently the doctor has in mind that constant rubbing of the abdomen together with this puncture might have been more ineffective than a puncture would alone. While I think there is something in that—constant irritation is the type of trauma which generally produces cancer—if it does at all—the whole point is that when the constant irritation lasted only a few weeks, it is impossible to attribute to it any infection in that period. The irritation that produces cancer lasts for months and years—pipe smoker's cancer of the lip—I don't think the constant irritation for a few weeks should have rendered that needle puncture any more infective than if the man had been engaged in any other occupation. The time is too short.

Q In other words, you agree with the doctor in one part, but disagree as to the other? A In principal.

Dr. James Ewing, cross.

Q In principal, yet you disagree with this doctor when he says on the same page: Question: "The primary cause, you say, was this puncture?" Answer: "No, the injury." Do you disagree with that? A I don't understand that.

Q The question to the doctor was—the same doctor: "The primary cause, you say, was this puncture?" Answer—he said: "No, the injury." Do you disagree with him as to the primary cause of the injury? A I don't understand what he was driving at, because the injury constitutes the puncture and the puncture was the injury—a very fine point there.

Q When he says: "The primary cause" we must read into there: "The primary cause of the cancer." In other words—in effect, what the doctor said—the question asked of him was: "The primary cause of the cancer, you say, was this puncture?" and the answer was: "The injury." A Well, I disagree with him in the assumption that this needle caused that cancer in the umbillicus.

Q And when he was asked again: "Did you say it was or it might be?" He said: "It was the injury, yes, sir." You disagree with him there, too, doctor? A Absolutely.

By Mr. Harley.

Q From your experience, doctor, what do you say was the cause of the cancer in the gall bladder in this case?

Mr. Tartalsky: Just a minute. The question is quite objectionable.

Mr. Harley—As described in the testimony which the doctor has just read.

Dr. James Ewing, cross.

A There is no obvious cause for the cancer of the gall bladder stated. The most common cause is gall stones—the chronic inflammation of the gall bladder that goes with it. The gall stones may be very small and numerous or there may be large gall stones. The greater portion of gall bladder cancer is associated with gall stones. I would like to explain why this cancer of the umbillicus could come from a primary cancer of the gall bladder—

Q I will ask that question. How, in your opinion, could the cancer of the umbillicus come from a primary condition of cancer in the gall bladder?

Mr. Tartalsky—I object to that on the ground that there is no evidence of a primary condition of cancer in the gall bladder.

Q Well, from a cancer of the gall bladder. We will leave the word "primary" out. A By passing around the lymphatic and the round ligament of the liver to the ligaments which are the remains of the old fetal connections. Cancer of the gall bladder and stomach not infrequently travel along these old structures and appear at the navel. Now, I volunteered this point because it has been discussed in the evidence which I have read before.

By Mr. Tartalsky.

Q Doctor, do I understand that you do not practice medicine? A I am not in the ordinary sense a practitioner of medicine. I am a teacher. I make diagnoses. I see a great many operations at the Cornell hospital and other places.

Dr. James Ewing, cross.

Q How long is it that you are out of practice? A I never engaged in the office practice of medicine. I have been a laboratory man all my life.

Q Now, doctor, irritation does cause cancer, does it not? A Yes.

Q And do you know of a case where a man working as a harness maker— Well, would irritation alone cause cancer? A Well, irritation alone is the one factor in the production of certain cancers that we can put our finger on. Others come along and think there is a parasite comes in there.

Q How about occupational cancer, is there such a thing? A Oh, yes.

Mr. Harley: I object to it. There is no evidence in this case of occupational cancer, or any claim of occupational cancer.

Mr. Tartalsky: The evidence at page 21. Question by Mr. Harley: "Then the piercing of the skin by the needle would not cause it?" Answer: "If there was no other irritation." Question: "Then it would be due to the occupation?" Answer: "The occupation, occupation cancer, if you want to put it that way."

Mr. Harley: There is no claim in the petition, however, and I object to it.

Mr. Tartalsky: We claimed sufficiently in the petition to put you on notice.

Mr. Harley: There is no claim in there about irritation.

Mr. Tartalsky: I concede that. I stated in the petition to the best of my ability at that time, and certainly there was no surprise. There is the evidence right here.

Dr. James Ewing, cross.

They know his business. They know what he was doing. They know when he died.

The Court: I allow the question.

Mr. Harley: Exception.

Q In your experience, doctor, do you know of harness markers getting cancer because of the work and irritation that they do? A Never saw one.

Q I am now judging from your knowledge of the subject. A I could imagine that it might.

Q And it could be produced by irritation? A Constant irritation over months and years.

Q And if this man worked for several years at the plant of the defendant as harness maker, and then one day he suffered an injury, and then subsequently this mass occurred and was found six weeks after, is it probable, in your opinion, that that could be called, as Dr. Von Roeder says, "An occupation cancer, if you want to put it that way"—caused by the penetration of the needle and the irritation? A In theory it is possible but it does not agree with the facts. It all depends upon what kind or type is produced—a skin cancer? Yes.

By Mr. Harley.

Q This wasn't a skin cancer in this case, was it, doctor? A Not in my opinion, but you haven't a microscopic examination to make that absolutely certain, but there is no indication in the history that it was a skin cancer. There is every indication that it was a deep cancer.

Q Then, in your opinion, doctor, this would be a deep-seated cancer and not an occupational cancer or skin cancer? A Yes.

Frederick Wilhelmi, recalled, direct—cross.

REBUTTAL.

FREDERICK WILHELMI, already sworn, recalled.

Direct examination by Mr. Tartalsky.

Q Frederick, you testified that you went after your father's tools at the American Express Company? A Yes.

Q You got the tools, didn't you? A Yes.

Q And what were some of the tools you found in the bag at the factory of the defendant?

Mr. Harley: I object to that question on the ground that it is immaterial, irrelevant and incompetent. It doesn't make any difference what the tools were.

The Court: I will allow it subject to its being connected up. I don't know what he has in mind.

Q Just tell us some. A Awls, a small hammer—needles.

Q And did you take that bag home with you? A We have it home.

Q Who gave you this bag? A His fellow-worker.

Q It was Mr. Straub? A Mr. Straub.

Cross examination by Mr. Harley.

Q You say you have the bag home? A Correct.

Q Did you bring it with you here today? A No, I did not.

Henrietta Wilhelmi, recalled, direct.

HENRIETTA WILHELMI, already sworn, recalled.

Direct examination by Mr. Tartalsky.

Q Mrs. Wilhelmi, what time did your husband come from his work on August 4th, the day of the accident? A Well, he didn't come home —right after supper, about eight o'clock.

Q What time of the day did he come home from his work on the day of the accident? A When he left home?

Q What time did he come from his work? A (No answer.)

By the Court.

Q What time did he get home? A About eight o'clock.

By Mr. Tartalsky.

Q Didn't he go to the doctor—

Mr. Harley: I object to that.

Q He went to work on August 4th, didn't he? A Yes.

Q What time of the day did he go to work? What time in the morning did he leave? A He left six o'clock.

Q In the morning? A Yes.

Q What were his working hours? A Well, I—

Q How many hours a day did he work? A Eight.

Q What time did he come home every night, about what time? A Six.

Henrietta Wilhelmi, recalled, direct.

Q Did he come home at the same time on the day of the accident? A No, he went to the doctor first.

Mr. Harley: I object to that and ask that it be stricken out, that he went to the doctor. How can this witness know that he went to the doctor?

The Court: Strike it out. It is not responsive.

Mr. Tartalsky: I think she said he came home and then went to the doctor: "Now, on August 4, 1925, did he come home in the evening?" Answer: "Yes, he came home in the evening and he complained—" Question: "Just answer the question, when he came home was there anybody there besides you?" Answer: "Yes, my children." Question: "How many children have you?" Answer: "Two." Question: "That night did he go anywhere?" Answer: "Yes, he went to a doctor." Question: "What doctor?" Answer: "Doctor Greenstein."

Q Now, you mean to say—did he come home from his work and go to the doctor, or, so far as you know, did he go to the doctor before he came home? A Yes, that's what I mean.

Q When he came home he had been to the doctor? A Yes.

Q And he came home about eight o'clock? A Yes.

Q And his working hours were until six, you say? A Yes.

No cross examination.

Certificates.

I Hereby Certify that the foregoing is a true and accurate transcript of the above-entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

PETER O'BYRNE.

I, W. E. Stubbs, Secretary of the N. J. Workmen's Compensation Bureau, hereby attest the authenticity of the signature of Peter O'Byrne, and that he, as the court stenographer in this case, is the proper one to certify as to the transcript of the testimony.

W. E. STUBBS.

We hereby stipulate that the foregoing is an accurate transcript of the testimony in this cause and consent to the filing of the same without further certification.

O'BRIEN & TARTALSKY,
Attorneys for the Petitioner-Appellant.

DAWSON, HARLEY, COX & WALBURG,
Attorneys for Defendant-Respondent.

Filed Clerk's Office
Mar. 14, 1927
Hudson County, N. J.

John J. McGovern,
Clerk.

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU.

Finding of Facts and Determination.

HENRIETTA WILHELMI, *Petitioner,* *vs* AMERICAN RAILWAY EXPRESS CO., *Respondent.*	*On Petition for Compensation.*

The above matter coming on for hearing and having been submitted to me for decision, I hereby find and determine as follows:

1. That this is a proceeding brought by Henrietta Wilhelmi, wife of Frederick Wilhelmi, deceased, and against the above-named American Railway Express Company, under an act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto; that a petition was filed with the Workmen's Compensation Bureau on January 5, 1926, and that a copy of said petition was duly served upon the respondent; that answer was filed with the said bureau in due time and that due notice of hearing of said petition and answer was given to the respondent; that the case came on for hear-

ing on November 19, 1926, which hearing was continued on December 15, 1926, at which hearing the introduction of evidence on behalf of both parties was concluded, said hearing having been held in the presence of Samuel Tartalsky, of O'Brien and Tartalsky, for the petitioner, and William B. Harley, of Dawson, Harley, Cox and Walburg, for the respondent.

2. That petitioner was employed by the respondent as harness maker on December 9, 1918, and that he continued in such employment until September 16, 1925.

3. That there is no legal evidence of an accident arising out of and in the course of decedent's employment and there is no evidence from which it may be assumed that there was an accident from the cause alleged by petitioner rather than from some other cause.

It is, therefore, on this 23rd day of February, nineteen hundred and twenty-seven,

ORDERED, that judgment final be entered in favor of the respondent and against the petitioner.

(Signed) CHARLES E. CORBIN,
Deputy Commissioner.

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

W. E. STUBBS.

Filed, Clerk's Office, March 14, 1927, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

NOTICE OF APPEAL.

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

	HENRIETTA WILHELMI, *Petitioner,* *vs* AMERICAN RAILWAY EXPRESS Co., *Respondent.*	*Notice of Appeal.*

To the Secretary of the Workmen's Compensation Bureau, the County Clerk of Hudson County, Dawson, Harley, Cox & Walburg, attorneys for respondent, or to whom it may concern:

PLEASE TAKE NOTICE, that the petitioner hereby appeals to the Court of Common Pleas in and for the County of Hudson from the determination of the Workmen's Compensation Bureau, made in the above-entitled matter on the 23rd day of February, 1927, ordering that judgment final be entered in favor of the respondent and against the petitioner.

Dated, February 26, 1927.

Respectfully,
O'BRIEN & TARTALSKY,
Attorneys for Petitioner-Appellant.

Filed, Clerk's Office, February 28, 1927, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Order.

HUDSON COUNTY COURT OF COMMON PLEAS.

HENRIETTA WILHELMI, *Petitioner-Appellant,* *vs.* AMERICAN RAILWAY EXPRESS CO., *Respondent-Appellee.*	*On Appeal from Workmen's Compensation Bureau.* *Order.*

Application having been made by O'Brien & Tartalsky, attorneys for petitioner-appellant, for an order fixing a time and place for the hearing of the appeal in the above-entitled matter;

It is on this 16th day of March, 1927, 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 Hudson County Court of Common Pleas, at the Court House, Newark avenue, Jersey City, New Jersey, on the 5th day of April, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard.

DANIEL O'REGAN,
Judge.

We consent to the entry of the foregoing order.

DAWSON, HARLEY, COX & WALBURG,
Attorneys for Appellee.

Filed Clerk's Office
April 5, 1927
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

Order.

HUDSON COUNTY COURT OF COMMON PLEAS.

HENRIETTA WILHELMI, *Petitioner-Appellant,* *vs.* AMERICAN RAILWAY EXPRESS CO., *Respondent-Appellee.*	*On Appeal from Workmen's Compensation Bureau.* *Order.*

The hearing in the above-entitled matter having been fixed for April 5, 1927, and the Court having been unable to dispose of the same, it is hereby ORDERED that the hearing and argument on the appeal in the above matter take place at the Hudson County Court of Common Pleas at the Court House, Newark avenue, Jersey City, N. J., on the 17th day of May, 1927, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

DANIEL O'REGAN.

Filed Clerk's Office
April 5, 1927
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Finding of Facts and Determination.

HUDSON COUNTY COURT OF COMMON PLEAS.

HENRIETTA WILHELMI, *Petitioner-Appellant,* *vs.* AMERICAN RAILWAY EXPRESS CO., *Respondent-Appellee.*	*On Appeal from Workmen's Compensation Bureau.*

FINDING OF FACTS AND DETERMINATION.

The above matter coming on for hearing and having been submitted to me for decision, I hereby find and determine as follows:

1. This is a proceeding brought by Henrietta Wilhelmi, wife of Frederick Wilhelmi, deceased, and against American Railway Express Company under an act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplemental thereto; that the cause came on for hearing on November 19th, 1926, and continued and concluded on December 15th, 1926, and that on February 23, 1927, said Workmen's Compensation Bureau ordered that judgment final be entered in favor of the respondent and against the petitioner; that notice of appeal was filed with the Secretary of the Workmen's Compensation Bureau on the 28th day of February, 1927,

and with the County Clerk of Hudson County on the said 28th day of February, 1927, and that within time required by law the said petitioner-appellant filed with the Clerk of the Court of Common Pleas a transcript of record and testimony in this cause as required by law; that order fixing time and place of hearing of the said appeal was made on March 16, 1927; that notice of the order fixing time and place for hearing appeal was duly served upon respondent-appellee; that the said appeal come on for hearing on the 17th day of May, 1927, upon the transcript of the record and testimony and argument thereon in pursuance of the statute in such case made and provided; that said trial of said appeal was heard in the presence of Samuel Tartalsky, Esq., of the firm of O'Brien & Tartalsky, attorneys for the petitioner-appellant, and William B. Harley, Esq., of the firm of Harley, Cox and Walburg, attorneys for the respondent-appellee, and the Court having considered the record and testimony and argument, and counsel having been heard, I do find and determine:

1. That the deceased, Frederick Wilhelmi, for a number of years prior to his death was employed by the respondent as a harness maker and that he continued in such employment up to the 16th day of September, 1925.

2. That at the time of his injury the said Frederick Wilhelmi received as wages the sum of thirty-six dollars ($36.00) per week.

3. That on the 4th day of August, 1925, the said Frederick Wilhelmi while in the course of his employment and engaged in the work of harness maker suffered and sustained injuries to the umbillicus as the result of an accident and

that the said accident arose out of and in the course of decedent's employment.

4. That the respondent herein received notice of the said accident.

5. That as a result of the said accident and the injuries sustained as a result thereof, the said Frederick Wilhelmi died on the first day of October, 1925.

6. That the said petitioner is entitled to the sum of $150.00 as funeral expenses which has not been paid by the respondent.

7. That the petitioner Henrietta Wilhelmi is the widow and sole dependent of the said Frederick Wilhelmi and I find, therefore, that the petitioner is entitled to compensation for a period of three hundred (300) weeks from October 1, 1925, at the rate of $12.50 per week.

8. I do hereby allow the petitioner as costs the sum of one hundred and fifty dollars ($150.00) for three medical witnesses, viz., Doctors Greenstein, Von Roeder and Coughlan, who testified at the hearing before the Workmen's Compensation Bureau, such medical witnesses having been necessary for the proper presentation of the case.

9. I find that O'Brien & Tartalsky, attorneys for the petitioner, are entitled to the sum of $700.00 for fees for services rendered by them in the presentation of this case, which sum may be taxed and the costs recovered against the respondent.

10. That petitioner is entitled to costs in this proceeding.

Finding of Facts and Determination.

It is, therefore, on this 6th day of January, 1928, on motion of Samuel Tartalsky, of the firm of O'Brien & Tartalsky, and in the presence of William B. Harley, of the firm of Harley, Cox & Walburg, attorneys for respondent,

ORDERED, that judgment final be entered in favor of the petitioner, Henrietta Wilhelmi, and against the respondent, American Railway Express Company, in the sum of $12.60 for a period of 300 weeks from October 1, 1925, together with $150.00 for funeral expenses; $150.00 for medical witnesses; and that the respondent pay O'Brien and Tartalsky the sum of $700.00 as counsel fee together with costs.

DANIEL O'REGAN,
Judge, Hudson County
Court of Common Pleas.

Filed Clerk's Office
January 6, 1928.
Hudson County, N. J.

REASONS.

Filed January 14, 1928.

NEW JERSEY SUPREME COURT.

HENRIETTA WILHELMI, *Petitioner-Defendant,* *vs.* AMERICAN RAILWAY EXPRESS CO., *Respondent-Prosecutor,* *In Certiorari.*	*On Certiorari.* *Reasons.*

The prosecutor presents the following reasons for setting aside the determination and judgment brought before this Honorable Court by the writ of certiorari in the above-entitled cause:

First. Because the finding that the petitioner's decedent sustained an injury as the result of an accident arising out of and in the course of decedent's employment is unsupported by any legal evidence.

Second. There is no evidence to show that the cause from which the petitioner's decedent was alleged to have died was the result of a traumatic injury.

Third. There is no evidence from which there may be assumed an accident from the cause alleged by petitioner rather than from some other cause.

Reasons.

Fourth. Because the said determination and judgment are in divers other respects irregular, unjust, illegal and oppressive to the prosecutor.

HARLEY, COX & WALBURG,
Attorneys for Prosecutor.

Filed January 14, 1928.

JAMES F. MINTURN,
Justice of Supreme Court.

OPINION OF SUPREME COURT.

Filed June 28, 1928.

NEW JERSEY SUPREME COURT.

No. 206, May Term, 1928.

HENRIETTA WILHELMI,
Petitioner-Respondent,

vs.

AMERICAN RAILWAY EXPRESS CO.,
Defendant-Prosecutor.

On Certiorari.

Submitted May Term, 1928; decided June 27, 1928.

Before Justices Minturn, Black and Campbell.

For the prosecutor: Messrs. Harley, Cox and Walburg.

For the respondent: Messrs. O'Brien and Tartalsky.

Per Curiam:

This is a workmen's compensation case. The certiorari was allowed to review a judgment reversing an order made in the Workmen's Compensation Bureau dismissing the petitioner's petition. The basis of that order was, as found by the Deputy Commissioner, that there was no legal evidence of an accident arising out of and in the course of decedent's employment. The Court of Common Pleas of Hudson County found there was such evidence. With that finding of fact by the Court, we are satisfied. The judgment must be affirmed.

The prosecutor files four reasons for reversing the judgment of the Court of Common Pleas. They all may be included in one, viz: the Court of Common Pleas entered judgment without evidence.

The controverted question is the finding by the Court of Common Pleas, that on the 4th day of August, 1925, the petitioner's decedent, Frederick Wilhelmi, while in the course of his employment and engaged in the work of a harness maker, suffered and sustained injuries to the umbillicus, a carcinoma of the umbillicus, as the result of an accident, that the said accident arose out of and in the course of decedent's employment, as the result thereof, the said Frederick Wilhelmi died on the 1st day of October, 1925.

To prove the case, the petitioner relied upon the testimony of Dr. Harry Greenstein, record, p. 22; Dr. Ludwig R. Von Roeder, record, page 26; Dr. James Coughan, record, page 32. These physicians were all consulted for treatment by the decedent. Dr. Greenstein on the 4th day of August, 1925, the day of the alleged injury. Dr. Von Roeder on September 12, 1925, and Dr. Coughan on September 23, 1925. The decedent died October 1, 1925. The testimony of these physicians was competent and legal evidence, under the case of *Koske* v. *Delaware &c. R. R. Co.*, 6 N. J. Adv. R. 844.

It would serve no useful purpose to review the testimony set out in the record. It is rather fully set out in the brief of the respondent. The judgment of the Hudson County Court of Common Pleas is affirmed.

RULE OF AFFIRMANCE AND REMITTITUR.

NEW JERSEY SUPREME COURT.

HENRIETTA WILHELMI, *Petitioner-Respondent,* *vs.* AMERICAN RAILWAY EXPRESS CO., *Defendant-Prosecutor.*	*On Certiorari.* *Rule of Affirmance and Remittitur.*

The Court having inspected the transcript and proceedings of the Court of Common Pleas in and for the County of Hudson returned with the certiorari in this cause, and reasons for refusing the judgment below, and heard the argument of counsel therein and having duly considered the same;

It is ORDERED that the judgment of the Court of Common Pleas in and for the County of Hudson be and the same is hereby in all things affirmed and the said record remitted to the court below to be proceeded with according to the law and practice of said court.

Entered July 23, 1928.
On motion of
SAMUEL TARTALSKY,
Of Counsel.

NOTICE OF APPEAL.

Filed July 26, 1928.

NEW JERSEY SUPREME COURT.

HENRIETTA WILHELMI, *Petitioner-Respondent,* *vs.* AMERICAN RAILWAY EXPRESS COMPANY, *Prosecutor-Appellant.*		*On Certiorari.* *Notice of Appeal.*

To Messrs. O'Brien & Tartalsky, attorneys of petitioner-respondent.

SIRS:

TAKE NOTICE, that the prosecutor-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully,

HARLEY, COX & WALBURG,
Attorneys of Prosecutor-Appellant.

Dated July 25, 1928.
Filed July 26, 1928.
FRED L. BLOODGOOD,
Clerk.

Due service acknowledged this 25th day of July, 1928.

O'BRIEN & TARTALSKY,
Attorneys of Petitioner-Respondent.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRIETTA WILHELMI,
Petitioner-Respondent,

vs.

AMERICAN RAILWAY EXPRESS COMPANY,
Prosecutor-Appellant.

On Certiorari.

Grounds of Appeal.

To Messrs. O'Brien & Tartalsky, attorneys of petitioner-respondent.

SIRS:

The prosecutor-appellant states the following grounds of appeal:

The Supreme Court of New Jersey erred in giving judgment for the petitioner-respondent instead of for the prosecutor-appellant for some one or more of the grounds of appeal urged in the said Supreme Court.

Dated July 25, 1928.

Respectfully,

HARLEY, COX & WALBURG,
Attorneys of Prosecutor-Appellant.

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

New Jersey Court of Errors and Appeals

HENRIETTA WILHELMI,
Petitioner-Respondent,

vs.

AMERICAN RAILWAY EXPRESS COMPANY,
Respondent-Prosecutor.

On Certiorari.

BRIEF OF APPELLANT.

This appeal is from the judgment of the Supreme Court on certiorari affirming the order of the Hudson County Court of Common Pleas awarding compensation to the petitioner under the provisions of the Workmen's Compensation Act.

Statement of the Case.

The petitioner is the widow of Frederick Wilhelmi who was employed by the respondent, American Railway Express Company, as a harness maker. The petition filed praying for compensation alleges that on August 4, 1925, the deceased in the course of his employment received an injury to the umbilicus from which death resulted on October 1, 1925.

At the hearing it appeared that there were no eye-witnesses to the alleged accident. The petitioner sought to establish that the deceased had suffered an accident arising out of and in the course of his employment by statements alleged to have been made by him to Drs. Greenstein, Van Roeder and Coughan.

This testimony (Dr. Greenstein, pp. 22-26; Dr. Van Roeder, S. C., pp. 27-28, and Dr. Coughan, S. C., p. 33) was received by the Deputy Commissioner over the objection and exception of the respondent (S. C., p. 23, p. 27, p. 33). At the conclusion of the first day of the hearing, the Deputy Commissioner requested that counsel for both parties be prepared at the next trial date to argue "on the question of how far a history taken by a doctor for treatment is binding as evidence to prove an accident" (S. C., p. 58).

This evidence was offered as part of the history which the decedent gave the doctors at the time he first saw each of them. The information was elicited from each doctor in the following manner:

"*Dr. Greenstein.*

Q What did he say to you regards to his history? (S. C., p. 22, l. 26).

Dr. Van Roeder.

Q Did you get his history? A I did, sir.
Q What did he say to you about it? (S. C., p. 27, ll. 18-19).

Dr. Coughan.

Q What did he say to you about his history?" (S. C., p. 33, l. 9).

In response to these questions, the doctors testified that the deceased had told them that on August 4, 1925, while working on a harness, a needle had penetrated his umbilicus (S. C., p. 23, ll. 8-13; p. 27, ll. 31-37; p. 33, ll. 18-22).

The petitioner's case with the exception of the above testimony was as follows:

Decedent was a harness maker in the employ of the American Railway Express Company (S. C., p. 15, ll. 15-18). He worked eight hours a day (S. C., p. 81, l. 38) and usually came home

about 6:00 P. M. (S. C., p. 81, ll. 37-40). Prior to August 4, 1925, he was in good health, according to his widow (S. C., p. 15, ll. 28-30). On August 4, 1925, he left home for work at 6:00 A. M. and (S. C., p. 81, l. 31) returned home in the evening and "complained" (S. C., p. 15, ll. 32-33). That night petitioner saw a "little red" mark on her husband's body at the navel (S. C., p. 20, ll. 8-14).

Dr. Greenstein asserted that the decedent visited his office "close in to eight o'clock" on the evening of August 4, 1925 (S. C., p. 59, ll. 24-26). Examination disclosed a mark on his abdomen "around the navel" from which the doctor concluded that something sharp had penetrated it (S. C., p. 23, ll. 18-22).

He further said that from his observation of the wound, it had been received sometime during the day. From five minutes to an hour after the injury was received there would be bleeding. At the hour of the examination, eight o'clock, there was no bleeding (S. C., p. 62, ll. 1-9). The doctor, therefore, concluded that the injury had been received a few hours earlier (S. C., p. 62, ll. 11-14). He could not be at all certain, however, as to the time of the occurrence saying he could not say whether it happened two or three hours before or five or six hours before (S. C., p. 62, ll. 19-25).

According to Dr. Greenstein, on August 4th there was no evidence of a lump or mass at the site of the navel (S. C., p. 23, l. 28). On August 10th, *six days later*, he advised the deceased "to see a surgeon" (S. C., p. 23, ll. 31-35).

It does not appear that Wilhelmi visited a surgeon from that time until September 12th (S. C., p. 27, ll. 30, *et seq.*). On that date Dr. Van Roeder found a mass "in practically the

middle of the abdomen and umbilicus,'' which he diagnosed as cancer (S. C., p. 28, ll. 27-30).

Operation for carcinoma of the umbilicus was performed by Dr. Coughan (S. C., p. 33, l. 36), and death followed on October 1st (S. C., p. 24, l. 33).

Frederick Wilhelmi, Jr., son of the deceased, testified that he obtained his father's tool bag from the respondent's factory and that it contained, among other things, awls, a small hammer and needles (S. C., p. 80, ll. 10-26).

After the conclusion of the entire hearing the Deputy Commissioner handed down his determination in which he found *inter alia:*

> ''That there is no legal evidence of an accident arising out of and in the course of decedent's employment, and that there is no evidence from which it may be assumed that there was an accident from the cause alleged by petitioner rather than from some other cause.''

Since the Deputy Commissioner had permitted these doctors to testify over the objection and exception of respondent as to the history given them by the deceased, which history included the time and place where he received his injury and the cause thereof and had later requested counsel to be prepared on the date to which the hearing was adjourned for completion to argue the question of the admissibility of such evidence, this finding and determination was in effect the striking of that part of the history from the record.

POINT I.

There is no legal evidence that the deceased met his death as the result of an accident arising out of and in the course of his employment.

No citation of authority is needed to support the assertion that the petitioner in this case must establish as prerequisite to the recovery of compensation that the decedent died as the result of injuries received (1) through an accident (2) arising out of and in the course of his employment.

Respondent-appellant respectfully contends that there is no such proof. The only testimony in the case as to the *cause* of the decedent's injury and when and where he received it comes from the three doctors as part of the history given them.

Respondent respectfully insists that the Deputy Commissioner was justified in deciding there was no legal evidence in the case of an accident arising out of and in the course of the deceased's employment.

The law in this state as to the admissibility of declarations made to a physician as part of the history given by the patient, as to the cause of his condition, may be regarded as settled beyond question. The syllabus in the case of *State* v. *Gruich*, 96 L. 202, is as follows:

> "Declarations made to a physician as to the cause of the injury which is the particular subject matter of inquiry and which may be proved by other evidence are inadmissible."

Justice Swayze, speaking for the Court of Errors and Appeals, propounded the rule in this wise:

> "The rule is approved by Professor Wigmore, Wig. Ev. sec. 1722. He cites the

opinion of the Supreme Court of Massachusetts in Roosa *v.* Loan Company, 132 Mass. 439. The headnote of that case is: 'The statement by a patient to his physician of the cause of an injury from which he is suffering is inadmissible as evidence of that cause in an action for the injury.' The hearsay statements in the Roosa case and the Lambertson case differ from the one now before us, because in those cases the hearsay was the statement of the plaintiff in the action; *here it is the statement of the injured person who is not a party to the suit because the suit is an indictment in which the state is the active party.* The reasoning underlying the decisions is quite as conclusive. In the Massachusetts case the court said: 'While the witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages be ascertained. *But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject matter of inquiry and which may be proved by other evidence.*' ''

The Gruich case was approved by the Court of Errors and Appeals in the very recent case of *Koske* v. *D. L. & W. R. R. Co.*, 6 Atl. Rep. 847 (decided May 14, 1928). There Judge McGlennon, quoting from the Gruich case said:

> ''While the witness not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient, in relation to his condition, symptoms, sensa-

tions and feelings, both past and present. In both cases, these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the inquiry, and who seeks to obtain damages, be ascertained. *But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject matter of inquiry, and which may be established by other evidence.*"

The statements of the decedent in this case as to when and where he received his injury and as to its cause, as testified to by the three physicians, are manifestly hearsay under the above decisions.

Let us consider the hearsay rule itself, aside from the decisions and its application to the decedent's declarations to Drs. Greenstein, Van Roeder and Coughan. Hearsay is testimony which when offered does not depend for its efficacy on the credibility of the person testifying but on the credibility of some other person. The law for wise reasons, devised through centuries of experience, recognizes that the most effective method of arriving at the truth of any and all testimony is by subjecting it to the acid test of cross examination.

How can it be said with any degree of accuracy that the alleged declarations of the deceased to the doctors, as to the cause of his injury, coming at the trial through the mouths of the doctors, do not invade this rule when to accept them as evidence would be to force upon the court and the respondent binding testimony the credibility and efficacy of which the respondent has not the slightest opportunity to impeach?

This rule is relaxed only in a certain few instances where a knowledge of man, his mental

processes and his physiological reactions to certain situations, arrived at empirically, has persuaded the judiciary to the view that evidence so arising should be admitted despite the lack of opportunity for cross examination. Experience and study has taught that a sort of vicarious cross examination is presented by the very situation out of which the evidence offered, is created.

It is because of the realization that all normal men are imbued with the will to live and a paramount desire for self-preservation, that the law excepts the statements and declarations of a patient to his doctor as to his conditions, symptoms, sensations and feelings, from the hearsay rule. The law assumes that men who innately desire health and freedom from pain will, when suffering from a condition inconsistent and incompatible with an enjoyment of life to the fullest extent of their physical and mental capacities, speak truly and honestly concerning their ailments to those to whom they appeal for surcease.

This departure from the hearsay rule, however, encompasses and makes evidential only the narration to the doctor of symptoms, sensations and feelings; those matters which are essential to proper diagnosis and applicable treatment. It does not include or make evidential declarations as to the cause of the condition or when and where it occurred. For here this vicarious cross examination, the nature of the man himself, does not hold sway. There no longer exists the overwhelming incentive for truth; the causes may be fabricated so long as the condition is accurately described, for in the diagnosis and treatment the symptoms, conditions and sensations regulate the course of treatment, not the cause.

Viewed in this light, aside from the guiding decisions, there is no justification for the admission of such declarations as the cause of the injury and when and where it was received and the Deputy Commissioner was legally correct in so holding.

Aside from these New Jersey decisions and the rule of reason which respondent has attempted to analyze, there are decisions in courts of other jurisdictions which are so clearly analogous that they should be controlling.

The English case of *Amys* v. *Barton,* decided by the English Court of Appeals, October 25, 1911, 5 Butterworth, 117, 1 K. B. 40, is almost identical with the present situation and respondent, therefore, takes the liberty of quoting the entire opinion:

> "On October 18, 1910, Amys, being then in perfect health, went with his master's machine to his master's wheat field to help to thresh his master's wheat. When the work was in progress some of the labourers saw wasps upon the drum and at the back of the machine 'right close against Amys,' who was engaged driving the engine. No wasp was seen elsewhere that day or thereafter. Next day Amys had a swollen leg and complained of pain. He worked on for a few days. He was seen by a carpenter limping along on the way home, to whom he made a statement. Dr. Alexander was called in and Amys made a communication to him in the presence of his wife. On November 1st, Amys died. In cross examination Dr. Alexander said death was caused by blood poisoning which was set up by the sting of a wasp. It was, he said, the only possible thing to account for it. 'I do not think it is possible that a stocking could have caused the poisoning in this case.' "

Cozens-Hardy, M. Y.—"This case has been very well argued, but having listened attentively to the argument, I have come to the conclusion that the decision of the learned County Court Judge cannot be supported because I think there is no evidence that the accident arose out of the employment.

I assume, for the purpose of my decision, that there was sufficient evidence to show that the deceased man was on October 18th stung by a wasp when he was engaged in working for the appellant and that the sting of that wasp introduced into his system the poison which ultimately led to his death; but that is only part of the necessary proof. It must never be forgotten that the accident must not only arise in the course of the employment, but must also arise out of the employment. * * * but as mention has been made most properly of a case in the Irish Court of Appeal (Wright *v.* Kerrigan) I think it right just to say one word about it.

The learned County Court Judge admitted a statement made to the doctor ten days after the accident. 'Amys told me he was threshing wheat and must have disturbed a wasp' nest as wasps were about and one stung him and that he sat down and unloosed his buskin and took a dead wasp off his stocking.'

The view of this court as to the admissibility of a statement of that kind has been expressed in a form which is binding upon us in the case of Gilbey *v.* Great Western Railway Co., 3 B. W. C. C. 135, where we said that statements made by a deceased man as to his bodily or mental feelings are admissible, but that those made as to the cause are not admissible in evidence. The learned County Court Judge seems to have thought that the very recent case in the Irish Court, Wright *v.* Kerrigan, *supra*, was inconsistent with that view and he held that this evidence was admissible.

The headnote to the report in the Irish Law Reports undoubtedly bears out the view which his Honor took in the case. * * * The headnote is—'Held by the Court of Appeal that the statements of the deceased workman were properly admitted in evidence.'

The judgments do not bear out that headnote at all. They both base their judgments upon the grounds that the circumstances were such as to justify that inference.''

The case quoted above follows closely the theory laid down by this same court in *Gilbey* v. *Great Western Railway Company*, 3 B. W. C. C. 135, which holds as follows:

''Statements made in the absence of his employer by a deceased man as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not admissible in evidence and as there was no other evidence of an accident arising out of and in the course of his employment, then these statements and the award could not be supported.''

The facts in the above-entitled case are as follows:

The plaintiff was a meat porter, whose work commenced shortly after midnight, and the accident is alleged to have happened on Tuesday mornng, May 11, 1909. On the preceding Monday, May 10th, he told his wife he did not feel well, and when the time arrived for him to go to work about one o'clock on Tuesday morning, his wife tried to dissuade him from going, as he was obviously ill and spitting blood. He went to work and returned about 9:00 A. M., again spitting blood and saying, ''I do feel bad.'' (The wife then proceeded to give evidence as to what her husband said about his accident. Counsel for the employer objected but this objection was over-

ruled by the Court.) The wife, continuing her evidence, said that she had remarked to her husband, "You look very ill." He spat blood freely and said, "I have broken my small rib. I shall wash myself now and lie down." In answer to further questions, he told his wife how he had broken that rib through trying to save the meat from slipping into the dirt. He said he was carrying the meat and it slipped from his shoulder and to save the meat from falling he gave himself a sudden jerk to save the meat. That was the cause of it. * * *

Edward Crook, a meat porter, testified that he saw Gilbey between four and five A. M. on Monday, May 10th, carrying sides of beef with another man, who was not called as a witness. He saw him later at nine A. M., when Gilbey told him that he had hurt himself; that he was very queer and he was going home.

The medical evidence in this case showed that in addition to inflammation in the lung, in the back lower lobe of the left lung, opposite the ninth rib, there was a vertical tear in the lung substance, about one-half inch in length and about one-quarter of an inch deep, which the doctor testified could happen in the manner described by the deceased.

In this case the Court, by unanimous decision, set aside the verdict of the lower court on the ground that there was no legal or competent evidence to prove the existence of an accident arising out of or in the course of decedent's employment.

These English cases are of the greatest importance since the English Compensation Act (6 Edw. VII, 658) as to the elements which must be established as essential to recovery are identical

with those outlined in our act. They should, therefore, be of especial value as a guiding influence to judgment in the instant case (*Bryant* v. *Fissell*, 84 L. 72).

We need not, however, rely upon the British decisions entirely in support of our contention that hearsay evidence of the type involved in this case is not admissible, as there are several opinions from courts of great authority in this country sustaining our contention. We desire to call particular attention to the case of *Peoria Cordage Co.* v. *Industrial Board of Illinois*, 284 Ill. 90, 119 N. E. 996, which held as follows:

> "Declaration by an employee to his physician and members of his family that he had received an injury arising out of and in the course of his employment are not admissible in a proceeding to recover for his death under the Workmen's Compensation Act."

In this case, the decedent's widow made application under the Workmen's Compensation Act of Illinois for compensation for her husband's death, alleged to have been caused by an accident arising out of and in the course of employment with the Peoria Cordage Company. The Industrial Board found for the petitioner and its finding was overruled by the Illinois Supreme Court.

The plaintiff's decedent in that case died on February 17, 1916, from septicemia or general infection, following an injury to the index finger of his left hand, and it was alleged in the application that the injury occurred accidentally on February 2, 1916, and arose out of and in the course of his employment. The only testimony that the injury occurred while at work for the employer and in the course of such employment, was the testimony of witnesses that he said he cut his

finger on a can while at work in the plant. No one saw the accident and no one in or about the plant had any knowledge that it occurred.

The decedent was working on February 4, 1916, and on that day he showed his finger to his son and said that it was cut two days before on a can while at work. The decedent's wife had been troubled with an infection and abscess on her arm and had been treated by a doctor. The son applied on his father's hand some of the antiseptic solution that the mother had been using. The next day there was no improvement and the decedent's wife telephoned the company that he had hurt his finger while working at the cordage plant, which operated as notice to the plaintiff-in-error of the alleged accident.

In pursuance of that notice the company's doctor gave some treatment to the father and testified that the decedent told him the injury occurred ten days before that time. On February 6th, the decedent went to the office of the doctor who had been treating his wife and told him that he had cut his finger while at work in the plant of the cordage company a few days before. The finger was then badly infected and the doctor could not tell whether there had been any laceration but on opening it he found considerable pus. Decedent was treated thereafter by the doctors and the finger becoming gangrenous he was taken to a hospital and the finger was amputated on February 15th. There was a general infection of the system and he died two days afterward.

In arriving at its decision the Court said:

> "It is not necessary that some witness should testify to seeing an accident arising out of and in the course of employment if it is shown in some way that while the em-

ployee was at work there has been a recent accident or some circumstances tending to show the fact; but in this case there was none whatever.

The testimony of witnesses as to whether the injury arose out of or in the course of employment was all merely hearsay and incompetent.

> Declarations made by one injured to his attending physician are admissible in evidence when they relate to the part of the body injured and his symptoms and sufferings because the physician is necessarily guided to some extent by such information, free from suspicion of being spoken with reference to future litigation *but the statements are not competent if they relate to the cause of the injury.*''

It is interesting to note that this court has used almost the identical language of the British Court of Appeals in the case of *Gilbey* v. *Great Western Railway Company, supra.*

New Jersey has adopted the same rule as the Supreme Court of Illinois in the Peoria Cordage Company case and the Court of Appeals of Great Britain in the Gilbey case, *supra.* The following quotation is from the case of *Lloyd* v. *Campbell Soup Company,* N. J. Ad. Rep., vol. 4, p. 553:

> ''After carefully going over the evidence in this case, I find that the petitioner has failed to sustain the burden of proving that the deceased suffered an injury by accident arising out of and in the course of the employment. There was no evidence that the alleged injury arose out of or in the course of the employment, and the only thing that there was that indicated that there was an injury by accident was the history of the case given by the deceased to Dr. Buzby on September 25th. This history was merely evidential as to treatment by Dr. Buzby and

was not evidential as to whether or not an injury occurred by accident. Therefore, I find, not only that the petitioner failed to show that the alleged injury arose out of and in the course of the employment, but has also failed to show an injury by accident.''

The case of *Walsh* v. *Ford Motor Co.*, vol. 4, Misc. 21, is worthy of consideration. There the decedent was alleged to have died from septicemia resulting from an injury to his hand.

The decedent was employed as a glass cutter by the respondent. The petition alleged that on a certain day he had cut the middle finger on his left hand while cutting windshields. His death occurred ten days later from septicemia. There were no witnesses to the accident. The petitioner and her father-in-law testified over objection that the decedent immediately after his arrival at home said he had cut the middle finger of his left hand while at work.

The Court said:

> ''It is fundamental that the burden is on the petitioner to prove by competent, legal evidence that (1) decedent sustained an injury by accident (2) arising out of and (3) in the course of his employment, and (4) that decedent's death was caused by the accident. * * *
>
> As pointed out above the only proof offered of the accident was the declarations of decedent. Inasmuch as these declarations were hearsay, I hold that there was no legal proof that decedent sustained an accident arising out of and in the course of his employment.''

The petitioner attempts to justify the apparent reception of the hearsay evidence of the doctors by the Common Pleas Court by referring to the provisions of the Workmen's Compensation Act

that the official conducting the hearing shall not be bound by the rules of evidence (sec. 9, P. L. 1918, p. 433, C. S. Supp. 236-50) and citing Justice Kalisch's discussion thereof in the case of *Scalise* v. *Uvalde Asphalt Paving Co.*, 98 L. 696.

A perusal of this opinion will convince that the petitioner has a misconception of its content. Justice Kalisch said, *inter alia* (p. 700):

> "But as to the probative force of testimony condemned by the generally accepted rules of evidence to be incompetent or improper or valueless, an entirely different legal situation is presented."

This expression in conjunction with the context can lead to but one logical conclusion, namely, that an appellate court will accord no probative force or value to testimony which is condemned by the generally accepted rules of evidence.

Therefore, to lend any effect to the alleged declarations of the deceased would be to ignore rules of evidence which have been settled from time immemorial and to concede to them an artificial probative force which they are not legally entitled to.

The petitioner refers to the opinion of Mr. Justice Cuddeback in *Carroll* v. *Knickerbocker Ice Co.*, 218 N. Y. 435; 113 N. E. 507, which is cited by Mr. Justice Kalisch in the Scalise case. This case, construing a somewhat similar though broader provision of the New York Compensation Act, supports the conclusion drawn by the respondent from the Scalise case. It in part holds:

> "The act may be taken to mean that while the Commissioner's inquiry is not limited by the common law or statutory rules of evidence, or by technical or formal rules of pro-

cedure, and it may in its discretion accept any evidence that is offered, *still in the end there must be a residuum of legal evidence to support the claim before an award can be made.*''

Even under this somewhat broader construction of the New York Act respondent contends that shorn of the alleged declarations of the deceased, testified to by the doctors, there is absolutely nothing to legally connect his death with an accident arising out of and in the course of his employment; in the language of the New York case there is no ''residuum of legal evidence'' to support the claim to compensation.

In this connection an excerpt from the case of *McCauley* v. *Imperial Woolen Co.*, 104 Atl. 617 (Pa.), cited by the petitioner, is important. Justice Moschzisker said:

> ''*The act permits liberal investigation by hearing and otherwise; but after all the data have been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law, must be excluded from consideration; that is to say, when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound probative character as may be left, be this circumstantial or direct.*''

POINT II.

After excluding the testimony of the doctors as to the alleged declarations of the deceased there remained no evidence that the deceased came to his death as the result of an accident arising out of and in the course of his employment.

The petitioner apparently appreciating that these alleged declarations of the deceased are

legally inadmissible and entitled to no probative weight argues that after their exclusion there are enough facts in the case upon which to predicate an award.

The only facts in the case which are worthy of legal consideration are as follows: For some years prior to August 4, 1925, the petitioner's husband was occupied as a harness maker for the respondent, American Railway Express Company. His hours of employment were eight and he usually returned home about six P. M. in the evening.

Prior to August 4, 1925, he was in good health according to his wife. On August 4th he left home for work at six A. M., returned home in the evening and "complained." That night petitioner saw a "little red" mark on her husband's body at the navel.

The deceased visited Dr. Greenstein at his office "close into eight o'clock" on the evening of August 4th. Examinations disclosed a mark on the abdomen "around the navel" from which the doctor concluded that something sharp had penetrated it.

This doctor said the wound had been received sometime during the day. His premises for this observation being that such a wound would bleed from five minutes to an hour after it was received. At the time of the examination there was no bleeding. The doctor's admittedly uncertain conclusion that it had occurred a few hours earlier, later saying that it might just as well have been five or six hours earlier.

According to Dr. Greenstein, on August 4th there was no evidence of a lump or mass at the site of the navel. On August 10th, or *six days*

later, he advised the deceased "to see a surgeon."

Deceased visited a surgeon, Dr. Van Roeder, on *September 12th.* On that date cancer of the umbilicus was diagnosed and operation suggested.

Operation was performed by Dr. Coughan and death followed on October 1, 1925.

It further appeared that Frederick Wilhelmi, Jr., son of deceased, obtained his father's tool bag from respondent's factory after his father's death and it contained among other things awls, a small hammer and needles.

The respondent asserts that the above outline comprehends all that the Court is entitled to consider in arriving at its decision as to whether the petitioner's husband suffered an accident arising out of and in the course of his employment.

The petitioner points to a statement of the foreman of the respondent's factory as a possible link in the chain of connection between the injury and the employment. The foreman is alleged to have said, "he didn't think a needle could do that." This statement was admitted over the objection and exception of respondent. It is settled almost beyond the necessity of citations that the statements of an employee in instances such as the present one are inadmissible to bind his employer unless such statements are part of the *res gestae.*

King v. *Atl. City Cas. Co.,* 90 N. J. L. 679;
Huebner v. *Erie,* 69 N. J. L. 327;
North v. *Maniera,* 3 M. 98;
Blackman v. *West Jersey Ry. Co.,* 68 N. J. L. 1.

It can hardly be contended that it was part of the *res gestae.*

Aside from the admissibility of this remark, it does not appear to have any intrinsic evidential value to the petitioner's case. There is no admission that a needle did cause the injury. For all that can be gathered, it tends to negative the petitioner's case. In all probability it was made in the course of the conversation with the son of deceased after he (the son) had asserted that his father had been injured by a needle and indicates rather a lack of knowledge of any such accident.

Petitioner also refers to a letter written by deceased to this foreman in which he said in part: "I write you today so that you can report me sick to the company, because I received my sickness at that place and it will be sometime before I can work again."

This letter operated as notice to the company and was evidential only for the purpose of establishing that the statutory requirement of notice was complied with. In the language of the Peoria Cordage Company case, *supra,* where there was testimony that decedent's wife telephoned the company that he had hurt his finger while working at the cordage plant, this letter served "as notice to the respondent and was not evidence of anything."

Again it is worthy of note that this letter makes no reference to an accident or to any injury accidentally received while at work. It was written ten days after the diagnosis of cancer had been made and shortly after his arrival at the St. Francis Hospital for operation.

A study of the facts above recited will convince that the petitioner has utterly failed to

establish an accident arising out of and in the course of deceased's employment. A careful analysis reveals—

(1) While there is evidence that decedent was in good health prior to August 4, 1925, there is no *specific testimony as to his condition on the morning of August 4th before he went to work;*

(2) He worked eight hours a day and usually returned home about six o'clock in the evening. On the morning of August 4th he left home at six A. M. and returned after eight P. M. It is reasonably probable that his hours were from seven A. M. in the morning until four P. M. in the afternoon with a one hour lunch period.

Under these facts it is just as reasonable to suppose that the deceased received his injury *between six and seven in the morning on the way to work; or between twelve and one—his lunch period; or between four in the afternoon and eight in the evening when he visited Dr. Greenstein.*

Nor is the testimony of Dr. Greenstein as to the time when the injury occurred, which is most obviously speculation, as even a superficial perusal will demonstrate, incompatible with these theories. If it occurred "a few hours before" the decedent's visit then it occurred after he had departed from work. The good doctor admitted it might have taken place during lunch hour and also that it might have occurred five or six hours before eight. The latter conjecture which is quite apparently worthy of little or no weight is the only one which could possibly bring the injury within the working hours.

Even assuming that the injury was received five or six hours before eight P. M. and during

his working hours, there is none of the essential connecting proof present. There is no evidence that it arose out of or by reason of the employment. There is no evidence that it was the result of an accident.

The petitioner in such cases has an affirmative burden to shoulder. The case is considered on the basis of two possible hypotheses, one, that the accident, if one is established did not arise out of and in the course of the employment and the other that it occurred out of and in the course of the employment. In order to recover the petitioner must adduce evidence making the hypothesis of an accident arising out of and in the course of the employment the reasonable probability and the hypothesis of no accident arising out of and in the course of the employment, the reasonable improbability. If the evidence leaves one hypothesis as consistent as the other or the mind in equipoise as to whether a petitioner sustained an accident arising out of and in the course of employment, there can be no award to the petitioner.

Again the petitioner is required to exclude by testimony the possibility that the injury might have been received from a cause other than that alleged by making it reasonably probable that it occurred as alleged. If the testimony is equally consistent with the happening of the injury from some cause other than that alleged by petitioner, then the judgment should be for the respondent.

Phillips, Admx. v. *Hamburg Amer. S. C. Co.*, 37 L. J. 167;

Curran v. *Newark Gear Cutting Machine Co.*, 37 L. J. 21.

At this point the respondent would like to direct the Court's attention specifically to the

cases of *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, and *Migliaccio* v. *Public Service Ry. Co.,* 101 L. 496, aff. 102 L. 442, which are clearly analogous to the situation *sub judice.*

In the Suburban Electric Company case, Chief Justice Gummere, speaking for the Court of Errors and Appeals said:

> "It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for the decedents' death in order to entitle him to a verdict. It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected."

Justice Trenchard who wrote the opinion in the Migliaccio case followed and approved the Surburban Electric Company case. He said:

> "It is incumbent upon the plaintiff to exclude the idea that death was due to a cause with which the defendant was unconnected. This is pointed out in the opinion of the present Chief Justice in the case of Suburban Electric Co. *v.* Nugent, 58 N. J. L. 658 (a death case), in which he said: 'It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which

the defendant was unconnected.' This the plaintiff has failed to do. * * *

We think the plaintiff failed to exclude in his testimony the idea that death was due to a cause with which the defendant was unconnected. To permit the recovery of a judgment upon the testimony of the present case would be to permit a jury's guess or speculation to deprive a defendant of its property. Such a result can only be obtained by a logical deduction from proven facts. To hold otherwise would throw wide open the door of recovery in many cases where illness and death have occurred long after an injury has been inflicted upon the theory that the illness would not have taken place if the person's vitality had not been lowered as a result of the accident. Physicians may be honest in being willing to testify that the illness would probably not have resulted if the injury had not occurred. But it is impossible for such an opinion to be much more than a guess because in no case would it be possible to frame a hypothetical question which would embody all the facts relative to the person of whom it is asked. No person knows to what disease he may be subjected to in a day's travel or business. It may be that the application of the principles above enunciated may in the present case seem harsh, but the letting down of the bars and departing from settled and well established principles always results in worse evils.''

(3) The injury which the decedent had on August 4th was a puncture wound around the navel. There is no testimony in the case that there was anything unusual about the injury; anything which so linked it up with his employment as to render it reasonably probable that it was received while at work.

Nothing appears in the case to in any way demonstrate that the injury was an occupational one or one which is commonly received by per-

sons engaged in the same business as the petitioner's husband or one which is peculiar to the type of business decedent was employed in. It is possible to conceive of countless causes of this injury which are perfectly compatible with its happening elsewhere than in the course of decedent's employment.

Furthermore, let us assume that the injury was received by the decedent while on the respondent's premises on August 4, 1925. Even this assumption should not be dispositive of the case. Still another essential is lacking. There is no proof that it was the *result of an accident.* There is *no proof that it arose out of and in the course of the employment.* Mere proof of an injury received while at work without the establishment of the requisite elements of (1) an accident and (2) arising out of and in the course of the employment does not seem to respondent to be a compliance with the statutory requirements or sufficient evidence upon which to predicate an award.

Respondent, therefore, respectfully urges:

(1) There is no direct legal evidence in the case of an accident arising out of and in the course of decedent's employment.

(2) There are no sufficient factual inferences, no sufficient circumstantial evidence in the case which would justify a finding that the decedent met his death as the result of an accident arising out of and in the course of his employment.

Petitioner relies on the Pennsylvania case of *McCauley* v. *Imperial Woolen Co.*, 104 Atl. 616. There, however, the evidence and the inferences to be drawn therefrom were decidedly stronger than in the situation at bar. Decedent was a wool

sorter. There was evidence that he was perfectly well on the morning of April 4, 1916, but that when he left respondent's plant in the afternoon there was a scratch on his neck. A swelling at the site of the scratch indicated the inception of anthrax which caused death within three days.

The Court said (p. 621):

> "The latter (respondent) admitted 'he died of external and not internal anthrax.' Concededly, it is a matter of general knowledge that anthrax is primarily a disease of animals, such as sheep, which may be transmitted to men when handling infected materials, like wool. It is caused by the entrance into the human body of anthrax bacilli, and their rapid multiplication and development. The findings of the referee show a practical accord among the doctors, produced as experts, that in the majority of cases, the inoculation which causes external anthrax occurs through a scratch or abrasion of the skin; which internal anthrax is usually caused by inhaling the germ, or taking it in with food. * * *
>
> In other words, under the circumstances of this case, deceased *apparently not having been where he was liable to become inoculated with external anthrax, except at his work*, and he, as he left defendant's mill on the day in question, having shown symptoms of that disease by the mark upon and swelling of his neck, the inference may reasonably be drawn, in view of the nature of the work on which he was engaged, that the inoculation occurred during the course of his employment * * *."

Petitioner cites In *re Bean*, 116 N. E. 826. There, however, the Compensation Act specifically permits the admission of hearsay. See Mass. Comp. Stat. 533, sec. 65, which provides that hearsay evidence shall not be inadmissible if the Court finds it was made in good faith before the commencement of the action.

Reference is made by petitioner to the case of *State, ex rel. Albert Dickinson Co.* v. *District Court,* 139 Minn. 30, 165 N. W. 478, which case is among those collated in 20 A. L. R. 1, *et seq.,* under the title "Workmen's Compensation Cases —Disease—Proof." The petitioner, however, does not set forth all the facts in the case. They are: the employee was engaged in loading and unloading bags into and from box cars. When he arrived home one evening he had a scratch on one hand. It was about one and one-half inches long and had been bleeding "quite badly." He had wrapped it in a piece of handkerchief which was bloody. The blood was hard, and witnesses testified it looked as if the scratch was about two hours old. The time required to go from his work to his home was about twenty minutes. He had no scratch on his hand when he left home for work that morning. It was shown that the men engaged in his line of work often received scratches on their hands, sometimes from nails inside the cars. Blood poisoning shortly set in causing his death. A letter of the insurance company stated that it had examined all the workmen at the plant, and found only one man who knew anything about the workman being injured.

A consideration of these facts in the aggregate may well lead to the conclusion that in all reasonable probability decedent died as the result of an accident arising out of and in the course of his employment. The mere outline of these facts differentiates this case from the one at bar.

Reliance is placed upon the English case of *Fleet* v. *Johnson,* 6 B. W. C. C. (N. S.) 61. A perusal of the facts quickly distinguishes it. The decedent was a mason's laborer who used a hammer and chisel at his work. He returned

home *with an abrasion on the thumb of the hand that held the chisel where the hammer would most probably have hit him had it slipped.* Needless to say, the inference to be drawn from these facts alone aside from any other proof in the case, direct the mind to the one most reasonably probable conclusion—an accident arising out of and in the course of the employment.

Petitioner sets forth somewhat in detail the opinion of the Court in *Wright* v. *Kerrigan* and argues that *Amys* v. *Burton* did not overrule it. However, the fact is that there the Court admitted the testimony of the doctor who treated the deceased, to the effect that decedent told him he had suffered an accident, while in *Amys* v. *Burton,* a later expression of the judicial will, the admissibility of such evidence was distinctly repudiated.

With this testimony in the record, which incidentally was the only statement therein that decedent had sustained an accident, the Court was enabled through a consideration of the other facts and circumstances to infer that he had suffered an accident arising out of and in the course of his employment.

The fact that the Court placed considerable emphasis on the doctor's testimony is indicated by the decision. It says:

> "* * * He states that what he saw on the body of the deceased was consistent with the accident which deceased said had occurred to him."

Withdraw this evidence from the record and respondent feels that no such inference would be justified.

Without desiring to become unnecessarily prolix in the discussion of the case, respondent would

like to point out a few more decisions in other jurisdiction which may be helpful to the Court in its deliberations.

In *White* v. *American Society*, 180 N. Y. Supp. 867, the claimant was an ambulance driver for the Society for the Prevention of Cruelty of Animals, and died of anthrax taken through a boil on his nose. It was held that, in the absence of some evidence that the disease was contracted in the course of his employment other than the bare proof of the nature of his employment, an award in his favor could not be sustained. The Court said:

> "As to the second theory, that an anthrax germ attacked the deceased through an incision in the boil, there is no evidence that he contracted the disease in the course of his employment. It does not appear that any of the animals with which he came in contact had anthrax. It does not even appear that about the time when he contracted the disease he came in contact with any diseased animals, except a lame horse, or with any other kind of animal, either sick or well, except horses. It does not appear that the disease is peculiar to horses. No evidence was given as to the nature of anthrax or as to the circumstances or conditions under which it attacks mankind. Because the deceased died of anthrax, and because his employment was in connection with animals, the commission has concluded that a causal relation between his employment and death existed. Such a conclusion is not justified in the absence of evidence of a causal relation."

In *Wood* v. *D. Davis & Sons*, 5 B. W. C. C. (Eng.) 113, a collier on return from his work, was seen to have a small scratch on his knee and a large lump in his groin. The lump was a bubo due to blood poisoning. He died a few days

later from blood poisoning caused by the scratch. The dependent claimed compensation, alleging that the scratch was caused at work on the day when it was first seen. There was no direct evidence of the cause of the scratch, but there was medical evidence that if the lump was due to the scratch, the scratch must have been received at least three days before the lump appeared. It was held that there was no evidence to support the inference that death was due to an accident arising out of and in the course of the employment.

In *Valentine* v. *Weaver*, 228 S. W. (19) 1036, a workman, while cutting kindling in the course of his duties, got a splinter in his finger. He died a week later of septicemia, claimed to have been a result of the injury. There was no evidence as to how or where he injured his finger except the statements of his family, friends and the physicians as to what the injured man had told them. No splinter was found in his finger by the physicians. It was held there was no evidence on which a finding that the injury arose out of and in the course of his employment could be based.

The petitioner urges that a factual question alone is presented by the case and, therefore, the findings of fact by the Hudson County Common Pleas Court should not be disturbed. This view is clearly erroneous. The question for determination is simply whether the petitioner has proven any facts which will justify the legal conclusion that the decedent sustained an accident arising out of and in the course of his employment and that his death resulted from the accident.

The respondent respectfully submits that this requisite burden of proof has not been met and that the petitioner has failed to establish that the decedent came to his death because of an accident arising out of and in the course of his employment.

Comments on Supreme Court Opinion.

The Supreme Court *per curiam* said:

> "To prove the case, the petitioner relied upon the testimony of Dr. Harry Greenstein, record p. 22; Dr. Ludwig Van Roeder, record p. 26; Dr. James Coughan, record p. 32. These physicians were all consulted for treatment by the decedent. Dr. Greenstein on the 4th day of August, 1925, the day of the alleged injury, Dr. Van Roeder on September 12, 1925, and Dr. Coughan on September 23, 1925. The decedent died October 1, 1925. The testimony of these physicians was competent and legal evidence, under the case of Koske *v.* Delaware, etc. R. R. Co., 6 N. J. Adv. Rep. 844."

It is respectfully urged that this opinion is erroneous and the very case cited the authority which declares it erroneous. The Court of Errors and Appeals in the Koske case said (p. 847):

> "While the witness not an expert, can testify only to such exclamations and complaints, as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by the patient in relation to his condition, symptoms, sensations and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the inquiry and who seeks to obtain damages be ascertained. *But the necessity does not extend to declarations by the party as to the cause of the injury, which*

is the principal subject matter of inquiry, and which may be proved by other evidence.''

It is, therefore, respectfully urged that the judgment of the Supreme Court be reversed and judgment be entered by this court for the respondent.

Respectfully submitted,

HARLEY, COX & WALBURG.

New Jersey Court of Errors and Appeals

HENRIETTA WILHELMI, Petitioner-Respondent, vs. AMERICAN RAILWAY EXPRESS COMPANY, Prosecutor-Appellant.	On Petition for Compensation Under Workmen's Compensation Act. On Appeal from Supreme Court.

Sat below, Justices MINTURN, BLACK & CAMPBELL.

BRIEF FOR PETITIONER-APPELLEE.

Statement.

This is an appeal from a judgment of the Supreme Court affirming a judgment of the Hudson County Court of Common Pleas in favor of petitioner in a workmen's compensation action. Only a factual question is involved. There was abundant evidence to support the judgment of the Supreme Court.

The Facts.

Petitioner, Henrietta Wilhelmi is the widow of Frederick Wilhelmi. Decedent lived in New York City and was employed in the Jersey City factory of appellant as a harness maker for a number of years previous to his death (Case, p. 15). Up and until August 4, 1925, decedent was in good health (Case, p. 15), and on that day he worked for ap-

pellant (Case, p. 16). From his work he went for treatment to Doctor Greenstein at his office in New York City. He testified as a witness for petitioner. *No valid objection was made to any of the doctor's testimony and to the greatest portion of it no objection whatsoever was interposed. Nor was any motion to strike out any part of the evidence urged.* Doctor Greenstein testified:

At Case, page 23:

"Q. *What did he tell you, doctor?* A. *The man came into my office on August 4, 1925, in the evening complaining of pain in his abdomen. He held his hand on his abdomen and told me while he was working on a harness a needle had penetrated it, that is the abdomen.*

Q. *Did he tell you when it happened?* A. *He told me it happened while he was working and from work he came to my place.*

Q. That day then? A. The same day.

Q. Did you examine his abdomen? A. I did, sir.

Q. *Did you find any marks there?* A. *A mark that appeared to me something sharp had penetrated it around the navel.*"

* * * * * *

At Case, page 24:

"Q. After you took his history, doctor, and he told you that while working on that day he injured his abdomen with a needle— A. Yes.

Q. *You examined him and found that he had been injured with a sharp instrument?* A. *Something sharp had penetrated, probably a needle.*

Q. You saw that, didn't you? A. I saw a mark where something sharp had entered.

Q. From your diagnosis was it probable that what he complained of was caused by a sharp instrument? A. Positively."

* * * * * *

At Case, page 59:

"Q. Will you tell us what time in the evening he came? A. It must have been close in to eight o'clock.

Q. Now, you made an examination of him and you testified that you found 'a mark that appeared to me something sharp had penetrated it around the navel.' That's right, isn't it? A. Yes, sir.

Q. And you also testified that 'something sharp had penetrated, probably a needle'? A. Yes, sir."

* * * * * *

At Case, page 61:

"Q. *I mean based upon your observation of that man, the examination of that particular portion of the anatomy?* A. *Then my answer is the same, that it occurred some time that day.*

Q. *Well, then, doctor, could you tell from your examination of that man whether it occurred five minutes before or five hours before?* A. *Yes, sir.*"

At Case, page 62:

"Q. *How could you tell that?* A. *Well, within five minutes to an hour before there would be a bleeding point at the point of entrance of that object that entered the body.*

Q. *Was there a bleeding point there?* A. *No, sir.*

Q. What would be the inference you would draw, doctor? A. That it must have taken place a few hours beyond that.

Q. A few hours beyond the time that he has seen you? A. A few hours before he had seen me.

* * * * * *

Q. It might just as well have been five or six? A. Yes.

Q. And in all probability, based upon your observation of that man, it did have the appearance that it occurred five or six hours before he had seen you? A. *Yes, sir.*"

During the examination on August 4th, the doctor found no lump or mass and did not consider decedent's condition serious. Thereafter, the patient consulted Doctor Greenstein on several occasions, the last visit was on August 10th (Case, p. 23).

Petitioner testified that her husband's working hours were until 6 P. M. (Case, p. 82, l. 37); that he worked eight hours a day; that he usually came home about 6 P. M. (Case, p. 81, ll. 37 to 40), but that on August 4th he went to Dr. Greenstein first (Case, top p. 82), and that on that day he did not come home until about eight o'clock (Case, p. 81). When he came home that evening he complained of pain (Case, pp. 15-16). That night, petitioner saw a little red mark on decedent's "belly button". At no time prior to August 4th did she see that mark nor did her husband complain or say anything about it (Case, pp. 20-21).

Despite the injury decedent suffered on August 4th, he continued to work at the plant of the appellant until September 16, 1925 (Case, p. 16, l. 37). *This fact prosecutor admitted in its answer* (Case, p. 11, ll. 30 to 35).

In the interval, decedent called for treatment upon Dr. Ludwig R. Von Roeder, a witness for petitioner, *to whose testimony there was likewise no valid objection, nor motion to strike out the whole or any part of the testimony.* He said:

"Q. Give the dates you saw him and what he said. A. Give the history?

Q. Yes. A. On September 12th, late Saturday afternoon or evening, he came to my office complaining of very severe pain in the middle

of his abdomen and *gave the history of having received an injury there while repairing collars, a large needle he was using penetrating his abdomen.* He gave the history that he had seen other doctors but they couldn't give him any relief and some patient of mine had referred him to me. I examined him carefully and found that he had a mass in practically the middle of the abdomen and the umbilicus. I told him at the time the only cure for him would be operation. * * * I gave him a slip to St. Francis' Hospital to Dr. Coughlan, James H., * * * I sent him with the diagnosis of cancer for an operation" (Case, pp. 27-28).

Dr. Von Roeder further testified *that the decedent's condition resulted, "from the trauma, that certainly started it";* and that *"the symptoms all dated from the time of the injury"* (Case, p. 28), that *"in my opinion the injury was the starting point"* (Case, p. 29); that "the *primary cause was the injury"* (Case, bot. p. 31, top p. 32).

He testified from his twenty-six years experience in medicine that "some cancers are very, very rapid and some are very, very slow" (Case, p. 30). He was familiar with the duties of a harness maker (Case, p. 30, l. 35). He testified that from the present knowledge of the causes of cancer one of them is irritation, constant irritation.

He attributed the condition of decedent to the injury he received on August 4th, because after having received the injury decedent continued working until September 16th, and the constant irritation of his work upon the injury constituted the primary exciting cause of the cancer (Case, pp. 30-31). Quoting from his testimony he said:

At Case page 31:

"Q. You said on direct examination that this mass came to this man, your diagnosis was from the injury he received on August 4th? A. Yes."

On cross examination he said:

"Q. You said that it couldn't come from a puncture or an abrasion of the skin tissue? A. *Yes, but this is more than that; the man had to continue work and the constant irritation of his working, pressing on that, is enough to cause it. That is the primary exciting cause of it.*

Q. Then the piercing of the skin by the needle would not cause it? A. If there was no other irritation.

Q. Then, it would be due to the occupation? A. The occupation, occupation cancer, if you want to put it that way."

On redirect, he said:

"Q. *The primary cause, you say, was this puncture?* A. *The injury.*"

Again on recross examination at Case page 32 he said:

"Q. *Did you say it was or it might be?* A. *It was the injury; yes, sir.*

Q. It didn't produce a cancer, did it? A. The irritation never produced it; it is exciting."

Dr. Von Roeder referred decedent to Dr. James Coughan for operation (Case, p. 29). He, too, testified as a witness for petitioner without objection, at page 33:

"Q. The umbillicus is the naval, the belly button, is that it, in plain English? A. Yes. *He said* (referring to decedent) *around the first part of August, I don't remember the exact date, at his work, he struck himself in the umbillicus with a needle and that he was a harness maker or repairer and worked along that line.*"

No motion was made to strike out any portion of this testimony.

Dr. Coughan examined decedent and verified Dr. Von Roeder's diagnosis of carcinoma of the umbillicus.

He said at Case page 33:

> "Q. Caused by what in this instance, in this case? A. *I attributed the cause to the stab wound, the penetrating wound.*"

At page 34:

> "Q. What caused a primary carcinoma, in your opinion? A. That I traced back to the puncture wound."

He operated upon decedent on September 24th (Case, p. 33). Decedent remained in the hospital for a week and died on October 1st. He further testified at page 34:

> "Q. In your opinion, based upon your observation of that man, what did he die from? A. Carcinoma of the umbillicus.
>
> Q. Caused by what? A. I assume it was due to the trauma.
>
> Q. What is that? A. Injury from a penetrating wound."

Dr. Coughan's operation and examination disclosed "the stomach was normal"; "that none of the growths were connected with the stomach"; and that the mass developed from August 4th to September 15th, and also said at page 34:

> "Q. Would it develop from this puncture? A. That was my opinion, that it did develop from the puncture."

Dr. Coughan practiced medicine for fourteen years (Case, 32) and he, too, testified concerning cancers—"there are slow growing and rapidly growing cancers" (Case, pp. 42, 43). He was positive of his conclusions in this case because of the physical

appearance of the contents of the man's body (Case, pp. 45, 46).

While decedent was in the hospital, he wrote a letter to appellant which appellant received and produced at the trial. The letter was written in German, a translation was agreed upon and offered in evidence without objection and marked Exhibit P-4 (Case, p. 21). In the letter, decedent notified his employer of the oncoming operation, and said in part: "I write you today so that you can report me sick to the company, because *I received my sickness at that place* and it will be some time before I can work again."

Frederick Wilhelmi, son of decedent, testified that after his father's death he called at the factory of appellant and talked with Mr. Straub, the foreman, who said "he didn't think a needle would do that" *and who gave him decedent's bag of tools and among them were "awls, a small hammer—needles"* (Case, p. 80).

The prosecutor produced no evidence denying the occurrence of the injury on August 4th, 1925. They submitted only medical testimony of two doctors who did not see nor examine decedent but who responded merely to hypothetical questions.

Argument.

We respectfully urge the affirmance of the judgment for two reasons; first, because there was evidence to support the findings and judgment of the Common Pleas and Supreme Court; second, assuming, but not conceding, that some of the evidence was hearsay, such testimony was given without proper objection, exception or motion to strike out and such evidence is, therefore, entitled to its natural probative effect.

POINT ONE.

There was evidence to support the findings in petitioner's favor.

The Supreme Court in its opinion correctly held that the testimony of petitioner's witnesses, Doctors Greenstein, Von Roeder and Coughan upon whom decedent called for treatment was competent and legal evidence (Case, pp. 95-96). The rule is well settled that declarations of a patient made to his physician or surgeon for the purpose of treatment are admissible in evidence.

Koske v. *D. L. & W. R. R. Co.*, 6 N. J. Adv. Rep. 844;
Consolidated Traction Co. v. *Lambertson*, 60 N. J. L. 452.

The declarations of the decedent in this case derive unimpeachable credibility because neither the doctor nor the decedent considered the injury serious; in fact the decedent continued working from August 4th until September 16th. No suit was pending nor was any contemplated. He sought relief from his suffering and it was necessary for the physicians to know the truth in order to be properly able to diagnose his condition. The appellant in its brief admits that declarations of the character described by a patient to a physician are competent but urges that under the authority of the case of *State* v. *Gruich*, 96 L. 202, declarations made to a physician as to the cause of the injury and *which may be proved by other evidence, are inadmissible.* There are several answers which are dispositive of the appellant's contention in this regard. First, *the cause of the injury could not be proved by other*

evidence; second, under the rules concerning trials before the workmen's compensation bureau, such evidence was admissible; *and last, and highly important, there was no valid objection to any of the questions and to some there was no objection. The appellant made no motion to strike out that portion of the testimony that related to the cause of the injury, it cannot now be heard to complain of this evidence.*

The law of 1918, Section 9, page 433 (Comp. Stat. 1911-1924, Supp. 236-50) amended the Workmen's Compensation Act and provides that the official conducting the hearing shall not be bound by the rules of evidence. In the case of *Scalise* v. *Uralde Asphalt Paving Co.*, 98 N. J. L. 696, Mr. Justice Kalisch, speaking for the Supreme Court at pages 699-700, said:

> "Observation is inescapable that there is no general design expressed to change the rules of evidence as they now exist, but that *the sole legislative aim is,* as a part of a procedure in a proceeding unknown to the common law, *to permit the statutory tribunal,* of the first instance, which may or may not be composed of individuals learned in the subleties and niceties of the law of evidence, *to hear and investigate each and every claim for compensation unhampered by the observance of the rules of evidence.* We think therefore that the object is germane to the title of the act.
>
> "But as to the probative force of testimony condemned by the generally accepted rules of evidence to be incompetent or improper or valueless, an entirely different legal situation is presented.
>
> *"Section 9 of the act of 1918 apparently had its origin in section 68 of the New York statute dealing with the same matter under consideration here.* The New York statute, however, is more explicit than ours."

The rule is well established in this jurisdiction and in every other jurisdiction wherein a similar provision of the statute is contained, that the workmen's compensation bureau is not bound by the technical rules of evidence; that hearsay evidence may be admitted and that a finding or verdict will not be disturbed because of the admission of hearsay evidence if there be other competent evidence in the case.

The *Scalise* case cited the case of *Carroll* v. *Knickerbocker Ice Co.*, 218 N. Y. 435; 113 N. E. 507, wherein this section of the New York Statute is construed by Mr. Justice Cuddeback in the following language:

> "This section has plainly changed the rule of evidence in all cases affected by the act. *It gives the Workmen's Compensation Commission free rein in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it.* The award of the Commission cannot be overturned on account of any alleged error in receiving evidence.
>
> "This is all true, but, as I read it, section 68, as applied to this case, does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the Commission made. That section does not declare the probative force of any evidence, but it does declare that the air and end of the investigation by the Commission shall be 'to ascertain the substantial rights of the parties.' No matter what latitude the Commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statutes become grossly unjust and a means of oppression.
>
> *"The act may be taken to mean that while the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and*

it may, in its discretion accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made."

Carroll v. *Knickerbocker Ice Co., supra,* is a leading case and has been cited in many jurisdictions where the same provisions as are contained in our statute are in force. Similar provisions in workmen's compensation statutes have been likewise construed by Mr. Justice Moschzisker (now chief Justice), speaking for the Supreme Court of Pennsylvania, in case of *McCauley* v. *Imperial Woolen Co.,* 104 Atl. 617, and by Chief Justice Bond of Maryland in *Standard Oil Co.* v. *Mealey,* 127 Atl. 850, reference to which will hereafter be made.

In its brief, the prosecutor cites at great length from the opinion of the Supreme Court of Illinois in *Peoria Cordage Co.* v. *Industrial Board, etc.,* 284 Ill. 90; 119 N. E. 996. *This is inapplicable because Illinois has no provision such as is contained in our statute* and in the statutes of numerous other jurisdictions like Pennsylvania, Maryland, California, Michigan and many others. *Reference is also made in prosecutor's brief to many British citations, but these again are inapplicable because though the New Jersey statute is identical with the British statute insofar as both require that before recovery can be had that an accident must arise out of and in the course of employment, yet the British statutes have no provisions for the relaxation of the rules of evidence.*

The cases on this subject are uniform in holding that a finding based exclusively upon uncorroborated hearsay evidence will not be sustained; but where there is legal evidence to support the courts finding the admission of hearsay, over objection, the judgment will be sustained. Where admissible evidence exists corroborative of the hearsay the

court will consider the legally competent and incompetent evidence together in arriving at its judgment, and such a judgment is invulnerable against attack.

Respondent contends that the record is replete with legally relevant, material and competent evidence. The only evidence in the case which appellant urges as objectionable, on the ground that it is hearsay is the testimony of the physicians concerning decedent's declarations as to the cause of the injury. We reiterate that there was no objection to this testimony nor a motion to strike it out, and hence, is evidence. For the sake of argument, assuming that this evidence be excluded, the residual competent evidence establishes the following facts:—that the decedent resided in New York and for a number of years prior to his death he was employed by the defendant in its factory in Jersey City as a harness maker; that up and until August 4th, 1925, he was in good health; that on that day he worked for defendant; that he worked eight hours a day until 6 P. M. on each day. About eight o'clock in the evening on August 4th immediately after his work, he called upon Dr. Greenstein at his office in New York City. When the doctor saw him, he held his hand over his abdomen and was in pain. Decedent told the doctor that he injured himself that same day while at work. Upon examination, the doctor found a red mark at the umbillicus where it had been punctured apparently caused by a sharp instrument, probably a needle; that from its appearance the wound had been inflicted between five and six hours before 8 P. M., *i. e.*, between two and three o'clock on the same day, at which hour he admittedly was working for his employer. That same night, upon his arrival home from the doctor's office, the deceased complained of pain to his wife and she saw the mark. Thereafter, he continued at his

work until September 15th. Two other doctors testified that he had told them he was injured while working on a harness and from their examinations were able to say that the decedent's condition was due to the injury he received on August 4th. It is further evidenced that among his tools found at the factory, with which he worked, were needles. Finally, the evidence establishes that he died on October 1st of carcinoma of the umbillicus, primarily caused by the injury he sustained on August 4th and brought about by the constant irritation occasioned by his working for the defendant until September 16th.

The deceased was in good health before he went to work on August 4th. It is presumed his health was good before that date.

None of the facts above detailed were controverted by the appellant.

The single question of fact in the case is whether the decedent was injured in the course and scope of his employment.

From the undisputed evidence that decedent worked for defendant on August 4th, the character of his work and the presence of needles among his tools, the appearance of the injury, and the evidence of Dr. Greenstein that the wound was sustained at about two or three o'clock in the afternoon when he admittedly was at work, his hours being until 6 P. M., the court was eminently justified in drawing the inference that decedent sustained the injury in the course and scope of his employment. These facts, considered with the decedent's statement, "I struck myself today with a needle at my work," make the inference that he was injured in the course and scope of his employment, conclusive, especially so, in the absence of any evidence to the contrary from appellant.

Mr. Justice McPherson in *McLoughlin* v. *Horn*, 106 Fed. 247 succinctly said, inferences of fact are themselves facts.

We concede that there was no eye witness to the penetration of the needle into the umbillicus of the decedent, but it is a well established rule of law supported by many authorities in our jurisdiction that an accident need not be established by direct evidence, but may be established by circumstantial evidence. All that is required is that the circumstances be such that the court might properly on the grounds of probability rather than that of certainty exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and where the probabilities may be all that are attainable.

Hannon v. *Delaware*, etc., 98 N. J. L. 191;
Austin v. *P. R. R. Co.*, 82 N. J. L. 416.

The rule is well settled that circumstantial evidence is frequently the only kind of proof attainable and if from the proven facts a reasonable inference is deducible that the injury arose out of and in the course of employment, such a conclusion by the trial court will not be disturbed.

Monziano v. *Public Service Gas Co.*, 92 N. J. L. 322;
De Fazio v. *Goldschmidt Dettinning Co.*, 88 Atl. 705; Affirmed 87 N. J. L. 317;
Muzik v. *Erie R. R. Co.*, 85 N. J. L. 129; Affirmed 86 N. J. L. 695;
Minard v. *West Jersey Co.*, 74 N. J. L. 39.

The petitioner's medical witnesses definitely testified concerning the injury of the decedent. Dr. Greenstein testified that in all probability, in his opinion, a needle did cause the injury. All of the doctors testified as to the effect of the injury upon

the decedent; the result thereof and the cause of his death. This testimony was not merely opinion testimony, but evidence based upon intimate knowledge. The rule is equally established that such evidence is admissible, competent, relevant, material and of much probative force.

Jones on Evidence, Vol. 3, pages 2462-2466;
Osbun v. *De Young,* 99 N. J. L. 204;
State v. *Powell,* 7 N. J. L. 244;

The Workmen's Compensation Act provides that the judgment of the Court of Common Pleas shall be conclusive and binding (Comp. Stat. 1911 to 1924, Secs. 236-60, p. 3894).

The law is that findings of the Common Pleas Court in workmen's compensation cases on questions of fact are final and will not be disturbed if there be any evidence to support them.

Hulley v. *Moosbrugger,* 88 N. J. L. 161;
Geizel v. *Regina Co.,* 96 N. J. L. 31; Affirmed 97 L. 331.

There are many cases in other jurisdictions whose workmen's compensation act is similar to the one in force in New Jersey which are directly in point. We will now discuss some. In the very recent case of *Johnston* v. *Payne-Yost Const. Co.,* 141 Atl. 481, decided by Chief Justice Moschzisker, the facts were that Johnston was employed as a laborer by the defendant. His widow filed her claim for compensation. No witness saw the occurrence, but petitioner claimed that on June 2, 1926, during working hours decedent was burned on the nose. Nine days later he died of tetanus. The widow stated that when her husband went to work on the morning of June 2nd he was well and uninjured, but

that, when he returned in the evening he had a blister on his nose, evidently caused by a burn. The court admitted, over objection, statement made by decedent to another after the happening. Medical testimony was offered as to what the physician regarded as the cause of the death. An award in favor of the petitioner was affirmed. The court determined that in Pennsylvania as in New Jersey that the revisory power of Appellate Courts are limited to such consideration of the testimony as will enable the reviewing tribunal to ascertain whether the record contains competent evidence to support the findings of the compensation authorities and that where they are supported by competent proof they, and the inferences to be drawn therefrom, are as conclusive as the verdict of a jury. The court further said that the testimony as to the utterance made by decedent soon after the injury could be treated as relevant corroborative proof of the validity of the inference that such injury occurred in the course of his employment. The court pointed out that in workmen's compensation actions the rules of evidence are not applied with the same rigor as in litigation before a jury; that strict or unduly technical application of the rules of evidence would at times defeat the chief purposes of the act. The award was affirmed.

The case of *Slemba* v. *William C. Hamilton & Sons,* 138 Atlantic 841, decided by the Supreme Court of Pennsylvania, is directly in point. Decedent was injured in his right knee. No one saw the accident. Shortly after, another employee noticed decedent holding his leg, and was told that he had been hit on the knee by a barrel. When decedent returned home that night he told his wife about the accident, and she saw the injured knee and the way it was swollen. Shortly afterwards he was taken to a hospital, and his trouble was diag-

nosed as sarcoma of the knee and metastasis of the lungs. While he was operated on, a growth, the size of an orange, was removed from the place of injury. The court, after stating the recognized rule that the findings of the compensation bureau would not be reversed if there be some competent evidence, said:

> "So, too, where the injury has resulted in death, and, by reason of that fact, the claimant is deprived of the testimony of the one who could have shown exactly how the accident happened, the inability to do so is not a fatal defect. It suffices if the facts justify the conclusion that the injury was an accidental one, sustained in the course of decedent's employment. (Citations.) It ought not to be necessary to repeat these propositions so constantly, but it seems to be required where insurance carriers are concerned. * * *
>
> "Even were we to disregard such of the above evidential facts as might perhaps be claimed as hearsay, yet enough would remain to sustain the findings that decedent suffered the injury complained of in the course of his employment.
>
> "The doctors who saw decedent during his illness all testified positively that, in their judgment, the sarcoma was caused by the injury to the knee."

The court affirmed the judgment on the ground that there was evidence to support the conclusions of the court below.

See, also, *McHenry* v. *Marion &c. Co.*, 133 Atl. 159.

Another case directly in point is *McCauley* v. *Imperial Woolen Co.*, 104 Atl., page 616, decided by Chief Justice Moschzisker. The facts were:

McCauley was a wool-sorter in the employ of the defendant. That he went to work on the morning of April 4, 1916, perfectly well, but that when he

left defendant's plant in the afternoon of that day there was a little scratch on the back of his neck which caused a swelling, which was the beginning of anthrax, from which he died within three days. There was admitted in evidence a remark made by decedent to his son when he left work, viz., "I got stuck with a sticker." On his return home, he told his wife that one of the stickers in the wool he was carrying had tore him in the neck. The court held that these conversations were hearsay and standing alone would be insufficient to sustain the findings of the complainant, but together with the other circumstances in the case were sufficient to support and justify an affirmance of the verdict in favor of the plaintiff. At page 621 it was said:

> "* * * *The board properly decided that what McCauley said, as to the cause of the mark upon his neck, is hearsay, and, standing alone, insufficient to sustain the findings in favor of the claimant made by the referee; but we concur in the view of the court below that the other facts in the case constitute circumstantial evidence which, together with the competent and relevant parts of the expert professional testimony already referred to, was adequate to sustain the referee's allowance of compensation.* In other words, under the circumstances of this case, deceased apparently not having been where he was liable to become inoculated with external anthrax, except at his work, and he, as he left defendant's mill on the day in question, having shown symptoms of that disease, by the mark upon and swelling of his neck, the inference may reasonably be drawn, in view of the nature of the work on which he was engaged, that the inoculation occurred during the course of his employment, or, as said by one of the doctors: In all probability 'the disease was caused by the anthrax germ entering through the skin by reason of a 'sticker' from the wool which deceased handled during the day."

In *Standard Oil of New Jersey* v. *Mealey,* 127 Atlantic 850, petitioner was the widow of a driver of a wagon whose death was caused by lymphosarcomo or lukemia, that is, of a malignant growth in the glands. The decedent had been employed by his employer for about six weeks. There were no witnesses to the injury which it was claimed caused the death. Chief Justice Bond, at page 851, said:

> "There was no visible injury; no bruising or external mark. Evidence of injury consists entirely of reported statements of the man himself prior to his death, which, of course, is hearsay testimony in these proceedings; and all the exceptions arise from the acceptance of such testimony as a basis of compensation under the Workmen's Compensation Act. * * * The wife testifies that when her husband came home on January 16th, he reported to her that he had slipped and struck his left side on his wagon that day, and had a feeling as if something had torn and she felt a lump or 'bubble' at the place indicated. The superintendent says the man later described to him such a fall against the wagon; and three physicians who attended the man within a few weeks after the beginning of disability, say that when examined he gave each of them a history of such an occurrence."

The Court then discusses the provision of its statute which is similar to the one in force in New Jersey. It points out the difference in Illinois, citing *Peoria Cordage* v. *Industrial Board,* 284 Ill. 90; 119 N. E. 996; and also the different rule in England, citing *Amys* v. *Barton* and *Gibley* v. *Gt. Western Ry. Co.,* which are relied upon by the appellant here. The Court then shows that Maryland has the same provision in its statute as New York and other states, cites the New York case of *Carroll* v. *Knickerbocker Ice Co., supra,* and follows the rule there laid down. The Court continued:

"With these considerations in mind, then, whether it was proper for the court below to admit statements of a deceased workman said to have been made to his wife, and to his physicians, that he had fallen and struck his side at a spot where the malignant growth later developed, and to refer to the jury the question of fact whether death resulted from an accidental injury, when this is all the evidence there is of such an occurrence. Without extending the discussion at this time in an attempt to work out final general principle, *we have concluded that in this particular case the action of the court in each respect was proper. The statements are reproduced by three or four witnesses who heard them at first hand from the workman. They refer to a simple fact, and were such as to leave no room for substantial misunderstanding, and it seems to us basing a finding of fact on them is, after all, hardly any greater relaxation of wise caution than has long been made in the admission of secondary evidence to establish the contents of a writing which cannot be produced.*"

A leading case in Massachusetts, *In re Bean* (1917), 106 Northeastern 826, also support the petitioner. Edward T. Bean was a workman in the Park Department of Boston. On May 19th and 20th, he was employed in improving the grounds. On May 19th he received a scratch on the back of his hand which became infected, and on May 25th he died of blood poisoning caused by the injury. *The only evidence of the injury were statements made by the decedent to his wife upon return from work and to persons at the hospital.* An award in favor of the widow was affirmed. In the course of the opinion, Mr. Justice Carroll, speaking for the Supreme Judicial Court, said:

"The employer argues there was no evidence that the injury arose out of and in the course of

his employment. On Thursday, May 20, on his return from work, the decedent complained of his hand and said it had bothered him all day. There was then a small scratch on his right hand back of the middle knuckle. He said it was done while he was at his work. The following morning the hand was very much swollen; he was removed to the hospital Sunday, and died the following Tuesday of septicaemia, resulting from the injury. Although there was no evidence to show in what manner he was injured, or what caused the scratch on his hand, there was evidence that the injury happened while he was at his work and it could have been found it arose out of and in the course of his employment. When examined at the hospital and asked how he was hurt, he replied, 'he scratched it on something,' while he was working around plants, he did not remember whether he 'stuck a thorn in it,' but he knew he was injured in the course of his employment and that the injury resulted from it. Under these circumstances there was evidence to support the finding of the court" (citing cases).

In 20 A. L. R. are numerous cases supporting our contention. At page 14, *State ex rel. Albert Dickinson Co.* v. *Dist. Ct.* (1917), 139 Minn. 30, 165 N. W. 478, is reported. It is like the case at bar. The decedent in the reported case was engaged in loading and unloading bags into and from box cars. Decedent had no scratch on his hand when he left home for work that morning; he returned home with a scratch on his hand. Witness testified that it was a scratch about two hours old. The Court held the circumstances sufficient to support a finding that the injury which resulted in death following blood poisoning was sustained in the course and scope of decedent's employment. In part, the Court said:

> "The fact that the deceased had no scratch when he left home in the morning and had one

when he came home from work at night; that he must have come home immediately, for he was home within half an hour of the time he quit work; that the scratch had blood upon and which had hardened, indicating that the scratch had been received earlier than the time he quit work; that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well receive while at work—these facts * * * were such that the court might infer that the scratch was received while the deceased was in the course of his usual work, and that it arose out of it."

Bearing in mind that the British Act does not contain the provisions for relaxation of the rules of evidence which exist in jurisdiction like New York and New Jersey, nevertheless, in cases involving similar questions, awards have been made.

In the leading case of *Mitchell* v. *Glamorgan Coal Co.* (1908), 9 Butterworths' Workmen's Compensation Cases 16 (Butterworths' Old Series), reported in Chartres' Judicial Interpretations of Workmen's Compensation Law 268, it was held as follows: A repairer, uninjured when he began work at a colliery, in the evening, returned home next morning with a crushed finger, and eventually died from blood poisoning. Held (reversing County Court Judge), that there was evidence to support inference that the injury arose out of employment. Gorell Garnes, P., said:

"If the known facts are equally consistent with either alternative the plaintiff is not entitled to succeed, because no one can reasonably draw the inference in his favor, but where the known facts are not equally consistent the case is totally different, because *one must bring in one's knowledge of what happens in ordinary life. Applying that here, the workman was engaged in work at which accidents*

do happen, and the probability therefore is that the accident happened at a time when he was so engaged rather than at a time when, in the ordinary course of life, such accidents do not happen. There is nothing to suggest here that the accident happened on the way home and the inference can reasonably be drawn that it arose out of and in the course of his employment" (p. 18).

Couzens-Hardy, M. R., said: "A man does not get a crushed finger when he is walking in the road, and he does not have a bit of rag to put around it. It is quite clear that the accident did not happen on his way to the colliery because he was all sound when he got there. What we held there was that the learned judge was entitled to draw the inference that an accident of that nature did occur in the only place, and only under the only circumstances in which such an accident could by any reasonable means occur. All that we decided was that the judge might draw that inference" (in *Jenkins* v. *Standard Collieries Co.* (1912), 5 B. W. C. C. at p. 74).

Another leading case decided by the Court of Appeals in England is *Fleet* v. *Johnson* (1913), 6 B. W. C. C. (New Series) 61, in which an award for petitioner was affirmed. The facts quoted were.

> "A mason's labourer, using a hammer and chisel at his work, left home without any injury to his hand. He returned home with an abrasion on the thumb of the hand that held the chisel where the hammer would most probably have hit him had it slipped. It was poulticed and about a fortnight later, after it had apparently healed, an abscess formed in the armpit and the man died soon after from blood poisoning due to the abscess. There was medical evidence that the incubation period was consistent with the theory that a microbe had entered the wound in the thumb on the day of the injury and set up the abscess. There was

no evidence to support any other theory. The county court judge found that there had been an accident arising out of and in the course of the employment and that death resulted from the injury caused thereby.

"Held, there was evidence to support the finding."

In the course of the opinion in the above case, Hamilton, L. J., at page 66, reasoned:

* * * "If I start the day with clean hands and then find my finger inked, it is a question of fact whether it became inked while I was sitting in Court or while I was taking off my robes, and there is no violence done to the facts in saying that the finger became inked in the course of my employment in Court. No one can suggest that the Judge is left in a state of equilibrium on that matter. In the same way in regard to the question of death resulting. The man had a qualified medical practitioner. By an operation it was proved that the abscess was characteristic of such a lesion as this man in fact sustained."

Similar in effect is *Stapleton* v. *Dinnington* (1912), Court of Appeals, England, 5 B. W. C. C. (New Series) 602, decided by Couzens-Hardy, M. R., and there, too, was no direct evidence of an injury. The workman had been well when he went to work and he finished his shift and walked home. At home, he complained to his wife about his foot and subsequently complained again. The doctor who examined it found marks which in his opinion had been caused by a weight having fallen upon the foot. On this evidence, the court affirmed the county court, which came to the conclusion that the legitimate inference was that the decedent met with an accident which later resulted in death.

Another case in point is *Wright* v. *Kerrigan* (1911), decided by the Irish Court of Appeals in 45

Irish L. T. 82, reported in Vol. 4 of Butterworth's Workmen's Compensation Cases, page 432, and which is cited in Wigmore on Evidence. The finding in favor of petitioner was affirmed. In this case, too, there was no direct evidence of injury. The only evidence being that the decedent was employed by defendant and that he went out well and when he came home he complained that his leg was hurt. There were marks on his body. He subsequently died. The court admitted testimony of the doctor that the decedent told him that he had met with an accident while moving a coffin. The opinion of the court, which was written by Sir Samuel Walker Bart, Lord Chancellor, stated in part:

> "This is rather a line-ball case; but we think, on the whole, that there was sufficient evidence for the Recorder to come to the conclusion of fact at which he arrived—namely, that death was due to injuries, the result of an accident which arose out of and in the course of the employment of the deceased. It was part of this man's business to lift coffins out of a van, and whilst he was so engaged one of the coffins might easily strike against his chest and cause the abrasion and injury. *He went out well, and when he came home he complained that his leg was hurt;* and there was a black mark on his right side, his leg was strained and swelled, and he was marked in the stomach. *The evidence of the doctor who examined him was as follows:* 'I strapped his side where *he complained of pain, which he said was result of accident.* I prescribed for his leg, which he said was hurt. Mark on right side as if something knocked against him, and also on his right leg. They were caused by abrasions of some sort. He died of pneumonia supervening on pleurisy. * * * In my opinion the pleurisy on which pneumonia supervened was caused by injury—*i. e.,* traumatic—and the post mortem shows that to be correct.' * * * *It is quite evident the deceased on that occasion told the doc-*

> *tor that an accident had happened to him.* The cause of death given by the doctor was pneumonia supervening on pleurisy caused by an injury. * * * He states that what he saw on the body of the deceased was consistent with the accident which deceased said had occurred to him. **This man, whose** employment was lifting coffins, went out well, and came home, as we have heard, with marks and injuries upon him. *In these circumstances it strikes me that the inference drawn in the Glamorgan case may be drawn here.* In that case, the man's fingers might have been crushed in many ways, and the Court of Appeals held that the County Court Judge might have drawn *the inference that the accident occurred in the course of his work,* so here, the Recorder having drawn a similar inference, I do not think we would be justified in upsetting the award."

We respectfully direct the attention of the court to the fact that the case of *Amys* v. *Barton,* cited by appellant in its brief, does not overrule the case of *Wright* v. *Kerrigan, supra.* The only criticism the *Amys* case makes is with the headnote in the Wright case.

The appellant in its brief, page 15, says that New Jersey has adopted the same rule as the Supreme Court of Illinois in *Peoria Cordage Company* case. Appellant is in error in this regard. The State of Illinois has no provision in its workmen's compensation act which permits the relaxation of the rules of evidence as we have demonstrated hereinbefore. Neither has the British Statute.

Appellant cites case of *Lloyd* v. *Campbell Soup Co.,* 4 N. J. Misc. 453, decided by Deputy Commissioner Corbin. Only a very small portion of the opinion is quoted from. In that case, the respondent showed that the decedent was in poor condition for a long time prior to the alleged injury,

and the evidence established that the disease causing the death of the decedent could not have been caused by the alleged accident, nor was there any evidence of aggravation of the pre-existing ailment.

Appellant also cites case of *Walsh* v. *Ford Motor Co.*, 4 N. J. Misc. 21, decided by Deputy Commissioner Goaz. The deputy commissioner said that there was no testimony aside from a declaration made by the decedent in support of the petitioner's allegation, and "moreover the petitioner failed to sustain the burden of showing that the injury (assuming there was one) caused decedent's death." Petitioner's own doctor testified that he saw no sign whatsoever of an injury. Clearly these cases are inapplicable.

We respectfully submit that the evidence in the case justified the inference by the Court of Common Pleas that the decedent sustained his injury in the course and scope of his employment. Eliminating the declarations of the decedent to his physician as to the cause of the injury, the evidence is that the appearance of the wound indicated that it occurred at about two or three o'clock in the afternoon at which time the decedent was at work. It certainly was a permissible inference for the court to draw and the reasonable probabilities justify the inference that the injury occurred while at work, rather than to assume, without basis, that decedent sustained his injury on his way from his work to the physician's office. It is most improbable to believe that the decedent received a puncture wound to his umbilicus, apparently caused by a needle, on his journey from his work to the doctor's office. This inference supported by the positive testimony most conclusively establishes that he sustained the injury in the course and scope of his employment. The

doctors' testimony leaves no room for doubt as to the cause of the injury and the death.

The appellant also cites case of *White* v. *American Society,* 180 N. Y. Supp 867; in that case, however, the court at page 868 distinctly said: "There is no competent evidence that the deceased received an abrasion from a wire or otherwise. * * * His wife disclaims that he so told her and no witness testifies to seeing a scratch or any indication of such an injury."

Appellant mentions *Valentine* v. *Weaver,* 228 S. W. (19) 1036, but omits the quotation of the court at page 1038 wherein it said: "that the testimony of the physician that Valentine said he stuck a splinter and the time when it happened was competent."

Appellant quotes from *Migliaccio* v. *P. S. Ry. Co.,* 101 N. J. L. 496. Clearly this case is inapplicable. That was a negligence action. Decedent died from pulmonary tuberculosis fifteen months after an injury. The court decided that such result could not reasonably have been foreseen; that it was not the natural and probable consequence of defendant's act, and that there was no testimony which established a casual connection between the injury and death.

POINT TWO.

Assuming declarations by decedent to his physicians as to cause of injury to be hearsay, there was no objection nor motion to strike out testimony, hence they were evidence.

The rudiments of trial practice require that timely objection be made to a question upon a specific ground pointing out the precise basis of com-

plaint. An objection to an entire line of testimony is of no effect.

English v. *Continental Co.*, 98 N. J. L. 438;
Semkin v. *Hollander*, 82 N. J. L. 485;
Willett v. *Morse*, 71 N. J. L. 104;
Fath v. *Thompson*, 58 N. J. L. 180.

The following presents the only ground of objection made by appellant's counsel to the testimony of Dr. Greenstein, at case pages 22-23:

"Q. What did he say to you regards to his history?

Mr. Harley: I object if the Court please. I object to this testimony, the man is dead.

The Court: He can give his history if he treated him.

Mr. Harley: He can get what he found, not what the dead man told him.

The Court: The history he took, he can testify to his history.

Mr. Harley: That is a conversation with the dead man.

The Court: He has a right to testify as to history that he took.

Mr. Harley: I object and ask an exception be noted.

The Court: Surely.

Q. What did he tell you doctor? A. The man came into my office on August 4th, 1925, in the evening complaining of pain in his abdomen. He held his hand on his abdomen and told me while he was working on a harness a needle had penetrated it, that is, the abdomen."

Obviously the objection made by appellant's counsel to the doctor's testimony "that the man is dead" presents no valid legal objection. Appellant now asserts that the physician was incompetent to

testify to the declarations of the decedent to his physician relating to the cause and manner from which the injury was sustained and that such declarations were hearsay. The specific ground of objection now asserted by appellant was not pointed out to either the court or counsel. *Furthermore, after such testimony was given by the doctor, appellant made no motion whatsoever to strike out that portion of the testimony which related to the cause of the injury and the manner in which and place where decedent received it. Appellant therefore acquiesced in the evidence; it cannot now be heard to complain because of its presence in the record.* The objection to the evidence of the doctor was most indefinite. To urge a physician cannot testify because the patient whom he treated is dead is without merit or substance, for the unquestioned rule of law is that a physician may testify to the declarations of decedent in so far as those declarations are pertinent history necessary for a proper diagnosis of the patient's ailment. Even assuming that the physician could not testify of decedent's declaration relating to the cause of, manner in which, and place where the injury was sustained, *appellant's failure to urge the specific objection now advanced and its acquiescence to such testimony by failure to move the striking out of such testimony constitutes evidence of the same probative effect as though otherwise legal and competent.*

Rolfe v. *Fingerhut*, 98 N. J. L. 894;
U. S. Transfer Co. v. *Young*, 80 N. J. L. 151;
Lavin v. *Public Service Co.*, 77 N. J. L. 217;
Messenger v. *Paterson Savings Co.*, 91 N. J. L. 654.

This rule even applies in equity, for in the case of *Summit* v. *Del. & Atl. Co.*, 63 Equity 93, affirmed 64 Equity 770, the Vice Chancellor said that the incompetency of the testimony was waived by failure to object and entitled to its natural probative force.

The rule is found in 10 R. C. L. 1008, Sec. 197, "A fact may be established by incompetent evidence, if it is material, when it is received without objection. *So when hearsay evidence is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible.*"

Diaz v. *United States*, 223 U. S. 442;
Schlemmer v. *Buffalo Ry. Co.*, 205 U. S. 1;
Continental Ins. Co. v. *Fortner*, 25 Fed. (2d) 398;
Wireless Co. v. *Priess* (Mass.), 124 N. E. 478;
In *re Condon's Estate*, 208 N. Y. S. 797.

"A rule of evidence not invoked is waived." 1 Wigmore (2nd Ed.), Sec. 18, under which *Diaz* vs. *United States, supra,* and other cases are cited.

Compensation cases are no exception to the rule.

Poluski v. *Glen Alden Coal Co.* (Pa.), 133 Atlantic 819;
Kaufman Const. Co. v. *Griffith* (Md.), 139 Atlantic 548;
Holmes v. *Communipaw Steel Co.*, 174 N. Y. Supp. 772;
Ascher Bros. Industrial Comm. (Ill.), 142 N. E. 488;
Kivish v. *Industrial Comm.* (Ill.), 143 N. E. 860.

Dr. Von Roeder also testified to declarations made by decedent which referred in part to the

cause and manner of injury. The testimony is outlined herein under the facts. No specific ground of objection nor motion to strike out was interposed. Appellant's counsel contented himself with saying that "my objection to this history is the same objection. I repeat it and ask an exception." This referred to the previous objection made to Dr. Greenstein's testimony and as inefficacious as the previous objection.

Moreover, to succeeding questions asked of Drs. Greenstein and Von Roeder no objection whatsoever was made.

To the following question asked of Dr. James Coughan no objection was made and no motion was made to strike out the whole or any part of the answer.

> "Q. The umbillicus is the naval, the belly button, is that it, in plain English? A. Yes. He (referring to decedent) said around the first part of August, I don't remember the exact date, at his work, he stuck himself in the umbillicus with a needle and that he was a harness maker or repairer and worked along that line" (Case, p. 33).

Apparently, the portion of the answer following the word "yes" was not responsive to the question and was volunteered by the witness. *Appellant, however, chose not to urge the striking from the record of the portion of the answer which contained the declaration by decedent as to the time, place and manner of the injury. The evidence was material and relevant to the fact in issue, and the court could give the testimony the value of direct evidence and on its base a finding of fact.*

The cases of *Poluski* v. *Glen Alden Coal Co.*, decided by Supreme Court of Pennsylvania and reported in 133 Atlantic 819, and *Kaufman Construction Co.* v. *Griffith,* decided by Court of Ap-

peals of Maryland, reported in 139 Atlantic 548, are squarely in point.

In *Poluski* v. *Glen Alden, supra,* the employer challenged the award for the reason that there was no competent evidence to sustain the finding of a compensable injury. The decedent went to work well and his widow claimed that he suffered an injury to his toe, causing blood poisoning, resulting in his death. Without objection evidence was admitted of declarations to a fellow worker and to his physician as to the cause of the injury. The court said that the length of time intervening between the accident and the conversation was not part of the *res gestae,* but said:

> "The finding of an injury in the course of employment is here sustained, not on the theory that the statements as to the accident and its cause were in fact part of the res gestae (Citations) but because *the evidence was admitted without objection as proof of these substantive facts.* Under this state of the record, *they must be treated as though counsel deemed them part of the res gestae, or, if not, then that they were of sufficient probative value for the purpose intended; that is, to show a compensable case. Where evidence, incompetent as hearsay, is admitted without objection and is relevant and material to the fact in issue, the court may give it the value of direct evidence, and on it base a finding of fact; or it may be treated, by what may be taken as consent, as part of the res gestae in determining the issue.*"
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> * * * * * *

(The court cited Wigmore on Evidence, 10 R. C. L. 1008; *Diaz* v. *United States, supra.*)

> "But an opponent may waive such requirements, as well as the right to be confronted by the witness, and the absence of an oath by failure to object. *Hearsay evidence may accurately portray a given set of circumstances.*

The reasons which exclude such a portrayal do not detract from its truth or accurateness. These reasons are the legal barriers which have been erected by the law, and which, in the interest of justice, the parties may move aside. Under this reasoning the evidence is then competent to the full extent of such probative value as it may have under all the circumstances. Under such state of facts, the evidence was sufficient on which to infer casual liability."

In *Kaufman Construction Co.* v. *Griffin,* also a compensation case, brought by the widow of decedent, the Court of Appeals of Maryland in affirming the award, 139 Atl. 548, at page 550 said:

> *"The evidence of injury comes wholly from the statements made by the deceased to a fellow workmen, to two physicians, and to his wife. It is hearsay, in without objection, and must be accepted as any other evidence of the fact of the alleged injury."*

In *Poliner* v. *Fazzino,* reported in 135 Atl. 289, the Supreme Court of Errors of Connecticut held that hearsay evidence, consisting of declarations made by deceased, admitted without objection, became evidence in the case.

In the instant case we respectfully urge that there was ample competent evidence from which the court was justified in making an award in favor of the petitioner.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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