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Notice and Grounds of Appeal

(Filed March 13, 1946)

NEW JERSEY SUPREME COURT

WALTER CARR, Petitioner-Defendant,	}	On Certiorari	10
<i>vs.</i>			
FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent-Prosecutor.			

TO FEDERAL SHIPBUILDING & DRYDOCK COMPANY,
Respondent-Prosecutor, 20

and

STRYKER, TAMS & HORNER,
Attorneys for Respondent-Prosecutor.

Sirs:

PLEASE TAKE NOTICE: That Walter Carr, Petitioner-Defendant, appeals to the New Jersey Court of Errors and Appeals, from the whole of the judgment entered in the above-stated cause, on the following grounds, viz.: 30

1. That the New Jersey Supreme Court erred in reversing the judgment entered in the Essex County Court of Common Pleas, and in giving judgment in favor of the Federal Shipbuilding & Drydock Company, Respondent-Prosecutor, and against the said Walter Carr, Petitioner-

Writ of Certiorari and Allocatur

Defendant, whereas the Supreme Court should have affirmed the said judgment of the Essex County Court of Common Pleas.

Dated: March 4, 1946.

10

JACOB S. SPIRO,
Attorney for Petitioner-Defendant.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 11th day of March 1946.

STRYKER, TAMS & HORNER,
Attorneys for Respondent-Prosecutor

20

Writ of Certiorari and Allocatur

(Filed August 29, 1945)

STATE OF NEW JERSEY, SS.:

30 *The State of New Jersey to the Court*
(L. S.) *of Common Pleas in and for the County*
of Essex and Russell C. Gates, Clerk of
said Court and Walter Carr, Greetings:

We being willing for certain reasons to be certified of and concerning a certain determination, findings of facts and rule for judgment rendered on the 29th day of June, 1945, by the Honorable Richard Hatrshorne, one of the Judges of the

40

Writ of Certiorari and Allocatur

Court of Common Pleas of the County of Essex
 in certain proceedings brought on behalf of Wal-
 ter Carr, petitioner, and against Federal Ship-
 building and Dry Dock Company, respondent, for
 the determination and recovery of compensation
 pursuant to Chapter 34, of Title 34 of the Revised
 Statutes of 1937, and the Acts supplementary
 thereto and amendatory thereof; therefore, we
 command you that the said determination, find-
 ings of fact and judgment, together with all pro-
 ceedings involved therein and all things touching
 and concerning the same, as fully and entirely
 as before you they remain, or are in your cus-
 tody and control, you do certify and send to-
 gether with this writ, to our Justices of the
 Supreme Court, at Trenton, on the 2nd day of
 October 1945, that therein may be done what of
 right and according to law ought to be done.

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20

Witness, Honorable Thomas L. Brogan, Chief
 Justice of the Supreme Court, at Trenton, this
 29th day of August, 1945.

JAMES J. GAVIN,
 Clerk.

STRYKER, TAMS & HORNER,
 Attorneys of Prosecutor.

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This writ is allowed. Let it be sealed.

FREDERIC R. COLIE,
 Justice of the Supreme Court.

Dated: August 22nd, 1945.

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Return to Writ

(Filed Sept. 28, 1945)

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

10 I, RICHARD HARTSHORNE, Judge of the Court of
Common Pleas in and for the County of Essex
and State of New Jersey, and RUSSELL C. GATES,
Clerk of the Court of Common Pleas, in and for
the County of Essex and State of New Jersey.

20 Do HEREBY CERTIFY and return to the Supreme
Court of Judicature of the State of New Jersey,
the judgment of the Court of Common Pleas and
Determination and Award and Proceedings made
and given by the Workmen's Compensation Bu-
reau of New Jersey, Department of Labor, in
the Compensation Proceedings of WALTER CARR,
Petitioner-Appellee, *vs.* FEDERAL SHIPBUILDING
AND DRYDOCK Co., FEDERAL SHIPBUILDING AND DRY-
DOCK COMPANY, Respondent-Appellant, together
with all things touching and concerning the same
as by the within writ to us directed and as
commanded.

30 IN WITNESS WHEREOF, we have hereunto set
our hands and official Seal the Sixth day of Sep-
tember, 1945.

RICHARD HARTSHORNE,
Judge of the Court of Common Pleas,
Essex County, New Jersey.

RUSSELL C. GATES,
Clerk of the Court of Common Pleas,
Essex County, New Jersey.

40 (SEAL)

Reasons

(Filed October 3, 1945)

NEW JERSEY SUPREME COURT

WALTER CARR,
Petitioner-Defendant
in Certiorari,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Respondent-Prosecutor
in Certiorari.

10

On Certiorari

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Federal Shipbuilding and Dry Dock Company, the prosecutor in the above entitled cause, sets forth the following as its reasons for setting aside the determination and judgment of the Essex County Court of Common Pleas which have been brought before this court by the writ of certiorari in this cause:

1. The determination of the Common Pleas Court that the petitioner-defendant sustained an accident arising out of and in the course of his employment by the respondent-prosecutor is contrary to the clear weight of the credible evidence.

30

2. The determination and judgment of the Common Pleas Court is founded upon medical evidence expressing mere possibilities.

40

Reasons

3. The determination and judgment of the Common Pleas Court is founded upon medical evidence given in answers to legally improper hypothetical questions.

10 4. The determination and judgment of the Common Pleas Court that the petitioner-defendant fell from a ladder and that the condition which the petitioner-defendant suffers is attributable to his climbing or falling from the ladder are not consistent with the pleadings or the theory upon which the case was tried.

20 5. The Common Pleas Court erred in finding that it is legally immaterial whether the petitioner-defendant suffered a rupture of a blood vessel previous to or subsequent to the fall from the ladder.

6. The determination and judgment of the Common Pleas Court are in divers other respects irregular, unjust and oppressive to the respondent-prosecutor.

30 STRYKER, TAMS & HORNER,
Attorneys of Respondent-Prosecutor.

Service of the within Reasons is hereby acknowledged this 28th day of September, 1945.

JACOB S. SPIRO,
Attorney for Petitioner-Defendant.

Supreme Court Opinion

(Filed Feb. 4, 1946)

NEW JERSEY SUPREME COURT

No. 246 January Term, 1946

WALTER CARR,
Defendant-in-Certiorari,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Prosecutor-in-Certiorari.

10

20

Submitted January 1946 Decided 1946
The proofs in this case failed to show
an accident arising out of and in the
course of the employment.

On Certiorari

For Prosecutor, STRYKER, TAMS & HORNER,
WILLIAM L. DILL, JR.

For Defendant, JACOB S. SPIRO, JOSEPH MORITZ.

30

Before Justices CASE, BODINE AND PERSKIE.

BODINE, J. This is a Workmen's compensation case. In the Bureau there was an award. This was affirmed by the Court of Common Pleas. Certiorari was allowed. There is no question in the case as to the petitioner's injury. The sole question is whether it was due to an accident arising out of and in the course of his employment.

40

Supreme Court Opinion

The petitioner testified that while climbing up a stepladder he felt cramps in his left leg, lost his balance and fell to the ground a distance of 4 or 5 feet; that he hit his head and injured his left arm.

10 Edward Ahrens, a sub-foreman under whom the petitioner worked, testified that when he first saw him on the day of the occurrence he was lying up against the bulkhead against the deck house, one leg under the back of the deck house and the rest of him was out from the deck house about 7 feet from the base of the ladder. The men picked him up. The petitioner was assistant to a mechanic—he carried materials to the mechanic. There were no marks or scars on petitioner's body when Ahrens found him.

20 Joseph Dainoski, a registered nurse who answered the ambulance call, took the petitioner to St. Francis hospital in Jersey City. Petitioner complained of a tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm; he was drooling from the left side of his mouth. The nurse found no marks, bruises, scratches or bumps on his head or body. The record in the hospital diagnosed the case as one of cerebral hemorrhage.

30 If the petitioner had fallen 4 or 5 feet and struck his head, there would have been bruises and scratches on his head and body. Further, if he had fallen off the ladder it is difficult to understand how he could have been found 7 feet away from it. A cerebral hemorrhage may occur without a blow of any kind. Unless all the probabilities are rejected and the petitioner's bare statement that he fell, which is not corroborated

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Rule for Reversal and Remittitur

in any way, is accepted as conclusive, there is no way to sustain the judgment below. The probabilities, in the absence of any direct proof, must weight in favor of the accident. This we do not think they do. *Azarowicz v. Metropolitan Beef Co.*, 118 N. J. L. 89; see also *Gilbert v. Gilbert Machine Works*, 122 Id. 533.

10

The judgment is reversed but without costs.

Rule for Reversal and Remittitur

(Filed Feb. 16, 1946)

NEW JERSEY SUPREME COURT

20

WALTER CARR,
Petitioner-Defendant,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Respondent-Prosecutor.

30

This cause having been duly submitted on briefs at the January Term 1946 by Jacob Spiro and Joseph Moritz, of counsel for the petitioner-defendant, and Stryker, Tams and Horner, of counsel for the respondent-prosecutor, and the court having examined the record and proceedings below and having considered the grounds

40

Rule for Reversal and Remittitur

of appeal, and finding that there was error in the said record of proceedings in the Essex County Court of Common Pleas;

10 IT IS ORDERED therefore that the judgment of the Essex County Court of Common Pleas be reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the Essex County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of said court.

Rule actually entered this 16th day of February 1946.

20 On motion of,

STRYKER, TAMS & HORNER,
Attorneys for Respondent-Prosecutor.

JAMES J. GAVIN,
Clerk.

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Employee's Claim Petition for Compensation

(Filed November 30, 1943)

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

WALTER CARR, Petitioner, vs. FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent.	10
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Received at Trenton Nov. 30, 1943.

Claim Petition No.

20

Date of Accident, 194.....

If known, state name of insurance company

.....

Attorney for Petitioner, Jacob S. Spiro, 75
Montgomery St., Jersey City, N. J.

*To the Workmen's Compensation Bureau of New
Jersey:*

Petitioner alleging that he sustained an acci- 30
dent arising out of and in the course of his em-
ployment with the respondent, respectfully
states:

1. What is your name? Walter Carr.
2. Where do you live? 251 Stanton Street,
New York City, New York.
3. Sex: male.
4. Age: 53. 40
5. Marital Status: Married.

Employee's Claim Petition for Compensation

6. By whom were you employed at the time of the accident? Federal Ship Building and Drydock Co., Port Newark, New Jersey.

7. What was the business of your employer? Ship building.

10 8. Did you give written notice to your employer at the time you were hired, or later, that Article 2 of the Workmen's Compensation Law of New Jersey should not apply to you? No.

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

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

20 11. If so, on what date? June 10th, 1943.

12. Did you notify your employer of such injury? Yes.

13. If so, on what date? June 10, 1943.

14. What was your regular occupation? Sheet metal worker.

30 15. What kind of work were you doing at the time of accident? I am a sheet metal worker and was working on a ship as a sheet metal worker.

16. When did the accident happen? June 10th, 1943 at 12:30 p. m.

17. Where did the accident happen? Federal Ship Building and Drydock Co., Port Newark, New Jersey.

18. What was the nature of the accident, and how did it happen? While descending from a wooden ladder, slipped and fell off.

40

Employee's Claim Petition for Compensation

19. On what date were you compelled to stop work because of the injury? June 10, 1943.

20. On what date were you well enough to work again? I have not returned.

21. If still disabled, on what date do you think you will be able to work? Unknown at this time. 10

22. Give nature of any injury from which you will recover: cerebral concussion.

23. Has any permanent injury resulted? If there has been amputation or loss of usefulness of any member or impairment of any physical organ, explain fully: cerebral concussion.

24. Were your wages fixed by piece-work? No.

25. If so, what was your average weekly wage? 20

.....

26. If wages were fixed by the hour, state rate per hour: \$0.86.

27. Give number of hours in ordinary working day: 8.

28. Give number of days in an ordinary working week: 5.

29. State the amount of weekly wages: \$45.00. 30

30. Have you been paid compensation? No.

31. If so, how much? Compensation Rate Temporary Disability Permanent Disability

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

33. If so, how much?

34. Was medical aid required? Yes. 40

Employee's Claim Petition for Compensation

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

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

10 37. Were they furnished? Yes.

38. If so, between what dates? June 10th, 1943-June 20th, 1943.

39. If not, what sum did you expend for medical, surgical or hospital services? \$25.

40. Give name and address of physician and hospital: St. Francis Hospital, Jersey City, N. J.; Medical Centre, Jersey City, N. J.; Dr. John Rich, 49 St. Marks Pl., New York City;
20 Dr. Bruno Tyson, 295 East 10th St., N. Y. C.

41. What other facts are there which you believe important?

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

Your petitioner therefore prays that the Workmen's Compensation Bureau will determine the amount of compensation due your petitioner from said Respondent, under Revised Statutes of New
30 Jersey, 1937, Title 34, Chapter 15, and the Acts supplemental thereto and amendatory thereof, and that our petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will pray, etc.

WALTER CARR, Petitioner.

Employee's Claim Petition for Compensation

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

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

10

WALTER CARR, Petitioner.

WALTER CARR.

Subscribed and sworn to before me, this 13th day of September, 1943, at New York City.

20

JACOB S. SPIRO
 Master in Chancery
 New Jersey

(This affidavit may be sworn to before any 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. Unless an answer in duplicate is filed within ten days after the service of this notice, with the Secretary of the Bureau, in the State House at Trenton, the Petitioner will proceed with proof of claim according to law.

30

WORKMEN'S COMPENSATION BUREAU.

40

.....
 Secretary.

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

I, Daniel A. Spair, Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the Petition filed in this cause.

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

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

(Filed Feb. 28, 1944)

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

20	WALTER CARR, Petitioner, <i>vs.</i> FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent.
----	---

30 Received at Trenton Feb. 28, 1944.
Claim Petition No. 77947.

Attorneys for Respondent: Lindabury, Depue
& Faulks, 744 Broad St., Newark, N. J.

In answer to Claim Petition filed in this cause
Respondent states:

1. Name of Respondent: Federal Shipbuilding and Dry Dock Company, Lincoln Highway, Kearny, New Jersey.

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

2. Was the petitioner in your employ at the time of the alleged accident? Yes.

3. State your business: Shipbuilding.

4. Did you receive written notice from the Petitioner at the time of hiring, or later, that Article 2 of the Workmen's Compensation Law of New Jersey was not to apply to him? No. 10

5. Did you give such written notice to him? No.

6. Did you have knowledge of an injury occurring at the time alleged in the petition? No.

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

8. Did you receive notice of an injury occurring at the time alleged in the petition? No. 20

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

10. What was the Petitioner's regular occupation? Helper.

11. What kind of work was he doing at the time an accident is alleged to have occurred? No knowledge.

12. Did the Petitioner sustain an accident arising out of the Petitioner's employment with the Respondent at the time alleged in the petition? No. 30

13. Did the Petitioner sustain an accident in the course of his employment with the Respondent at the time alleged in the petition? No.

14. If the accident occurred on a date other than the one alleged in the petition, state the correct date: 40

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

15. What was the nature of such accident, and how did it happen? Petitioner did not sustain any accident.

10 16. On what date was the Petitioner compelled to stop work because of injury? Petitioner did not stop work because of any injury.

17. On what date was the Petitioner well enough to work again?

18. If still disabled, on what date do you estimate he will be able to work? No knowledge.

20 19. Give your understanding of the nature of any injury from which he should recover: Petitioner did not suffer any compensable injury as claimed by him.

20. Give your understanding of any permanent injury which has resulted. If there has been amputation or loss of usefulness of any member or impairment of any physical organ, explain fully: Petitioner has no permanent disability as a result of any compensable injury.

21. Were the wages fixed by piece-work? No.

30 22. If so, what was the average weekly wage of the Petitioner?

23. If wages were fixed by the hour, state rate per hour: 81¢ per hour.

24. Give number of hours in an ordinary working day: 8.

25. Give number of days in an ordinary working week: 5.

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

26. State the amount of weekly wages: \$32.40.
27. How much money have you paid the Petitioner as compensation (not including medical aid) since the accident? None.
Temporary Disability: None. 10
Permanent Disability: None.
Compensation Rate: \$20.00 per week.
28. Have you promised to pay compensation? Any required by the New Jersey Workmen's Compensation Act.
29. If so, how much?
30. Was medical aid required? Not for any compensable injury. 20
31. Were you requested to supply the necessary medical services required by law? No.
32. Did you furnish this service? Yes.
33. If so, between what dates? July 10 to July 15, 1943.
34. If not, give reasons for failure to do so:
35. Give name of physician and hospital rendering service at your direction: St. Francis Hospital. 30
36. What other facts are there which you believe important?
37. If you deny that compensation is payable in this case explain your reasons for this conclusion: Respondent denies that the petitioner met with any accident which arose out of and in the course of his employment as claimed by him. It denies that he suffers any compensable injury as 40

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

a result of any such accident. It denies that petitioner suffered any disability as a result of any compensable injury as claimed. The petition therefore should be dismissed.

10

FEDERAL SHIPBUILDING AND DRYDOCK
COMPANY

Respondent,

By: J. H. LOVE

Agent.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.:

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

J. H. LOVE

Agent of Respondent.

30 Subscribed and sworn to before me this tenth day of February, 1944, at Kearney, New Jersey.

WM. J. CORNETTA,
Notary Public of N. J.

(This affidavit may be sworn to before any person authorized to administer an oath.)

I, Daniel A. Spair, Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the Answer filed in this cause.

40

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

Opinion of Deputy Commissioner

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

WALTER CARR, Petitioner, <i>vs.</i> FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent.	10
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March 5, 1945. 20

Before:

HON. HARRY S. MEDINETS, Deputy Compensation Commissioner.

Appearances:

JOSEPH MORITZ, Esq., for Petitioner.

WILLIAM L. DILL, JR., Esq., for Respondent.

The Court: The petitioner claims benefits under the provisions of the Workmen's Compensation Act of the State of New Jersey. He testified that on July 10, 1943, while working for the respondent as a sheet metal worker, he was climbing up a stepladder when he suddenly suffered cramps in his left leg, twisting his leg and causing him to lose his balance and falling, with the result that he struck his head, injuring the left side of his head, his arm and his leg. He

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Opinion of Deputy Commissioner

was taken to St. Francis Hospital where he remained for eight to nine days. He was subsequently treated but never returned to work.

10 He now complains that he cannot use his left hand, that his leg is weak, that his head bothers him very much, causing him to feel "like drunk all the time" as he expresses it. He complains that he can't look down as he gets dizzy and suffers from noises in the head all the time.

His wages amounted to \$42 a week.

He further testified that he was never sick before.

20 Dr. Henry Grossman testified on behalf of the petitioner, qualifying as a neurologist. He examined the petitioner on two occasions, the last being October 28, 1944. The doctor was of the opinion that the petitioner suffered from a post-concussional syndrome causing brain damage and that this was caused by the trauma described by the petitioner. He estimated the petitioner's disability at 100 per cent of total.

30 Edward A. Ahrens testified on behalf of the petitioner, stating that he saw him lying about seven feet from the base of the ladder: that after the accident he walked a short distance, and that the petitioner could not see. He didn't notice any beams near the ladder. However, the petitioner was near the wooden upright.

Joseph Dainowski testified on behalf of the respondent stating that he was the first-aid attendant and nurse at the respondent's plant hospital. On July 10, 1943, he picked up the petitioner and put him in an ambulance, taking him to the hospital, for treatment. He testified that the petitioner complained of a tightening

Opinion of Deputy Commissioner

sensation of the right hand, and he had difficulty in moving the left leg and arm, and that he was drooling on the left side of his mouth. He had difficulty in talking and received very little response from him. He appeared in a semi-conscious state.

Dr. Jack Blumberg testified on behalf of the respondent. He qualified as an expert in the neurological field. He was of the opinion that the petitioner is suffering from a brain condition and that there was nothing in the testimony to justify the conclusion that the trauma to the head was in any way related to the man's disability.

I have carefully considered these facts and all the proofs in this case and the various exhibits marked in evidence. The petitioner's testimony stands uncontradicted to the effect that he enjoyed normal good health for a man of his age at the time of the accident, and that he was a regular worker up to that time. There is no dispute of the fact that he fell off the ladder a distance of about four feet to the ground. He claimed he struck his head. This the respondent disputes. The fact nevertheless stands out that following this accident the petitioner was semi-conscious and complained of severe pain, drooling from the mouth in response to questions, all of which clearly indicates not only physical injury, but an injury to his brain as well. From that day on, that is, the date of the accident, he has been totally disabled, having failed to respond to treatment and now presents himself as a man who is unfit for any physical effort. The latter fact stands undisputed.

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Opinion of Deputy Commissioner

Assume for the sake of academic discussion that the fall which resulted from the cramp in his leg was not associated with his employment, we can nevertheless assume that his employment placed him in an unusual position of hazard on a ladder about four feet from the ground at the time of this occurrence. The ultimate physical injury suffered by the petitioner was not the result of the cramp in the leg, but was the result of the fall. He would not have fallen from the precarious position on the ladder were it not that his employment put him there, in that hazardous position. Therefore his employment was the cause of his ultimate disability. The principle of law enunciated in the case of *Reynolds vs. The Passaic Valley Sewerage Commission* applies with equal effect here even though there may be some question as to whether or not the petitioner actually struck his head, the fact is that the fall unquestionably shook him up a great deal and the reasonable probability is that he did strike his head, either on the ground, the upright or the wooden beams. For all practical purposes, it does not make any difference. The preponderance of the credible evidence in this case clearly indicates that this fall was the onset of the petitioner's complaints and ultimate disability.

I am therefore constrained to the opinion that on the day alleged by the petitioner, he suffered personal injuries resulting from an accident arising out of and in the course of his employment, of which the respondent had due and timely knowledge, and that as a result of that accident he has suffered total and permanent disability. I will therefore allow him total and permanent

Opinion of Deputy Commissioner

disability from the date of the accident, as medical treatment was of no avail. For all practical purposes his condition has not changed since the date of the accident. This will entitle him to compensation for a period of 400 weeks payable at the maximum compensation rate of \$20 per week, a total of \$8,000. 10

I will allow Dr. Grossman \$50 for his two neurological examinations to be paid by the petitioner and \$50 for his appearance and testimony in court to be paid by the respondent. I also direct the respondents to pay the reasonable medical bill of the St. Francis Hospital. I will allow a counsel fee of \$1,000 in this case, of which \$600 shall be paid by the respondent and \$400 by the petitioner. Stenographic fees are to be paid by the respondent. 20

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the proceeding as taken stenographically by me at the date and place hereinbefore set forth.

FRED S. BRAUSE,
Certified Shorthand Reporter. 30

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken before me at the time, place and date hereinbefore set forth.

HARRY S. MEDINETS,
Deputy Compensation Commissioner. 40

Determination of Facts and Rule for Judgment

(Filed May 11, 1945)

NEW JERSEY DEPARTMENT OF LABOR,

10

WORKMEN'S COMPENSATION BUREAU.

WALTER CARR,
Petitioner,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Respondent.

Claim Petition,
No. 77947

20

30

A formal petition was heretofore filed in the above-entitled matter by the petitioner, WALTER CARR, praying for compensation for disability to which the petitioner might be entitled by virtue of the terms of the Workmen's Compensation Act, and an answer was duly filed by the respondent denying that the petitioner met with any accident which arose out of and in the course of his employment as claimed by him in his petition; that he suffered no compensable injury as a result of any such accident, and it further denies that the petitioner suffered any disability as the result of any compensable injury as claimed by him in said petition.

The matter having come before me at the Workmen's Compensation Bureau for formal hearing on December 18th, 1944, January 15th,

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Determination of Facts and Rule for Judgment

1945 and January 29th, 1945, at which time the parties appeared before me and presented their testimony and evidence.

The petitioner testified that he was employed by the respondent on or about May 3, 1943; that his regular employment was that of a Helper and Sheet Metal Worker; that his rate of wages were fixed at eighty-one cents an hour; that his ordinary hours in an ordinary working day were eight; and that the number of days in an ordinary week were five, and that his average weekly wages amounted to \$42.00.

He further testified that on July 10th, 1943, while working for the respondent as a Sheet Metal Worker, and while he was climbing up a ladder he suddenly suffered cramps in his left leg, twisting his left leg and causing him to lose his balance and falling, with the result that he struck his head injuring the left side of his head, his arm and his leg; that he was taken to St. Francis Hospital where he remained for eight or nine days; that he was subsequently treated but never returned to work and that he now can't use his left hand, his leg is weak, his head bothers him very much causing him to feel "like drunk all the time". He can't look down as he gets dizzy and suffers from noises in the head all the time; that he enjoyed good normal health for a man of his age at the time of the accident and that he was a regular worker up to that time; that he fell off the ladder a distance of about four feet to the ground and that he struck his head while so falling; that following this accident he was rendered semi-conscious; that he was suffering from severe pain and

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Determination of Facts and Rule for Judgment

drooling from the mouth, and that from the date of the accident until today he has been totally disabled; that he has failed to respond to treatment and that he is unfit for any physical effort.

10 Doctor Morris Grossman testified on behalf of the petitioner and qualified as a Neurologist. He indicated that he examined petitioner on two occasions, namely October 6th, 1943 and October 28th, 1944. The Doctor was of the opinion that petitioner suffered from a post concussional syndrome causing brain damage, and that this was caused by the trauma described by the petitioner. He estimated petitioner's disability at 100% of total.

20 Edward A. Ehrens testified on behalf of the respondent and indicated that he found him lying about seven feet from the base of the ladder; that he did not notice any beams near the ladder but nevertheless he did find the petitioner lying near a wooden upright.

30 Joseph Dainowski testified on behalf of the respondent and stated that he was a First Aid Attendant and Nurse at the Respondent's Hospital; that on July 10, 1943 he picked up the petitioner and put him in an ambulance and took him to the Hospital for treatment. He further testified that the petitioner complained of a tightening sensation of the right hand; that he had difficulty in moving the left leg and arm, and that he was drooling from the left side of his mouth. He had difficulty in talking and received very little response from him. He appeared in a semi-conscious state.

40 Dr. Jack Blumberg also testified in behalf of the respondent. He qualified as an Expert in the

Determination of Facts and Rule for Judgment

Neurological Field. He was of the opinion that the petitioner was suffering from a brain condition and that there was nothing in the testimony to justify the conclusion that the trauma to the head was in any way related to the man's disability.

Having considered all the facts and testimony in the above-stated matter and all the proofs in this case as well as the various exhibits marked in evidence, I am of the opinion that

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1. Petitioner's testimony stands uncontradicted to the effect that he enjoyed normal good health for a man of his age at the time of the accident.

2. That he was a regular worker up to that time.

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3. That there is no dispute of the fact that he fell off the ladder a distance of about four feet to the ground and that he struck his head. Although this is disputed by respondent, nevertheless, no evidence to the contrary was presented.

4. That following this accident the petitioner was rendered semi-conscious; that he complained of severe pain; that he was drooling from the mouth, in response to questions, all of which clearly indicates not only physical injury but an injury to his brain as well.

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5. That from the date of the accident, the petitioner has been totally disabled having failed to respond to treatment and that he is now a man who is unfit for any physical effort which fact stands undisputed.

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Determination of Facts and Rule for Judgment

10 I am further of the opinion that even if the fall from the ladder which resulted from the cramp in his leg was not associated with his employment, nevertheless, his employment placed him in an unusual position of hazard on a ladder about four feet from the ground at the time of the happening of the accident; that the ultimate physical injury suffered by the petitioner was not the result of the cramp in the leg but was the result of the fall from the ladder. He would not have fallen from the precarious position on the ladder were it not that his employment put him there in that hazardous position, therefore, his employment was the cause of his ultimate disability. The principle of law enun-
20 ciated in *Reynolds v. Passaic Valley Sewerage Commission* applies with equal effect here even though there may be some question as to whether or not the petitioner actually struck his head. The fact is that the fall unquestionably shook him up a great deal and the reasonable probability is that he did strike his head either on the ground, the upright or the wooden beams.

I am of the opinion that the preponderance of the credible evidence in this case clearly indi-
30 cates that this fall was the onset of the petitioner's complaints and ultimate disability.

I, therefore, am of the opinion that on the day alleged by the petitioner, he suffered personal injuries resulting from an accident arising out of and in the course of his employment of which the respondent had due and timely knowledge and that as the result of that accident he has suffered total and permanent disability.

40 I, therefore, find and determine from all of the evidence and testimony that the petitioner suf-

Determination of Facts and Rule for Judgment

ferred an accident arising out of and in the course of his employment with respondent on July 10, 1943; that the respondent had due notice of this accident; that the petitioner was earning a weekly wage of \$42.00 at the time of the accident; that his compensation rate is \$20.00 a week; that as a result of the accident he received injuries to the left side of his head, his arm and his leg, resulting in his suffering from a post concussional syndrome causing brain damage, permanent disability of the left hand, weakness of the left leg; that his head bothers him very much causing him to feel "like drunk all the time", inability to look down as he gets dizzy and the suffering from noises in the head all the time; that as a result of the injuries he has suffered a total permanent disability to the extent of 100%, and therefore, is entitled to compensation for a period of 400 weeks payable at the maximum compensation rate of \$20.00 per week, or a total of \$8,000.00.

It is, therefore, on this 29th day of March 1945, ORDERED: that the respondent do forthwith pay to the petitioner the sum of \$20.00 per week, for a period of 400 weeks, making a total due of \$8,000.00, commencing with July 10, 1943 and terminating on March 10, 1951; and it is further

ORDERED: That Doctor Morris Grossman be paid the sum of \$50.00 for two neurological examinations heretofore made of the petitioner, to be paid by the petitioner, and in addition thereto \$50.00 for his appearance and testimony in court to be forthwith paid by respondent; and it is further

Determination of Facts and Rule for Judgment

10 ORDERED: That respondent forthwith pay the reasonable medical bill of St. Francis Hospital at Jersey City, N. J. for hospital services heretofore rendered to the petitioner, arising from the accident involved in the above stated matter; and it is further

ORDERED: That Joseph Moritz and Jacob S. Spiro, Attorneys for petitioner, be allowed the sum of \$1,000.00 as counsel fee—\$600.00 of which shall be paid by the respondent and \$400.00 by the petitioner; and it is further

ORDERED: That stenographic costs in the above matter be paid by the respondent.

20 ORDERED: On and after March 10th, 1951 the petitioner will have the right to apply for extended benefits in accordance with R. S. 1937, 34:15-12b.

HARRY S. MEDINETTS
Deputy Commissioner
(Harry S. Medinets)

30 I, Daniel A. Spair, Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the Determination of Facts and Rule for Judgment filed in this cause.

DANIEL A. SPAIR
Secretary, Workmen's
Compensation Bureau

Notice of Appeal

(Filed April 28, 1945)

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

10

WALTER CARR,
Petitioner,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Respondent.

On Claim Petition,
No. 77947.

On Petition for
Compensation.

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*To Jacob S. Spiro, Esq., Attorney for Petitioner,
Secretary of Workmen's Compensation Bu-
reau and County Clerk of the County of Essex:*

PLEASE TAKE NOTICE that the respondent, Federal Shipbuilding and Dry Dock Company, hereby appeals to the Court of Common Pleas in the County of Essex from the whole of the judgment entered in the above entitled cause by Honorable Harry S. Medinets, Deputy Commissioner of Compensation, on March 29, 1945, whereby and wherein it was determined that the petitioner met with an accident which arose out of and in the course of his employment by the respondent, that as a result of that accident the petitioner sustained injuries for which he is entitled to compensation for permanent disability amounting to 100% of total, and whereby judgment was

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Notice of Appeal

entered in favor of the petitioner, Walter Carr,
 for compensation for permanent disability for
 400 weeks at petitioner's compensation rate of
 \$20.00 per week in the total amount of \$8,000.00
 and that at the expiration of said period of 400
 10 weeks the petitioner will have the right to apply
 for extended benefits in accordance with RS
 34:15-126 together with certain medical fees, wit-
 nesses fees, counsel fees and costs.

STRYKER, TAMS, HORNER,
 Successors to

LINDABURY, DEPUE & FAULKS,
 Attorneys for Respondent.

20 Dated: April 26, 1945.

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Common Pleas Court Opinion

(Filed June 25, 1945)

ESSEX COUNTY COURT OF COMMON PLEAS

M 6288

10

WALTER CARR,
Petitioner-Appellee,

vs.

FEDERAL SHIPBUILDING & DRY
DOCK COMPANY,
Respondent-Appellant.

On Appeal from
Workmen's Com-
pensation Bureau

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JACOB S. SPIRO, for the Petitioner-Appellee.

STRYKER, TAMS & HORNER (WILLIAM L. DILL,
Jr.), for the Respondent-Appellant.

HARTSHORNE, J.

In this workmen's compensation appeal petitioner-appellee, a man of fifty-four, was employed by respondent as a sheet metal worker and helper, and on July 10, 1943 was working with others on and around the deckhouse of a ship against which was scaffolding, to which access was had by a ladder or ladders. The Bureau found that he fell from this ladder, was hospitalized for some time and now is disabled 100 per cent.

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Respondent appeals on the grounds (1) that petitioner did not fall from a ladder, and (2) that there was no legal evidence that his injuries

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Common Pleas Court Opinion

were due to other than an individual, constitutional defect.

10 As to the matter of petitioner's fall from the ladder, he testifies in detail in that regard and that he hit the left side of his head when he fell (record p. 4). No witness directly denies this, respondent's argument to the contrary being based upon the fact that when he was found on the ground one of his legs was some seven feet from the ladder, his body being closer to it. But this hardly proves petitioner a perjurer, since the evidence is he tried to hold on as he was falling, which may well have whirled his legs away from the foot of the ladder. Both the written record and the conclusion of the trier of the facts, who heard and saw the witnesses, lead
20 to the conclusion that petitioner was climbing the ladder as he fell.

Dr. Grossman, produced by petitioner, in the absence of the latter's treating physician, now in the Army, testifies that his original diagnosis was that of a post concussion syndrome with a cerebral lesion (record p. 25). But this was before the doctor had seen the hospital record of the man made during the period immediately
30 after the accident when he was there confined with a series of symptoms, which all agree indicated some form of brain irritation. On consideration of the record Dr. Grossman frankly states he considers his original diagnosis wrong and that the man had an aneurysm or bulging weakening in one of the blood vessels in the brain, which was ruptured in the stress of his climbing, and that this rupture caused a sub-arachnoid hemorrhage, which "was a competent
40 producing cause of the conditions that I found"

Common Pleas Court Opinion

(record p. 28), on his examination and as stated in the hospital record. This was in answer to a hypothetical question including the fact "that the man was climbing up a ladder" (record p. 26) and so constitutes definite evidence as to the accidental character of the injury. Indeed, Dr. Blumberg, the sole medical witness for respondent, himself confirms the fact that "If the man fell halfway from the ladder it certainly would be a competent and producing case for a rupture of an aneurysm (record p. 88), *i. e.*, such a rupture would probably arise from a strain of some sort. From the legal standpoint it is, of course, immaterial whether this rupture, due to this strain connected with the employment, arose previous or subsequent to the fall. If previous to the fall, it is directly connected with the employment on general principles. If subsequent and due to the fall, it arises from the peculiarly hazardous conditions of the employment and is, therefore, compensable under the case of *Reynolds v. Passaic Valley Sewerage Commission*, 20 N. J. Misc. Rep. p. 74; 130 N. J. L. p. 437; 131 N. J. L. p. 327.

The evidence on which respondent relies to the contrary is solely that of Dr. Blumberg, who admits that the present disability is due to a brain injury, but feels that this injury is due to a different and constitutional condition. This Dr. Blumberg describes as a cholesteatoma, a chronic infection of the middle ear, which "had existed for months and months" (record pp. 75, 94) and which "is characterized not only by the purulent discharge but by a peculiar, foul, putrid, acrid odor." It is apparently Dr. Blumberg's theory that petitioner's disability is not caused directly

Common Pleas Court Opinion

by this ear condition, but that this ear condition somehow caused a brain abscess, which brain abscess caused petitioner's disability (record p. 89). Regardless of the fact that Dr. Blumberg admits that petitioner's fall from the ladder would have irritated such an abscess, if he had one, and thus be largely responsible for petitioner's condition anyway (record p. 90), there is a grave question as to whether this ear condition existed at the time of the accident, even if the doctor's undemonstrated theory is right, that the ear condition caused such an abscess. For it is passing strange that the nurses and doctors at St. Francis' Hospital, to which petitioner was taken immediately after the accident and where he remained for many days, though they obviously were faced with a serious brain disturbance, never once noted said "purulent discharge" or the "peculiar, foul, putrid, acrid odor" which is characteristic of such a cholesteatoma. There is not a word in the hospital record in evidence showing anything whatever presently the matter with the ear, and this is the only medical evidence in the entire case as to the condition of the man's brain and head at the time of the accident itself.

Since respondent's theory as to the cause of petitioner's condition seems incredible and since, as seen before, it is legally immaterial whether petitioner's brain injury preceded or succeeded his fall from the ladder, the award of the Bureau will be affirmed and a determination may be entered accordingly.

RICHARD HARTSHORNE,
Judge.

June 20, 1945.

Determination and Judgment

(Filed July 2, 1945)

ESSEX COUNTY COURT OF COMMON PLEAS

Misc. 6288

10

WALTER CARR, Petitioner-Appellee, <i>vs.</i> FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent-Appellant.	}	On Appeal from Workmen's Com- pensation Bureau. By Order of the Court.
		Judgment Entered July 2, 1945.
		Judge Richard Hartshorne.

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JACOB S. SPIRO, Attorney for Petitioner-
Appellee.

The above entitled matter having come on for hearing on appeal before me in the presence of Jacob S. Spiro, attorney for, and Joseph Moritz, of counsel with, petitioner-appellee and Stryker, Tams & Horner(William L. Dill, Jr.), attorneys for and of counsel with respondent-appellant, the matter having been submitted to me for decision on oral argument and upon briefs, and I having considered the same and reviewed the transcript and proceedings of the court below, I do hereby find and determine as follows:

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1. This is a proceeding brought by Walter Carr, the petitioner-appellee, under Article 2 of the Act commonly known as the Workmen's Com-

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Determination of Judgment

pensation Act, Revised Statutes of 1937, Title 34, upon a claim petition duly filed.

10 2. Upon a hearing of said matter before the New Jersey Department of Labor, Workmen's Compensation Bureau, the Court found in favor of the petitioner and entered the following award dated March 29th, 1945 signed by Harry Medenits, Deputy Commissioner:

 The petitioner on July 10th, 1943 suffered personal injuries resulting from an accident arising out of and during the course of his employment.

 That respondent had due and time knowledge of this accident and the injuries resulting therefrom.

20 That petitioner was earning a weekly wage of \$42.00 at the time of the accident and that his compensation rate is \$20.00 a week.

 That on July 10th, 1943 petitioner was employed by respondent as a helper and sheet metal worker.

30 That petitioner testified that on July 10th, 1943, while climbing up a ladder, he suddenly suffered cramps in his left leg, twisting his left leg, causing him to lose his balance and falling, with the result that he struck his head injuring the left side of his head, his arm and his leg.

 That immediately after the accident petitioner was taken to St. Francis Hospital where he remained for eight or nine days; that petitioner was subsequently treated but never returned to work; that petitioner now cannot use his left hand, his leg is weak, his head bothers him very much, causing him to feel "like drunk all the time." He cannot look down as he gets dizzy

Determination of Judgment

and suffers from noises in the head all the time; that he enjoyed good normal health for a man of his age at the time of the accident, and that he was a regular worker up to that time; that he fell off the ladder aforementioned a distance of about four feet to the ground, and that he struck his head while so falling; that following this accident he was rendered unconscious; that he was suffering from severe pain and drooling from the mouth, and that from the date of the accident until today he has been totally disabled; that he has failed to respond to treatment, and that he is unfit for any physical effort.

10

That Doctor Morris Grossman, a Neurologist, called as an expert on behalf of the petitioner, testified that he examined the petitioner on two occasions, namely, October 6th, 1943 and October 28th, 1944 and that he was of the opinion that the petitioner suffered from a post concussion syndrome causing brain damage and that this was caused by the trauma described by petitioner. He estimated petitioner's disability at 100% of total.

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That Edward A. Ahrens testified on behalf of the respondent, which testimony indicated that he found the petitioner lying about seven feet from the base of the ladder; that he did not notice any beams near the ladder, but, nevertheless, he did find the petitioner lying near a wooden upright.

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That Doctor Jack Blumberg testified on behalf of the respondent and qualified as an Expert in the Neurological Field; that he was of the opinion that the petitioner was suffering from a brain condition, and that there was nothing in the testimony to justify the conclusion that the

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Determination of Judgment

trauma to the head was in any way related to the man's disability.

10 That as the result of the injuries, petitioner has suffered a total permanent disability to the extent of 100% and therefore is entitled to a compensation for four hundred weeks, payable at the maximum compensation rate of \$20.00 per week, or a total of \$8,000.00, commencing with July 10th, 1943 and terminating on March 10th, 1951; that Doctor Morris Grossman be paid the sum of \$50.00 for two neurological examinations made of the petitioner, to be paid by the petitioner and in addition thereto \$50.00 for his appearance and testimony in court to be forthwith paid by the respondent; that the respondent forthwith pay the reasonable medical bill of St. Francis Hospital of Jersey City, heretofore rendered to the petitioner, arising from the accident involved in the above stated matter; that Joseph Moritz and Jacob S. Spiro, attorneys for petitioner, be allowed the sum of \$1,000.00 as counsel fee—\$600.00 of which shall be paid by the respondent, and \$400.00 by the petitioner.

20 That stenographic costs in the above matter be paid by the respondent.

30 That on and after March 10th, 1951, the petitioner will have the right to apply for extended benefits in accordance with Revised Statutes of 1937, 34:15-12B.

3. A careful study of the transcript of testimony, findings and briefs of respective counsel, leads me to the conclusion that the Determination of Facts and Rule for Judgment entered by the Workmen's Compensation Bureau in the above

Determination of Judgment

matter on March 29th, 1945 should be sustained,
 and the appeal of the respondent-appellant dis-
 missed. The court feels that there was ample
 evidence to justify the findings of the Compensa-
 tion Bureau and that the award made by its
 Deputy Commissioner, in its behalf, was just and
 proper. This Court is satisfied that the petitioner
 fell from a ladder, as testified to by him in detail,
 and that he hit the left side of his head when
 he fell, especially in view of the fact that no wit-
 nesses were produced by respondent to directly
 deny this. The court is further satisfied that the
 petitioner had an aneurysm or bulging weaken-
 ing in one of the blood vessels in the brain which
 was ruptured in the stress of climbing a ladder,
 and that this rupture caused a sub-arachnoid
 hemorrhage which was a competent producing
 cause of the condition as found and determined
 by Doctor Morris Grossman, which condition is
 likewise confirmed by Doctor Blumberg, respond-
 ent's medical witness, in answer to a hypothet-
 ical question. This Court is satisfied that it is
 immaterial whether the rupture of the aneurysm
 due to this strain connected with the petitioner's
 employment, arose previous or subsequent to the
 fall, and if previous to the fall, it is directly con-
 nected with the employment of petitioner, and if
 subsequent and due to the fall, it therefore arose
 from the peculiarly hazardous conditions of the
 employment, and is, therefore, compensable under
 the case of *Reynolds v. Passaic Valley Sewerage*
Commission, 20 N. J. Misc. Rep., p. 74; 130
 N. J. L., p. 437; 131 N. J. L., p. 327.

This court is further satisfied that the peti-
 tioner is not suffering from a cholesteatoma—a
 chronic infection of the middle ear—which had

Determination of Judgment

10 existed for months and months, as testified to by Doctor Blumberg on behalf of the respondent, especially after taking into consideration that the records of St. Francis Hospital, to which hospital the petitioner was taken, immediately after the accident and where he remained for many days, do not disclose or note a purulent discharge or peculiar, foul, putrid, acrid odor, which is characteristic of such a cholesteatoma, and which records likewise make no note whatsoever or show anything presently the matter with the petitioner's ear. The court is satisfied that the respondent's theory as to the cause of the petitioner's condition seems incredible.

20 4. Accordingly, the findings of the Workmen's Compensation Bureau are affirmed and judgment is hereby entered in favor of the petitioner, in accordance with the finding of the court below and hereinabove referred to in paragraph 2.

30 5. There is hereby awarded to Jacob S. Spiro and Joseph Moritz, attorneys for and of counsel with petitioner, a counsel fee in the sum of \$660, payable $\frac{1}{4}$ by petitioner and $\frac{3}{4}$ by respondent, together with disbursements in the amount of \$36.25, assessed against the respondent-appellant, in addition to the costs and counsel fee allowed by the Deputy Commissioner in the Workmen's Compensation Bureau aforementioned.

Judgment Signed June 29, 1945.

Judgment Entered July 2, 1945.

CHARLES W. PARKER,
J.

40 Book Z2, Page 226
Common Pleas Judgments

Transcript of Testimony

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

10

WALTER CARR, Petitioner, <i>vs.</i> FEDERAL SHIPBUILDING & DRY DOCK COMPANY, Respondent.	}	20
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December 18, 1944.

Before:

HONORABLE HARRY MEDINETS,
 Deputy Compensation Commissioner.

Appearances:

JACOB S. SPIRO, Esq., for the Petitioner. 30

WILLIAM B. DILL, Esq., for the Respondent.

The Court: Is there a question of liability in this case?

Mr. Dill: Yes, your Honor.

Mr. Spiro: May I at this time with the Court's permission respectfully move to amend the peti-

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Walter Carr—Petitioner—Direct

tion insofar as the date of the accident. It should be, if the Court please, July 10th in lieu of June 10th.

The Court: What year?

Mr. Spiro: The same year.

10 The Court: Is there any objection to the amendment of the date of the accident?

Mr. Dill: I will check in just a minute, your Honor.

No, I have no objection.

The Court: You may proceed, sir.

Mr. Spiro: Thank you, sir.

20 WALTER CARR, the petitioner, called as a witness on his own behalf, being first duly sworn, testified as follows:

Mr. Spiro: May I get a bit closer to the petitioner. He has some difficulty with his hearing.

Direct examination by Mr. Spiro:

30 Q. Where do you live, Mr. Carr? A. 198 New York—Seventh Street, New York City.

Q. And in July, 1943, where were you working? A. Federal Shipyard.

Q. And what kind of work were you doing? A. Sheet metal worker, helper.

Q. And how long before July 10, 1943, had you been working at the Federal Shipyards? A. I only worked there for two months.

Q. Two months? A. Yes.

40 Q. Now, did you meet with an accident on July 10th? A. Yes.

Walter Carr—Petitioner—Direct

Q. Tell us, please, what happened? A. It was on July 10, 1943, 12:30, after lunchtime when the whistle blow I started to go to work by the step ladder and when I was half way on the step ladder, my left leg, the cramps catch me. I twisted my leg against the hole and I lost my balance and I fall on the left side of the step ladder. There was a hole near the step ladder. Well, I hit my head. I hit my head on the wood beams. 10

Q. Which side of your head did you hit when you fell? A. Right in the back here, the left side (indicating).

Q. Now, Mr. Carr, please speak as slowly as you can, but as clearly as you can. Do you understand me? A. That's right. 20

Q. You said you walked up a ladder? A. Yes, sir.

Q. Now, what happened when you walked up this ladder? Tell us again, please. A. I was on it, half way on the step ladder about four or five feet high. The cramp, I got a cramp in my leg.

Q. Which leg? A. The left leg.

Q. The left leg? A. Yes.

Q. And what happened? A. We started to twist and my leg, I couldn't hold it and I couldn't stand on the ladder any more and I lost by balance and I fell. 30

Q. You fell down the ladder? A. I fell down the ladder, yes, sir.

Q. What happened to you then? A. I was laying on the ground.

Q. Did you say you struck your head, did you hurt your head when you fell? A. I hurt my 40

Walter Carr—Petitioner—Direct

head, I hurt my left arm and my head (indicating).

Mr. Spiro: He indicates the left side.

By Mr. Spiro:

10 Q. You say you went to the ground from the ladder to the floor? A. Yes.

Q. And how long were you there before anyone picked you up? A. There was a man behind me when I climbed the step ladder. There was a lot of men behind me.

Q. Tell us your whole story. What happened?

A. I fell and somebody picked me up, take me on the side, they called up the ambulance. The ambulance come over and take me to the hospital.

20 Q. Well, now, can you tell us about how far you fell down, do you know? A. How high?

Q. Yes, how far did you fall?

The Court: He has already testified about four feet.

By Mr. Spiro:

30 Q. Well, now, they took you to an ambulance?
A. Yes.

Q. Where did you go, do you know?

The Court: He has already testified to the hospital.

By Mr. Spiro:

40 Q. Do you know what hospital? A. To St. Francis Hospital.

Walter Carr—Petitioner—Direct

Q. To St. Francis Hospital? A. Yes.

Q. How long did you remain in the hospital, do you know? A. About eight or nine days.

Q. Where else were you hurt at that time besides the leg and your head? A. My arm and head.

Q. Now, after you were in the hospital did you get any other treatments? A. When I left the hospital?

10

Q. Yes. A. Yes. I had my doctor, my private doctor, Dr. Rich.

Q. Where is his office? A. He is in the Army now.

Q. Where was his office when you went for the treatments, in New York? A. New York City, yes. St. Marks Place, 49.

20

Q. Did you have any other doctor besides Dr. Rich? A. Yes, Dr. Tyson.

Q. How long were you under his care? A. Dr. Tyson?

Q. Yes. A. He give me only a few treatments.

Q. Did you go to the Medical Center at Jersey City for treatment? A. No, they send me from St. Francis Hospital.

Q. You mean the St. Francis Hospital sent you to the Medical Center? A. Yes, sir.

30

Q. And did you remain in the Medical Center at Jersey City? A. I was there only three or four days.

Q. Now, Mr. Carr, did you at any time return to work after July 10, 1943? A. No, sir.

Q. And what is the matter with you presently? What is your trouble? A. Well, I can't use my left hand. I'm very weak on my left leg, and my head bothers me very much.

40

Walter Carr—Petitioner—Direct

Q. In what way does your head bother you so very much? A. Dizzy spell like drunk. I feel like drunk all the time.

Q. You say you have dizzy spells? A. Yes. I can't look down.

10 Q. What happens when you look down? A. Get dizzy in my head; something in my head; like some noise in my head.

Q. Noise? A. Yes.

Q. Now, this noise you speak of and which you tell us about, does that continue, does that remain with you for a long time? A. I didn't have it before.

Q. I mean how long does it remain with you when it comes? A. All the time.

20 Q. All the time? A. Yes.

Q. It never leaves you? A. No.

Q. Did you have that before this accident? A. No, never had it.

Q. Were you well before the accident? A. I was very healthy. The doctor is supposed to know. I passed a physical examination before I started to work there.

Q. Now, Mr. Carr, before this accident, what kind of work did you do? A. What kind of work?

30 Q. Yes. A. Sheet metal work, helper.

Q. What kind of work did you do? Did you work on buildings? A. Working on part of the ship on the ground.

Q. On the ground? A. Yes.

Q. Before you worked for the Federal Ship, what kind of work did you do? A. My trade is brick layer.

Q. A brick layer? A. Yes.

Walter Carr—Petitioner—Cross

Q. And as a brick layer did you work on tall buildings? A. Oh, yes. Even I worked on the State Empire Building.

Q. How much were you getting a week at the Federal Ship? A. \$42 a week.

Mr. Spiro: You may inquire, Mr. Dill. 10

Cross examination by Mr. Dill:

Q. Mr. Carr, how old are you, sir? A. Fifty-four.

Q. This particular day of July 10th, you were working on a deck house unit, weren't you? A. Working on the deck house——

Q. I say you had been working on a deck house unit on July 10th? A. Yes. 20

Q. What is a deck house unit? Do you know what a deck house unit is? A. A unit of the ship; no?

Q. Well, in the morning you had been in the deck house, hadn't you, inside the deck house? A. Yes, sure I was.

Q. You had been there in the morning? A. Yes, the whole morning.

Q. Then you came out and you had your lunch? A. Yes, sir. 30

Q. And when the lunch hour is over there are two whistles that blow, aren't there? A. Yes.

Q. What time does the first whistle blow? A. Five minutes to.

Q. Well, it blows twenty-five minutes after twelve, doesn't it? A. Yes, sir.

Q. And the lunch hour is over at 12.30? A. Yes.

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Q. You hadn't resumed work in the afternoon when this occurrence took place, had you? You hadn't started work in the afternoon, had you?

A. Well, I just started to climb, to go to work.

Q. Now, around this deck house there was a scaffold? A. Yes, all around.

10 Q. And that scaffold extended out from the deck house approximately three or four feet? A. Yes.

Q. How high above the deck house was that scaffold? A. There was about three platforms on the scaffold.

Q. I know, but the ladder went up to the first scaffold, didn't it? A. About nine feet.

Q. And the ladder rested against the scaffold, didn't it? A. Yes.

20 Q. And can you tell us how far from the scaffold the base of the ladder was—I withdraw that.

If you dropped a perpendicular from the outside edge of the scaffold to the deck how far from the perpendicular where it hits the deck was the base of the ladder? A. The ladder is about four feet wide.

Q. So from a line where the scaffold is the ladder extends out three or four feet more, doesn't it? A. Yes.

30 Q. Where did you have your lunch that day? A. On the ground.

Q. On the ground? A. Yes.

Q. With whom did you eat lunch? A. What?

Q. You had lunch alone, didn't you? A. Yes, about twenty-five feet from the place where I working.

Q. Had the first whistle blown? A. The first whistle blow, and the second, and I start to go
40 to work.

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Q. And who was your boss? A. I don't remember. I was a new man on that job.

Q. Do you remember Eddie Ahrens? A. Eddie. I know Eddie.

Q. Do you remember this man (indicating)? A. I recognize him.

Q. Was he the boss? A. Yes.

10

Mr. Dill: He identifies Edward Ahrens.

By Mr. Dill:

Q. Now, Mr. Ahrens was around there that day? A. Yes.

Q. Were you unconscious, Mr. Carr? A. When I fell.

Q. Were you unconscious? A. Not exactly.

20

Q. Now, you say that as you went up the ladder something happened, is that right? A. Yes.

Q. You got a cramp in your leg, your left leg? A. Yes.

Q. And you couldn't keep your leg on the ladder? A. No, I lost my balance.

Q. This cramp, how did it feel? A. I feel very bad in my legs; started to twist my leg.

Q. Your leg started to twist quickly? A. Yes. I got very much pain.

30

Q. You got very much pain and twist in your leg? A. Yes.

Q. Did you get a numb feeling anywhere? A. After I had the first accident—

Q. As you were going up the ladder did you feel a numbness or pain anywhere else? A. No, sir, no.

Q. And you fell off the ladder, you say? A. Yes.

40

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Q. And what happened to you then? A. When I fell they picked me up and take me on the side.

Q. Who took you on the side? A. Some man.

Q. Do you know who he was? A. I don't know.

Q. Did you see Mr. Ahrens there? A. No.

10 Q. Wasn't he there? He was there, wasn't he?
A. I see him the whole morning, but not exactly the noon time.

Q. And where did you sit down? A. They took me on the side.

Q. When you say on the side, where do you mean on the side? A. By the step ladder. He took me from the place where I fell.

Q. How far away? A. About twenty-five foot away.

20 Q. What did you sit near? A. Some kind of a plank.

Q. Some what? A. Some kind of a plank.

Q. And you were conscious all this time? A. I remember when they sent me to the hospital.

Q I say you were conscious, you remember what went on? A. Yes.

Q. You weren't unconscious? A. No.

Q. When you fell down did you pick yourself up? A. No.

30 Q. Somebody picked you up? A. Somebody picked me up.

Q. Were you able to talk? A. Yes.

Q. Did you talk? Do you recall now whether you could talk or not? A. I didn't have nothing to say at that time.

Q. Well, did you talk? A. Yes, I could talk.

Q. Well, did you talk? A. I don't remember.

Q. You don't remember if you talked or not.
Do you remember talking to anybody at all? A.
40 I don't remember.

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Q. You couldn't talk, could you? A. I remember I talked to the doctor.

Q. What is that? A. I remember I talked to the doctor in the ambulance.

Q. With the man in the ambulance? A. Yes.

Q. Did you talk before you got into the ambulance? A. Yes. 10

Q. You did? A. Yes.

Q. Do you remember whom you talked to? A. No.

Q. Are you sure you talked? A. Of course I'm sure.

Q. What did you say? A. I'm sure.

Q. And you remember being in the St. Francis Hospital, don't you? A. Yes.

Q. Did you have any bumps or anything on your body? A. I had bumps on my head. 20

Q. Anywhere else? A. And I got some briuses on my leg.

Q. And what were the briuses like? A. Some scratches.

Q. What were they? A. Scratches.

Q. And where abouts on your leg? A. I couldn't walk.

Q. What part of your leg were these scratches on? A. Over here (indicating). 30

Mr. Dill: Indicating the anterior part of the leg between the foot and the knee.

Is that right, Mr. Spiro?

Mr. Spiro: Yes.

By Mr. Dill:

Q. You had some scratches on your leg? A. Yes.

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Q. And do you have anything else on your leg? A. No.

Q. You say you had some bumps on your head? A. On the head (indicating).

10 Q. What did you have back there? A. When I hit the planks there, the wooden beams.

Q. What did you have there on your head? A. A lump.

Q. What? A. I had a lump, a big lump.

Q. How many? A. One.

Q. One lump? A. Yes.

Q. Did you have any other scratches or bruises, or anything else? A. No, just my arm. I feel much pain in my arm too.

Q. You had pain in your arm? A. Yes.

20 Q. Did you have any bump there or anything? A. I don't know.

Q. You didn't see any? A. I couldn't see it.

Q. You didn't feel it? A. Not now.

Q. Did you at that time? A. At that time I didn't see it.

Q. You didn't feel it either, did you? A. I only feel a big pain here (indicating).

Q. But you didn't feel any bump? A. No.

Q. You didn't see any blood? A. No.

30 Q. You didn't see any cuts, did you? A. No.

Q. Did you have anything else in any other part of your body? A. No.

Q. You say you fell on your left side? A. Yes.

Q. You didn't have any bump on your knee? A. No.

Q. Nor on your hip? A. I didn't have no bump, but I feel pain in my hip (indicating).

Q. You feel pain in your left hip? A. Yes.

40 Q. You didn't have any scratch or cut or bump? A. No.

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Q. You didn't have any bump on the left side of your back? A. No.

Q. How long did Dr. Rich treat you? A. He treated me about two months.

Q. And when was that, do you recall? A. When was it?

Q. Yes. A. After they released me from Medical Center.

Q. In August, July or August, 1943? A. July.

Q. July? A. Yes.

Q. And Dr. Tyson, when did he treat you? A. After Dr. Rich.

Q. In August, 1943, or how soon after you left Dr. Rich? A. About two weeks after.

Q. And what kind of treatment did Dr. Tyson give you? A. He give me some kind of electric treatment on my leg, shoulder and my arm; and my head too he give me treatment.

Mr. Spiro: What did you say?

The Witness: And my head he give me treatment too.

By Mr. Dill:

Q. Dr. Tyson did? A. Yes.

Q. You said that you went to the hospital and remembered talking to the man in the ambulance? A. Yes.

Q. Did you tell him what happened? A. They didn't give me any question.

Q. Did you tell the man in the hospital what happened to you? A. No, I don't remember that.

Q. You didn't tell him that.

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Mr. Spiro: He says, "I don't remember that."

The Witness: I don't remember that.

By Mr. Dill:

10 Q. Do you remember whether you told him what happened or not? A. No.

Q. You don't remember whether you did? A. No.

Q. Is that right? A. I didn't remember if I talked to him in the ambulance or not.

Q. You don't remember whether you talked to him in the ambulance or not? A. I don't remember that.

20 Q. Mr. Carr, have you ever been sick before? A. No.

Q. Do you remember being taken sick once on your way in to work?

Mr. Spiro: When, please?

By Mr. Dill:

30 Q. Some time within the preceding two months while you worked at the Federal Ship; weren't you out for a couple of days because you were sick? A. Before the July time?

Q. Yes. A. I wasn't sick.

Q. You weren't sick? A. No. I hurt my leg. I had an accident in the ship.

Q. Which leg did you hurt? A. (Witness indicates.)

Mr. Dill: Referring to the left lower leg.

*Walter Carr—Petitioner—Cross**By Mr. Dill:*

Q. And what was the matter with that? A. I fell in a hole in the ship.

Q. When was that? A. It was in July maybe.

Q. July 3rd or 4th? A. Yes.

Q. And you hurt your leg? A. Yes.

10

Q. The same leg you are talking about now?
A. That is what the cramps come from where I caught my leg. I never had that cramps before.

Q. This deck unit you worked on was on the ground, wasn't it? A. First when I fall in the hole it was in the ship.

Q. The deck unit on July 10th, that was on the ground? A. On the ground, yes.

Q. You were working on the ground and not on the ship? A. No.

20

Q. The deck was a sub-assembly, wasn't it?

Mr. Spiro: I am afraid he doesn't understand you.

By Mr. Dill:

Q. You weren't on the ship on July 10th? A. Yes.

Q. You were on the ship? A. That ship was almost finished to launch. They sent me—

30

Q. On July 10th, were you on the ship? You were working on the deck house unit on July 10th? A. Yes.

Q. Was it on the ship? A. No, it was on the unit.

Q. And the unit was on the ground? A. Yes.

Q. You were just a helper, weren't you? A. Yes.

40

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Q. And you would hold things for the sheet metal workers and mechanics and pick them up?
A. I bring them all the stuff.

Q. You weren't a mechanic yourself? A. I cut the pieces.

10 Q. You weren't a mechanic, you were just a helper? A. That's right.

Mr. Dill: That is all.

Mr. Spiro: Mr. Dill, have you the record of your institution with reference to his examination in regard to his employment?

Mr. Dill: I don't have it with me.

The Court: That will be all, Mr. Carr.

Who is your next witness?

20 Mr. Spiro: If the Court please, with the exception of Dr. Grossman, that is virtually the petitioner's case. He is on his way.

(A recess was had.)

DR. MORRIS GROSSMAN, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

30 Mr. Spiro: If the Court please, with the consent of the attorney for the respondent may I introduce in evidence the hospital record of St. Francis Hospital in Jersey City.

Mr. Dill: I have no objection.

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

Dr. Morris Grossman—For Petitioner—Direct

Direct examination by Mr. Spiro:

Q. Doctor Grossman, you are a duly licensed, practising physician of this state? A. I am.

Mr. Dill: I admit the doctor's qualifications.

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By Mr. Spiro:

Q. Doctor, did you have occasion to examine professionally Mr. Walter Carr? A. I did, on two occasions: The first was on October 6, 1943, and the second was on October 28, 1944.

Q. On the first examination did he give you a history? A. He did.

Q. Would you be good enough to tell us what your findings were, and the history you received from him?

20

Mr. Dill: I object to the history.

The Court: Objection sustained. The doctor was merely an examining physician and not the treating physician, if I am correct.

Mr. Spiro: That is correct, sir.

The Court: Confine yourself merely to your findings.

30

The Witness: I found the following—

By Mr. Spiro:

Q. Pardon me. What kind of an examination did you make? A. A medical and a neurological examination.

Q. What were your findings, Doctor? A. I found the patient to be pale and plethoric. There

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was tenderness of the cervical spine and the movements of the cervical spine were limited. He walked with a cautious gait, and there was a slight limp on the left side. He showed tremors of the eyelids and both hands. The associated movements were diminished in the left arm. All his deep reflexes were moderately active, and they were definitely more active on the left than on the right side. The abdominal reflexes were more active on the right than on the left. There was some weakness of the muscles of the left arm and leg. Muscle tone and muscle irritability were increased on the left side. Sensory examination showed pin prick was felt better on the left than the right leg, but felt equally on the arms, face and trunk. Touch and temperature were not disturbed on either side, and vibration was felt better on the right than on the left ankle. Vision was 20/30 on the right and 20/50 on the left without correction. His fundi showed some arteriosclerotic changes, but were otherwise normal. His pupils were equal and reacted to light. He showed a left facial asymmetry. His ear drums were intact. There was an old healed perforation of the left drum. Hearing was approximately 20/20. The Rinne was positive and he localized incorrectly on the left side with the Webber test. His other cranial nerves were not disturbed. The cranial sensation was diminished. The pharyngeal reflex was not elicited. The tongue was moist and deviated to the left, and there was tenderness to percussion in the right occipital region of the skull. His intelligence and attention were poor, his cooperation was fair. He was emotionally very unstable and

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depressed. His memory was poor. He was apprehensive. There were no delusions, hallucinations or obsessions, and he was oriented for time, place and person.

His medical examination showed that his heart sounds were negative. They were of poor quality, no murmurs were noted, and there was some roughening of the first sound. Blood pressure was 130/90, pulse 84. Lungs and abdomen were negative. There was some limitation of motion at the left wrist and left shoulder.

Q. Doctor—— A. Those were the findings at the first examination. Now, I reexamined this petitioner on October 28, 1944, and I found these findings: There was a definite hemiplegic gait on the left side. There was clumsiness in the finer movements of the left hand. His speech was slurring. There were twitchings in the left hand and tremors in both hands, more on the left than on the right side. He showed a positive Hoffman on the left side. His associated movements were diminished in the left arm. His deep reflexes were more active on the left than they were on the right side. The abdominal reflexes were now absent on the left side. He showed an equivocal plantar response with a definite tendency to the Babinski response on the left side. The weakness was still present in the arm and leg, and the increased tone and irritability were likewise present. On the second examination I found no sensory changes of any note. The fundi showed a haziness of the right nerve, the left was okay. He showed a left central facial weakness. The corneal sensation was diminished. He had approximately 15/20 hearing on the left and 20/20 on the right. The Rhinne was positive. And he

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10 localized incorrectly with the Webber test on the right side. The tongue deviated to the left. Corneal sensation was diminished. There was generalized tenderness most marked on the left side of the skull. He was still emotionally unstable and apprehensive, and otherwise there is no change in his mental status. Blood pressure was 120/80, pulse was 84. There were peri-arthritic changes, and the movements were restricted at the left shoulder.

20 Q. What was your diagnosis, Doctor? A. The first diagnosis I made was a post-concussion syndrome and a focal lesion in the right cerebral hemisphere, a focal vascular lesion in the right hemisphere; and that remained my diagnosis after the second examination.

Q. Doctor, this focal vascular lesion of which you speak, would you say that a trauma would be a competent producing cause for such an injury?

Mr. Dill: I object.

The Court: I will allow it. Whether it will apply in this case, I don't know.

Mr. Spiro: I'll get to the next question.

30 The Court: I will allow the question to be answered.

The Witness: It could be the cause of it, yes.

By Mr. Spiro:

40 Q. Assuming, Doctor, if you will, that the man was climbing up a ladder, and when he reached the ladder—he had gotten up about four or five feet and he gets a cramp in the left leg and falls down, and falls that distance. He strikes, the left

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side of his head striking some planks or boards on the floor. Would you say that this injury which I just described would be the kind of accident that would be a competent producing cause for that injury?

Mr. Dill: I object. I think it is a leading question. 10

The Court: The question is so framed that it is leading. I think you had better leave the facts as contained in the hypothetical question as is, and reframe the last part of your question.

Assuming the facts, Doctor, contained in the hypothetical question, what in your opinion was the competent producing cause of the disability that you found? 20

The Witness: That could have been one of the competent producing causes of the disability.

The Court: What do you mean by one of the competent producing causes of the disability?

The Witness: There are others, your Honor. For instance, he could have a hemorrhage at the base of the brain, which would not be a hemorrhage within the brain substance itself. That would be a competent producing cause. He could have a thrombosis of one of the blood vessels eventually leading to a condition such as he presented. That could be another competent producing cause. 30

The Court: I will simplify it, Doctor.

Do you think this man suffered an attack before he fell or after he fell? 40

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The Witness: Your Honor, you are not simplifying it. That is the age old question. It is very difficult to say that. Nobody can answer that question, your Honor.

10 The Court: He suffered what may commonly be described as a stroke, did he not?

The Witness: I don't think so from the additional facts given to me. That was my original feeling in the matter, but from the subsequent facts given me and from the hospital record this man didn't have what we ordinarily call a stroke.

20 The Court: Was this focal vascular lesion caused by striking his head or was it due to an organic disease unrelated to the accident?

The Witness: In view of the additional facts given to me only recently this man had a sub-arachnoid hemorrhage, and this sub-arachmoid hemorrhage was a competent producing cause of the conditions that I found.

The Court: What caused the sub-arachnoid hemorrhage?

30 The Witness: That is due in all probability to a rupture of intracranical aneurysm.

The Court: Was that spontaneous, preceding the fall or was it due to the fall? What is the greater probability in view of the facts?

The Witness: In all probability I think what he was doing played a very definite part in producing this rupture of the aneurysm.

40 The Court: What was he doing that caused it?

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The Witness: He was climbing a ladder up and down as was indicated in the hypothetical question; going up and down ladders and what else he was doing in the way of physical work. Those facts were not given to me as yet.

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By Mr. Spiro:

Q. Well, Doctor, if I may supplement the question which was addressed to you a moment ago, and say to you now that the petitioner states that he was cutting tin plate, preparing the same and making such deliveries to persons who were engaged in actual manual work of sheet metal, would that confirm your views? A. That could be a competent precipitating cause of the sub-arachnoid hemorrhage, yes.

20

The Court: Where is there any such proof in this case?

Mr. Spiro: Oh, yes. As I recall the cross-examination very definitely the witness testified that he was a helper and that his work was to cut this metal and bring it, and he would bring it to the persons who were engaged in that work.

30

The Court: I think you are in error. That generally was his work, but there is no proof that is what he was doing preceding the event. All we have is that he went out for lunch and he was through with his lunch and was about to go back to the place of his work which necessitated his climbing a ladder and when about four or five feet from the ground he got this cramp in the leg and he fell off.

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Mr. Spiro: But the question was specifically what work was he doing that morning, and he testified to what he was doing. It is true that within that range of one-half an hour, or whatever the lunch period was, that he was having his lunch.

10

The Court: I will let it stand and I will check the testimony.

Mr. Spiro: I will be glad to recall the petitioner.

By Mr. Spiro:

Q. Have you made an examination of the hospital records, Doctor? A. I did review them this morning, yes.

20

Q. And from your examination of the hospital records—withdraw that.

With some degree of particularity, did the hospital records of which you have spoken a moment ago confirm the judgment which you have expressed? A. The man was brought into the hospital, he had a sudden seizure. He was brought into the hospital in a semi-conscious state. The man on lumbar puncture showed a bloody spinal fluid and subsequently became irrational and noisy and disturbing and suicidal. That is the typical sequence of a ruptured aneurysm producing a subarachnoid hemorrhage.

30

Q. Doctor, what is your prognosis in a case of this character? A. I think that same process is going to be stationary and the man is disabled fairly completely. I mean he might be able to take a position as a watchman, but he could never do any physical work of any kind or any skilled work with his hands.

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Q. And have you been able, by reason of your examination and experience to determine for us or arrive at the percentage of disability? A. I would say he is completely disabled.

Q. I am sorry, I didn't hear you. A. I would say he is completely disabled; 100 per cent disabled.

10

Mr. Spiro: You may inquire, Mr. Dill.

Cross examination by Mr. Dill:

Q. Doctor, this petitioner had a cerebral hemorrhage, didn't he? A. He had a sub-arachnoid hemorrhage.

Q. Is that one of the classes of cerebral hemorrhage? A. It is an intra-cranial hemorrhage, but it isn't what we ordinarily call a cerebral hemorrhage. The ordinary cerebral hemorrhage is a hemorrhage within the substance of the brain. And a sub-arachnoid hemorrhage is not per se inside the brain itself.

20

Q. You say a hemorrhage inside the skull? A. Yes.

Q. Close to the brain? A. Within the cranium.

Q. And its effects are very similar to those produced by a stroke? A. Oh, no, they are not. It so happens in this case that the man is left with a hemiplegia, but the largest percentage of the cases are not left with this kind of sequeli.

30

Q. But he does show the end results of a stroke from a fair part of which he has recovered, isn't that so, Doctor? A. No, I can't say that, because in my findings separated—my two examinations separated by a period of over a year there is a definite increase in the findings as

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noted in my first examination, compared to my first examination. I mean he had a definite Babinski the second time I saw him and he did not have that the first time.

10 Q. Well, going back to the hospital record, you find him better now than he was then, Doctor? A. Oh, yes.

Q. He had a paralysis of the left side at that time? A. He is better in this way: I can't evaluate what degree of paralysis he had, but he is better in this way, that the man recovered his mental faculties and his equilibrium. He is not disturbed as he was when he was in the hospital.

20 Q. And that is rather typical of cerebral hemorrhage? A. No. That is typical of a sub-arachnoid hemorrhage.

Q. It is typical of cerebral hemorrhage, too? A. Not necessarily.

Q. Regardless whether he had this hemorrhage inside or outside the brain, you thought it was in the right cerebral hemisphere? A. The signs indicated that he had interference with the right pyramidal tracts giving him a left-sided condition.

30 Q. And you diagnosed the condition as a focal vascular lesion in the right cerebral hemisphere? A. Yes.

Q. Why do you say right cerebral hemisphere? A. Because all his signs and paralysis and pathological signs were on the left side.

Q. During the course of your first examination you commented that you found tenderness on the right side of the skull? A. Yes.

Q. That was not present at the time of the second examination, was it? A. He was tender on

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the right side of the skull the first time I examined him and he had generalized tenderness mostly on the left side the second time I examined him.

Q. So that the tenderness is disassociated with any trauma, isn't it? A. Oh, I wouldn't put any particular value to it. It is a symptom. It is associated very frequently with trauma to the head. But I wouldn't give it any great evaluation from a focal point of view. 10

Q. What I mean is, Doctor, the fact that there is tenderness—I withdraw that.

Your findings with respect to tenderness would not indicate that the man—that the head was traumatized at the area of tenderness? A. Oh, no. 20

Q. The hemorrhage of the type you believe this man suffered does have a paralyzing effect on the body? A. It may have.

Q. And in this case you believe it did? A. It depends on the degree of compression that exists.

Q. And in this case you believe it did? A. Yes.

Q. The effects of such hemorrhage are rather severe and sudden, are they not? A. As indicated in this man's history and the hospital, yes.

Q. And as you indicated furthermore such a hemorrhage can occur from many things other than trauma to the head? A. Yes. 30

Q. What are the first symptoms of such a hemorrhage, Doctor? A. Which hemorrhage are you speaking about?

Q. The one you thought was present. A. In the sub-arachnoid hemorrhage, as a rule, the first symptom that is noted in a large percentage of cases is a disturbance in consciousness to a 40

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greater or lesser degree. The next very early symptom is the complaint of headache, if they don't lose consciousness completely.

10 Q. In view of the paralysis in this case, an immediate paralysis could have been one of the symptoms? A. That could be depending on the degree of compression at the base of the brain.

Q. And if the man becomes unconscious immediately, the last thing he remembers is a cramp in his leg, that might have been the beginning of hemorrhage, isn't that so? A. Yes—I mean that is a remote sort of thing.

20 Q. What is that? A. That is a remote sort of thing. There are so many things that happened besides the cramp that I would not take the cramp and say it is indicative of a beginning of the sub-arachnoid hemorrhage.

Q. I didn't ask you that, but understanding that the man was paralyzed almost immediately, that he was unconscious or semi-conscious, that he lost his power of speech, if the thing that he remembered is his leg going dead or numb, wouldn't you say that when he realized that fact that that was when the hemorrhage took place? A. No, I couldn't say that.

30 Q. Isn't that a likelihood? A. I couldn't say that. I would merely say this from my experience of twenty-five years that the early symptom is a disturbance in consciousness to a greater or lesser degree. That is what I would say definitely.

Q. And more or less simultaneously with that you would get paralysis, which would result in a one-sided paralysis? A. That may or may not be so. That depends entirely on the degree of

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pressure that takes place at the base of the brain.

The Court: From your testimony, Doctor, I assume that you are of the opinion that there was an aneurysm present preceding the accident?

10

The Witness: With reasonable probability.

The Court: The accident certainly did not cause the aneurysm?

The Witness: Oh, no.

The Court: For the record, I think you should state just what an aneurysm is. I understand it, but I think the record should be clear.

The Witness: An aneurysm is a defect of the wall of a blood vessel resulting either in a saculation of one side of the wall or a general dilatation known as a fusiform dilatation of the vessel itself. Those are the two common types of aneurysm.

20

The Court: What is generally accepted to be the cause of a rupture of such a condition as an aneurysm?

The Witness: I have had a great deal of experience in these things, your Honor. I was the first man to describe the probability of intra-cranial aneurysm twenty-seven years ago, and since then I have had an experience extending over many hundreds of cases. In the majority of these cases some form of physical stress, strain or emotional stress or strain was the precipitating cause. Many of them rupture spontaneously. There are spontaneous ruptures of intra-

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cranial aneurysms. A good percentage of them, I would say about 50 per cent. of them rupture spontaneously.

10 The Court: Would you mind explaining the mechanism of fear, fright, emotion or strain or effort bringing about the climax?

The Witness: Yes. Any cause that produces an increase in the tension in the blood vessels and physical stress, excitement, emotional excitement, and so forth, are definite causes of an increase in the pressure and is apt to produce a leaking or a rupture of an aneurysm.

20 The Court: Would that require a great amount of effort, Doctor, or a moderate or a slight amount of effort to bring about a rupture of an aneurysm?

30 The Witness: That is an entirely independent situation, your Honor. That would vary with every individual, depending on the condition of the vessel wall at the time of this stress. One couldn't possibly generalize on that because we don't see these aneurysms. We know they exist because we find them in these patients after autopsies are performed; and what the condition of the wall, of that particular vessel is at the time of the rupture is purely a speculative thing. You can't possibly say how dense the wall is at the time of the rupture or how thin it is. It is impossible almost to foretell that.

40 The Court: And how are you able to ascertain with any reasonable degree of certainty or probability that the rupture is due

Dr. Morris Grossman—For Petitioner—Cross

to the natural progression of the underlying condition or spontaneous, shall we say, or due to the end result of effort or strain?

The Witness: There is no way you can tell except that spontaneous hemorrhages occur at times when stress or strain is not present. But there is no way you can foretell that. And you can't foretell the degree of effort or strain necessary to rupture a given aneurysm because you don't know the condition of that wall. 10

The Court: Where the aneurysm is ruptured by reason of a condition unrelated to strain, effort or emotional stress, are there certain preceding factors?

The Witness: None at all. They may be in a one hundred per cent well-being and for one reason or another these aneurysms rupture due to the intra-cranial, intravascular tension, and nobody can foretell when it will happen. 20

The Court: Don't they sometimes have headaches and a feeling of discomfort?

The Witness: They may not have a single complaint, your Honor. And the only reason that we have to assume that they had aneurysms is because we have seen this particular clinical syndrome which I have described, this suddenness with explosive effects of all kinds, and then we find on post-mortem rupture of an aneurysm with hemorrhage in the sub-arachnoid space. 30

The Court: And you don't find it on autopsy sometimes?

The Witness: You never miss a sub-arachnoid hemorrhage but I have had occa- 40

Dr. Morris Grossman—For Petitioner—Cross

sions where we couldn't find the aneurysm at the point where the bleeding took place, but the hemorrhage is always there.

The Court: But the area is sometimes disrupted?

10 The Witness: Yes, but the point of rupture is often not localized.

The Court: Thank you, Doctor.

By Mr. Dill:

Q. Doctor, did you notice any unusual condition in the left ear? A. I did find on my first examination that he had a sclerosed ear. I think I do have a note here. Yes, I reexamined this patient with Doctor Blumberg here in Newark, and at that time Doctor Blumberg showed that there was an active discharge of pus from the left ear.

20 Q. And that was on October 30, 1944? A. Whenever that date was.

Q. Two days after your second examination. A. No, I didn't see it then, but I found it here with Doctor Blumberg.

Q. Well, it hadn't developed in two days, had it. A. It could. The man had an old middle ear condition and it could have ruptured in twenty-four or forty-eight hours and had an acute exacerbation of that.

The Court: Let's clear up another point. Independent of that ear condition, what is your opinion as to the extent of this permanent disability?

40 The Witness: Independent of that I would say that the man was completely disabled.

Dr. Morris Grossman—For Petitioner—Cross

The Court: Due to the effects——

The Witness: Due to his sub-arachnoid hemorrhage.

That will be all, Doctor.

Mr. Dill: Just a minute, Doctor.

By Mr. Dill:

10

Q. Doctor, you didn't know anything about the work this man was doing prior to the time that he collapsed, did you? I mean are you basing some of your opinion on the history that the man gave you? A. No, I am basing my opinion entirely on what happened to this man, and that is the only thing I am basing my opinion on.

Q. Then you didn't know what he was doing prior to the time he collapsed, did you, except what was contained in the hypothetical question? A. Well, he told me he was——

20

Q. Just a minute, Doctor. A. Excuse me. You asked me what I know, and I am trying to tell you.

Q. I say you didn't base your opinion on anything except what was contained in the hypothetical question, did you? A. No, I didn't.

Q. So that you don't know anything about what he was doing prior to the time he collapsed? A. No, I do not.

30

Q. And you rest it solely on that fact, do you, Doctor? A. That's right.

Mr. Dill: That is all, Doctor.

Mr. Spiro: That is all, Doctor. Thank you very much.

Mr. Spiro: If your Honor wishes me I will be glad to call Mr. Carr back so that I can clarify the issue.

40

The Court: All right.

Walter Carr—Petitioner—Recalled—Direct

WALTER CARR, the petitioner, resumed the stand, having been previously sworn, testified further as follows:

10 The Court: Don't have him repeat his testimony. Just develop what he did before he went out to lunch.

Direct examination (continued) by Mr. Spiro:

Q. Mr. Carr, tell the Court exactly what work you were doing before you went to lunch that morning? A. Well, we were working on some kind of pieces on the bottom.

20 Q. Take your time. What were you doing that morning before the accident? What kind of work did you do? A. I was a helper.

Q. What were you doing as a helper? A. I bring all kinds of pieces of material in and out.

Q. What kind of material? A. Pieces of steel.

Q. Was it heavy or light? A. It wasn't heavy; about two foot long.

Q. And—— A. Three inches wide.

Q. Did you do that all morning? A. Yes.

30 Q. Where did you get the steel from? A. From outside.

Q. How far did you walk to the place to deliver it? A. Oh, about fifty foot.

Q. About fifty foot? A. Yes.

Q. What time did you start work that morning? A. 8:30.

Q. And you continued to do that all morning, is that right? A. Yes, sir.

Q. Now, did you climb any ladders that morning? A. Yes.

40

Walter Carr—Petitioner—Recalled—Direct

Q. How many, do you remember? Did you go up and down the same ladder or different ladders? A. The same.

Q. How many times did you go up and down, have you any idea? A. Before?

Q. Before the accident. A. I make about eight or ten trips. 10

Q. How far did you climb and how far did you go down? Was it a high ladder? A. The first ladder was about seven, eight, nine feet.

Q. And how about the second ladder before you went to lunch? A. The second ladder was about seven foot.

Q. And you say you went down and up about how many times? A. About eight or ten times.

Q. Just another question. 20

Q. When you fell from this ladder, when you went back to work you said you fell on some planks or boards? A. Yes.

Q. Where were the planks or the boards? A. Near the step ladder.

Q. Near the step ladder? A. Yes.

The Court: We have gone into that.

Cross examine.

Mr. Spiro: Just another question. 30

By Mr. Spiro:

Q. Were you carrying anything when you went up and down the ladder? A. No.

Mr. Spiro: That is all.

*Walter Carr—Petitioner—Recalled—Cross
Edward Ahrens—For Respondent—Direct*

Cross examination (continued) by Mr. Dill:

Q. Mr. Carr, you started lunch at 12 o'clock?

A. Yes, sir.

10 Q. And you ate your lunch? A. Yes.

Q. And you sat down in the open somewhere?
A. Yes.

Q. And it was a nice, clear bright day? A.
Sure.

Q. The weather was good? A. Yes.

Q. You felt all right that morning? A. Per-
fect.

Mr. Dill: That is all.

The Court: We will adjourn for lunch.

20

AFTERNOON SESSION.

EDWARD AHRENS, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination by Mr. Dill:

30 Q. Mr. Ahrens, you are employed by the Federal Ship Building and Dry Dock Company, are you not? A. Yes.

Q. Do you work at the Port Newark Plant?
A. I do.

Q. How long have you worked there? A. I guess about since August 1942, I think. I think it was 1942.

Q. What position do you have? A. Now I am sub-foreman.

40

Edward Ahrens—For Respondent—Direct

Q. And do you recall what position you had in July 1943? A. I think it was lead man.

Q. What department are you in? A. 89 Sheet Metal.

Q. Did you know a man by the name of Walter Carr? A. Yes, I had him working for me.

10

Q. He worked under your supervision? A. That's right.

Q. Do you recall the day that Mr. Carr was taken to the hospital? A. I do.

Q. Where were you working on that day, Mr. Ahrens? A. I had some men on the deck house.

Q. When you say deck house, will you describe what a deck house is, and where this particular deck house was? A. It is the forward part of the deck from the main deck up. It consists of a main deck house and super deck and navigation bridge.

20

Q. Where was this deck house? A. On the ground.

Q. In other words, you assemble it and then move it to the ship, is that correct? A. Yes. The ship fitters put the deck house together and we put bulkheads in.

Q. What was around this deckhouse? A. The staging.

30

Q. By staging you mean scaffolding, is that right? A. That's right, the scaffolding.

Q. Can you describe how that was set up, Mr. Ahrens? A. That was on the first level from the ground to the ship deck would be one scaffold and from there to the navigation would be another scaffold and the bottom one would be about seven or eight feet off the ground.

Q. In other words the first scaffold would be seven or eight feet off the ground? A. Yes.

40

Edward Ahrens—For Respondent—Direct

Q. How wide was that scaffold? A. About three or four planks. That would be about forty-eight inches or more.

10 Q. In other words, it would be about four feet, the outside of the scaffolding would be about four feet from the deckhouse, is that correct? A. Yes.

Q. Was there a ladder that went from the staging to that first—from the ground to the staging? A. Yes, there was a ladder.

Q. And how far was the base of the ladder from the base of the deck house? A. I'd say about seven or eight feet.

Q. Did this deck house set on the ground all away around? A. No, it was a little off the ground.

20 Q. What did it set on? A. On what we call angle iron braces.

Q. What was the purpose of having it set off the ground? A. For leveling the house off.

Q. Was there an open area under the deck house? A. Yes, there was an open area under the deck house.

Q. Now, do you remember the lunch period on that day when Mr. Carr was taken to the hospital? A. Yes, I do.

30 Q. Do you recall seeing Mr. Carr? A. I do.

Q. As the lunch hour drew to a close where did you see him? A. The first I saw him was after the twenty-five after twelve whistle on the ground.

Q. How many whistles are there that blow? A. Two whistles.

Q. What time does the first one blow? A. Twenty-five after and 12.30.

40 Q. And what time do you have to resume work? A. You resume 12.30.

Edward Ahrens—For Respondent—Direct

Q. And did you hear the twenty-five after whistle blow? A. I did.

Q. And did you see Mr. Carr? A. I did not take particular notice of him, no, not at that time.

Q. Well, did you see him after the twenty-five whistle? A. Yes. 10

Q. How long after that whistle blew? A. A few minutes after; between 12.25 and 12.30.

Q. Where was he? Where did you see Mr. Carr? A. When I first saw him I noticed him on the ground.

Q. Where on the ground? A. Laying up against the bulkhead against the deck house unit.

Q. Where were his head and feet? A. One leg like was under the back of the deck house and the rest of them was out from the deck house. 20

Q. How far was he from the base of the ladder that went from the ground to the first staging? A. About seven foot.

Q. And when you saw him what did you do? A. There were a few men there and we sort of ran over to him and picked him up.

Q. Did you get there as soon as anybody? A. 30 About as soon as anybody else.

Q. And did you help pick him up? A. I did. I think I did.

Q. Where did you take him? A. We sort of walked him over about fifty feet to some plank-ing and set him on there.

Q. Did you men assist him? A. Yes, I had to assist him.

Q. Did he talk? A. No. 40

Edward Ahrens—For Respondent—Cross

Q. Could he talk? A. I don't think he could. He didn't seem to say anything.

Q. Did you see any marks or scars on his body? A. No, sir, I didn't notice any.

Q. Did somebody send for the ambulance? A. Yes, somebody did.

10 Q. Do you recall what kind of a day it was? A. A clear day and warm.

Q. Do the men eat their lunch around that neighborhood? A. Yes, they sit all around that area.

The Court: How much time was allowed for the lunch hour?

The Witness: That is actually twenty-five minutes; from 12 to 12.25, and they have
20 five minutes to go back to work.

By Mr. Dill:

Q. They resume their work at 12.30? A. They resume their work at 12.30. It is like a warning whistle, the twenty-five after.

Mr. Dill: That is all.

30 *Cross examination by Mr. Spiro:*

Q. Mr. Ahrens, what work did Mr. Carr do under your supervision? What was he supposed to do? A. To assist the mechanic.

Q. And what did he have to do, carry materials to the mechanic? A. Some materials, but anything heavy it would be done with two men.

Q. Did he help? A. He had to help, yes.

Q. In other words, the heavy material was carried by Carr and somebody else? A. That's
40 right.

Edward Ahrens—For Respondent—Cross

Q. And in that capacity was he obliged to do any cutting of any material? A. Not very much. He is not supposed to use tools on the job as a helper.

Q. In the carrying of these materials, whether by yourself or in association with somebody else, did he go up and down ladders? A. No, it was low enough, the scaffolding, to be passed up in between in most cases. Unless it was small material which could be brought up by hand. 10

Q. The small material, was that part of this function, to carry it up by hand? A. Yes.

Q. And on the morning of this accident he did do that kind of work, is that correct? A. He may have, yes.

Q. The first time you saw Carr was after the men were ordered back to work at 12.25? A. After the whistle, yes. 20

Q. The 12:25, that is the signal for the men to return to work? A. That is the signal to go back, to get started.

Q. You say the first you saw him was on the ground? A. That is right.

Q. You don't know what happened before that time? A. No, I don't.

Q. You made no observation of him? A. No. 30

Q. Now, Mr. Ahrens, give us your best recollection with respect to the time. Was it, let's say, immediately before the 12.30 whistle that you saw him? A. No, I would say just about in between.

Q. About three minutes after the first whistle? A. Maybe three minutes after the first whistle or so.

Q. That is the time you saw him on the ground? A. That is right. 40

Edward Ahrens—For Respondent—Cross

Q. Now, you said something about his being a few feet from the ladder? A. Yes.

The Court: He said seven feet.

By Mr. Spiro:

10

Q. Now, this ladder went from the ground to the first staging or first planking, is that correct? A. That is correct.

Q. Well, now, from the side of this deck house to the base of the ladder, how far would you say that was? A. I would say about seven or eight foot.

20

Q. So that you saw him, am I to understand, about seven or eight feet from the base of the scaffold? A. From the base of the ladder.

Q. Now, in and around that ladder and in and around the deck house there were planks and boards piled up? A. No, there was nothing piled up underneath any of the scaffolding. The only thing that is there is mostly uprights, to hold the scaffolding.

Q. What do you mean by the uprights? A. That would be——

30

The Court: That is the support of the scaffold.

Mr. Dill: The two by fours.

The Witness: The two by fours.

By Mr. Spiro:

Q. Was there any other material lying around there? A. Not around the immediate ladder.

40

Q. How about near the scaffold—near the deck house? A. Near the deck house, no; they are

Edward Ahrens—For Respondent—Redirect

not supposed to pile anything underneath any scaffolding.

Q. Well, was there any? A. No, there wasn't any that I noticed.

Q. You are sure of that? A. I wouldn't say positive, no.

10

The Court: Were there any wooden beams close to the ladder?

The Witness: Not that I noticed, no, sir.

By Mr. Spiro:

Q. You say that when you noticed Mr. Carr on the ground there someone besides yourself assisted him and sat him down at some planks? A. That's right.

20

Q. How far from the place of the accident were these planks you are talking about? A. I guess almost fifty foot.

Q. Now, I understood you to say he was at that time as you saw him in a semi-conscious condition? A. That's right.

Q. Now, when you saw Mr. Carr was he anywhere near those wooden uprights of which you talked? A. Yes, he was laying next to the wooden uprights.

30

Mr. Spiro: That is all.

Redirect examination by Mr. Dill:

Q. Do you know who helped you take him from there? A. No, I don't. There was quite a few men around and I couldn't say who was there at the time.

40

Mr. Dill: That is all.

Colloquy

The Court: Do you rest for the day?

Mr. Dill: That is all for today.

(The hearing was adjourned to a later date.)

10

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

ROBERT A. BIRCHMAN,
Certified Shorthand Reporter.

20

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken before me at the time, place and date hereinbefore set forth.

Deputy Compensation Commissioner.

30

40

Transcript of Testimony

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

 O-O

WALTER CARR,

10

Petitioner,

vs.

FEDERAL SHIPBUILDING & DRY DOCK Co.,
 Respondent.

 O-O

January 15, 1945.

Before:

20

HONORABLE HARRY S. MEDINETS,
Deputy Compensation Commissioner.

Appearances:

JACOB S. SPIRO, Esq., for the Petitioner.

WILLIAM B. DILL, JR., Esq., for the Respond-
 ent (STRYKER, TAMS & HORNER, Esqs.).

 30

Mr. Dill: I advised the petitioner's coun-
 sel, your Honor, that we have one witness.
 The other witness is Dr. Blumberg, with
 whom I communicated last week. He is in
 Perth Amboy but he will be here this morn-
 ing; he said he can't be here before 12
 o'clock. Counsel said he has to leave at
 11.30. I am agreeable to put the case over
 if he wants it to go over.

40

Joseph Dainoski—For Respondent—Direct

Mr. Spiro: I am hopeful that the doctor may be here before then, but I do have to get back before 11.30. I would like to make some disposition of this case.

10 The Court: You are no more anxious than I am, I assure you. I don't look with favor upon the trial of these cases on the installment plan. What do you gentlemen want to do under the circumstances?

Mr. Spiro: I would suggest that we go ahead with this witness.

Mr. Dill: I would like to put this witness on. I wanted to make your Honor aware of that.

20 Mr. Spiro: How many more witnesses do you have? Are there any other witnesses, factual ones?

Mr. Dill: No, no more factual witnesses.

JOSEPH DAINOSKI, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

30 *Direct examination by Mr. Dill:*

Q. Mr. Dainoski, you are employed at the Federal Shipbuilding Company, are you not? A. Yes, sir.

Q. You work at the Port Newark plant? A. Yes, sir.

Q. Did you work there in July, 1943? A. Yes, sir.

40 Q. What position do you have, Mr. Dainoski?
A. First Aid attendant, sir.

Joseph Dainoski—For Respondent—Direct

Q. And you are a nurse? A. Yes, sir.

Q. Have you had nurse's training? A. Yes, sir.

Q. Graduated from where? A. St. Joseph's Hospital, Reading, Pennsylvania.

Q. To be exact, did you work there on July 10, 1943? A. Yes, sir. 10

Q. Is this hospital card in your hand writing, Mr. Dainoski? A. Yes, sir.

Q. That bears what date? A. July 10, 1943.

Q. Refers to what individual? A. Walter Carr.

Q. And did you answer an ambulance call on that day? A. Yes, sir.

Q. Did you pick up Walter Carr? A. Yes, sir.

Q. Do you recall where you picked him up? A. According to the records, assembly area. 20

Q. Assembly area? A. Yes, sir.

Q. Where did you take him? A. I took him to St. Francis Hospital, in Jersey City.

Q. Did you go there with him on the ambulance? A. Yes, sir.

Q. What was his condition, Mr. Dainoski? A. You mean his condition when?

Q. When you took him to the hospital or in the ambulance, or when you picked him up; at any time during that course of period of time; you may refer to the records to refresh your recollection? A. He complained of tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm. 30

Q. What else was there? A. He was drooling from the left side of his mouth.

Q. Did you make a cursory examination of him? A. When I arrived at the scene of the accident I looked him over.

Q. Did you look over his head? A. Yes, sir. 40

Joseph Dainoski—For Respondent—Cross

Q. Did you find—were there any marks, bruises, scratches or bumps or anything else on the petitioner's head? A. No, sir.

Q. Then you took him down to St. Francis Hospital? A. Yes, sir.

10 Q. Do you recall whether he had difficulty in talking, communicating with you? A. He did, sir, yes, sir.

Mr. Dill: You may cross examine.

Cross examination by Mr. Spiro:

Q. Mr. Dainoski, when you first saw Mr. Carr, where did you see him? A. Where did I see him?

20 Q. Yes. A. Well, as I said, the north area, assembly area. They call that the north area.

Q. At that time was there anyone with him? A. I don't recall, sir.

Q. What was his position when you first saw him? A. According to the card, he was in a sitting position. I don't recall.

Q. You have no definite recollection except by refreshing it from the card with respect to this incident? A. Yes, sir.

30 Q. May I see that card? A. Yes, sir.

Q. When you first saw him, did you or did you not speak with him? A. I tried to speak to him, yes.

Q. Did he make any response to any inquiries? A. The only thing I could get out of him was the tingling sensation in his fingers of the right hand.

40 Q. Now, you removed him to St. Francis Hospital. A. Yes, sir.

Joseph Dainoski—For Respondent—Cross

Q. Is that in one of the hospital ambulances or one of your own? A. The company ambulance, sir.

Q. When did you make this cursory examination of which you have spoken? A. When I arrived at the scene of the accident.

Q. Did you ask Mr. Carr what happened before you made your examination? A. I asked the man, yes, sir. I didn't get much response from him at all. 10

Q. Did you get any? A. I got some response.

Q. Was he conscious, semi-conscious? A. He was sitting up.

Q. I am sorry, sir. A. I said he was in a sitting position when I arrived there.

Q. Well, was he conscious or semi-conscious? A. He was semi-conscious, I would say. 20

Q. Where did you get your responses as indicated on this card, no complaint of pain? A. I don't remember, sir.

Q. Is that in your hand writing? A. Yes, sir.

Q. What right did you have to put on there "no complaint of pain"? A. Well, the man may have told me. I don't remember, sir.

Q. Were you present when he was examined at St. Francis Hospital, or did you leave when you arrived and brought him into the hospital to the admission ward? A. I brought him into the hospital and I left. 30

Q. You were not present when the examination took place? A. No, sir.

Q. How long was your cursory examination in time? A. I don't remember the exact time, sir.

Q. Did you remove any of his clothing? A. No, sir.

Q. Did you remove his hat? A. I don't recall that he had a hat on, sir. 40

Joseph Dainoski—For Respondent—Cross

Q. How were you able to determine there were no marks on his body if you didn't remove his clothing?

10 Mr. Dill: I object. That wasn't the witness' testimony, your Honor.

The Court: That is right. He only testified to the absence of marks on his head.

By Mr. Spiro:

Q. Did you make an examination of his body at all? A. Only of his head.

Q. You don't know whether he had any marks on his legs or his arms or anything else? A. No, sir.

20 Q. Now, you have said that you had no definite independent recollection of what happened there or this man's injury except by looking at this card. Is that correct? A. Yes, sir.

Q. I want you to show me on this card where it says anything about no injury to the head. A. I don't see anything on here about that, sir.

Q. Thus you cannot positively say at this time that there was no injury to the head, isn't that correct, sir? A. Yes, sir.

30 Q. Now, on this card you have a reference to difficulty in moving the left leg. Did you test this man's ability to move his left leg or did he tell you so? A. I don't remember that, sir.

Q. Well, will you be good enough to tell us what do you personally remember with regard to this man and this particular incident? A. All I remember is what I read on the card there.

Q. Nothing else? A. No, sir.

Joseph Dainoski—For Respondent—Cross

The Court: Suppose you lower your voice a little bit.

Mr. Spiro: I am sorry.

By Mr. Spiro:

Q. Well, now, Mr. Dainoski, would you be good enough to tell this Court whether there is anything on this card which would indicate how you determined that he had difficulty in moving his left leg? A. I don't understand the question, sir. 10

The Court: Just a moment. We will have the stenographer read the question.

(The reporter read the last question as follows: "Q. Well, now, Mr. Dainoski, would you be good enough to tell this Court whether there is anything on this card which would indicate how you determined that he had difficulty in moving his left leg?") 20

The Witness: The only thing I can go by is the notation on here. I stated difficulty in moving his arm and his leg there.

By Mr. Spiro:

Q. Mr. Dainoski, when did you complete this card, at the scene of the accident or after your return from the hospital? A. When? 30

Q. Yes. A. After my return from the hospital, sir.

Mr. Spiro: That is all.

Mr. Dill: I offer this card in evidence, sir.

The Court: It may be marked. 40

Joseph Dainoski—For Respondent—Cross

Is there anything more that you have, Mr. Spiro?

Mr. Spiro: There is one question I wanted to ask.

10 *By Mr. Spiro:*

Q. When you got to the scene of this accident, you say he was sitting up. Will you describe the condition in that particular spot? Where did you find him? A. I don't recall, sir.

Q. You don't remember? A. No, sir.

Mr. Spiro: That is all.

20 Mr. Dill: May I have the card marked in evidence?

(The article referred to was received in evidence and marked R-1, January 15, 1945.)

Mr. Dill: I think that is all.

(Witness excused.)

Mr. Dill: I have the hospital record which I believe the petitioner offered in evidence.

30 Mr. Spiro: That has been in evidence. Yes.

The Court: When can we finish this case?

Mr. Spiro: May I know whether you have presently produced those records which you said you would produce?

Mr. Dill: What records were they?

Mr. Spiro: They were the medical and physical examination of the report of Walter Carr.

40 Mr. Dill: Yes. I have the physical examination record of Walter Carr. The employment, you mean?

Colloquy

Mr. Spiro: Yes. May I see that a minute?

Mr. Dill: Yes, surely. No objection.

Mr. Spiro: May I at this time respectfully offer in evidence the record of Walter Carr, an employee of the Federal Shipbuilding and Dry Dock Company, which appears to bear the date of April 30, 1943. 10

The Court: Is there any objection?

Mr. Dill: No objection.

The Court: That will be marked P-1 as of this date.

(The article referred to was received in evidence and marked P-1, January 15, 1945.)

(Discussion off the record.)

(Whereupon an adjournment was taken to a future date.) 20

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

JACOB BAER,
Certified Shorthand Reporter. 30

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken before me at the time, place and date hereinbefore set forth.

Deputy Compensation Commissioner.

Dr. Jack Blumberg—For Petitioner—Direct
 NEW JERSEY DEPARTMENT OF LABOR,
 WORKMEN'S COMPENSATION BUREAU,
 NEWARK, ESSEX COUNTY DISTRICT.

10

WALTER CARR,
Petitioner,
vs.

FEDERAL SHIPBUILDING & DRY DOCK COMPANY,
Respondent.

January 29, 1945.

20 Before:

HONORABLE HARRY MEDINETS,
Deputy Compensation Commissioner.

Appearances:

JACOB S. SPIRO, Esq., for the Petitioner.

WILLIAM B. DILL, Esq., for the Respondent.

30

DR. JACK BLUMBERG, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Dill:

Q. Doctor, you are a licensed, practicing physician?

40

Dr. Jack Blumberg—For Petitioner—Direct

Mr. Spiro: I will admit the doctor's qualifications.

Mr. Dill: As a neurologist?

Mr. Spiro: Yes, certainly.

By Mr. Dill:

10

Q. Doctor, do you specialize in any particular field of medicine? A. Injuries and infections of the head.

Q. Doctor, did you make an examination of the petitioner, Walter Carr? A. Yes.

Q. Or did you make more than one examination? A. I made two examinations: One on April 13, 1944, and the second on October 30, 1944.

Q. Now, at the time of your first examination did you get a history from the petitioner, Doctor? A. Yes.

20

Q. Did the petitioner tell you that he had injured his head? A. Well, he didn't mention that he had injured his head. He mentioned the part that he injured as his left shoulder.

Q. And then what were your findings at the time of the examination, Doctor? A. There was present some weakness on the left side of the face. The mouth was drawn to the right. There was some eversion of the right eye. This was due to a paresis of the right internal rectus muscle.

30

Q. And where is that muscle, Doctor? A. On the inner side of the eye towards the nose. It is the muscle which pulls the eye inward. The pupils were dilated and reacted sluggishly to light. There was a constriction in the visual field of the temporal side of the left eye. In the left ear or the left side of the head, with specific

40

Dr. Jack Blumberg—For Petitioner—Direct

reference to the left ear, there was a severe chronic purulent otitis media. I feel positive that this man had a cholesteatoma.

10 Q. What is a cholesteatoma? A. A cholesteatoma is a collection of debris and epithelial tissue due to a chronic infection, and it is almost the cross-roads between an inflammatory reaction and a new growth. It has the characteristics of both. And I feel certain that this patient had it.

Q. Where does it appear, in what part of the body? A. In the middle ear extending on to the adjacent parts. Sometimes the dural plate, sometimes the labyrinth.

20 Q. And is it characteristic or characterized by the purulent discharge which you found at the time of your examination? A. It is characterized not only by the purulent discharge but by a peculiar foul putrid acrid odor. The tongue reflexes on the left side were exaggerated three plus, on the right side they were two plus. There was a definite ataxia in the left upper extremity. There was no spontaneous nystagmus, no spontaneous past pointing. There was no Romberg. Those were the findings at the time of that examination.

30 Q. And what were the findings at the time of your second examination? A. The findings were the same.

Q. What was the condition of the ear at that time? A. The same.

Q. And did you make a diagnosis? A. Yes.

Q. What was it? A. I felt that this man had a chronic purulent otitis media, a cholesteatoma, and probably a brain abscess.

Dr. Jack Blumberg—For Petitioner—Direct

Q. The difficulty that this petitioner experienced was in the use of the left side of his body principally, wasn't it— A. Yes.

Q. (continuing) —and was caused by some brain condition, was it not?

Mr. Spiro: I object to the form of the question. 10

The Court: Suppose we let the doctor answer the question?

Mr. Dill: I am sorry.

By Mr. Dill:

Q. In your opinion do your findings indicate some difficulty in the use of the left side of the body? A. That is true. 20

Mr. Spiro: I object to that.

The Court: I will allow it.

By Mr. Dill:

Q. What is the fundamental or basic cause of the difficulty in the use of those parts of his body? A. This man has a definite brain condition causing the difficulty. 30

Q. Are they produced by any traumas to the arms, legs or back, or what not? A. No—

Mr. Spiro: I object to the form of the question.

The Court: I will allow it.

The Witness: No.

Mr. Spiro: Exception.

The Witness: The difficulty that the man experiences or to put it in another way, the signs and symptoms that I elicited and man- 40

Dr. Jack Blumberg—For Petitioner—Direct

ifested in certain parts of the body, I will say the underlying cause, of course, is not in the specific parts, but within the brain. I that will clear up that situation.

10 *By Mr. Dill:*

Q. Did you find any marks or scars on his head? A. No, at the time of my examination there were no scars.

Q. Doctor, what is an aneurysm? A. An aneurysm is a dilatation of the blood vessel, which can best be described to the lay person as the bulge that is sometimes seen in an inner tube.

20 Q. Does it ever rupture spontaneously? A. The extreme majority of aneurysms rupture spontaneously.

Q. Have you any idea about how many rupture spontaneously? A. About ninety percent.

Q. Would the condition which you found in the petitioner's ear account for the condition which you found present at the time of your examination? A. It certainly would.

30 Q. Will you explain how and why, Doctor? A. Because this man, in my opinion, has an extension of the infection into the temporo-sphenoidal lobe in the brain localized, and I think the irritative effects of that extension into the brain is what is causing his present symptoms.

Q. Was there anything in the course of your examination to indicate that a trauma to the head had caused brain injury which resulted in the condition which you found? A. Nothing at the time of my examination whereby I could draw that conclusion.

40

Mr. Dill: Cross examine.

Dr. Jack Blumberg—For Petitioner—Cross

Cross examination by Mr. Spiro:

Q. Dr. Blumberg, you were asked by counsel for the respondent with respect to the man's history. You indicated that all he told you was something happened to his left shoulder, is that correct? A. That is incorrect.

10

Q. What did he tell you, please? A. The man told me on July 10, 1943, he fell off a step ladder. He doesn't know how he fell. He injured his left shoulder. He doesn't know whether or not he was unconscious. He was taken to St. Francis Hospital.

Q. Anything else, sir? A. That's all the man said, except that he described the length of stay in the hospital and what he did after he went home. Then he gave a history of another occurrence, namely, on or about July 3rd—

20

Q. I am inviting your attention to this accident. Is that all that he said at that time? A. What time?

Q. When you made inquiry with respect to this accident of July 10th, what you just told us a moment ago is what he said? A. I have completed what he said as regards the July 10, 1943, occurrence.

30

Q. Thank you, sir. Now, did you make any examination of his left shoulder, Doctor? A. No, I did not examine his left shoulder specifically for any orthopedic condition.

Q. And did you make any examination of his head? A. Yes.

Q. Am I correct, Doctor, in determining from the testimony you have just given that you are asserting as a positive fact that this brain accident as you described it is specifically caused by an ear condition?

40

Dr. Jack Blumberg—For Petitioner—Cross

Mr. Dill: I object. I don't think the doctor said anything about a brain accident. I think the term may be such that it might be confusing in the record.

10 Mr. Spiro: That is what he said, a brain accident.

The Court: I will allow the question. We are dealing with an expert witness who is competent to analyze the question.

The Witness: I haven't used the phrase you have used, and I think your question is, am I making a statement almost categorically concerning a brain accident. I never used those two words yet. I don't think it is intentional, but you are putting words in my mouth. I have described a brain condition.

20 Mr. Spiro: Suppose I reframe the question. With all due deference those are the words you used.

The Witness: It is very simple. The stenographer has the record and he can tell us. I can guarantee you I never used the words "brain accident."

The Court: Reframe the question.

30 *By Mr. Spiro:*

Q. Doctor, the condition which you described with respect to this man's brain, would you say positively it is caused by what you have described to us as an ear condition? A. I would say insofar as the frailty of humanity is concerned I'll make it as a definite statement realizing that a doctor is never absolute in his remarks, diagnoses or statements. I am not infallible. I make too many mistakes.

40

Dr. Jack Blumberg—For Petitioner—Cross

Q. Then may I infer you may be mistaken now? A. I may be; the same as every other human being that ever lived and every doctor that ever lived.

Q. I respectfully ask you to answer the question, sir. A. That is the best way the question can be answered, in my opinion. 10

The Court: The question is fully answered. The doctor has expressed his opinion and he is frank enough to admit that any professional opinion is not infallible.

By Mr. Spiro:

Q. Doctor, you never saw Mr. Carr before April 13, 1944? A. That is correct. 20

Q. Now, Doctor, you testified when Mr. Carr called at your office he indicated an injury to the shoulder, and nothing else. A. That is correct.

Q. What prompted you to examine this man's head? A. The man was sent to me for a neurological examination. I wouldn't make a neurological examination unless I examined his head, number one, and number two, I don't know of any patient I have examined in the last twenty years that I haven't examined his head. They are not examined by me for shoulders. I don't do orthopedic work. And that is why I examined his head which is in the neurological field. 30

Q. By whom was he sent to you for a neurological examination? A. He was sent to be my Messrs. Stryker, Tams & Horner; at that time Messrs. Lindabury, Depue and Faulks.

Q. What specific inquiries did you address to him to ascertain whether a neurological exam- 40

Dr. Jack Blumberg—For Petitioner—Cross

ination was necessary? A. None; in answer to that question.

10 Q. Did you ask him anything about his previous history with respect to warranting a neurological examination? A. I asked this man no questions whatsoever pertaining to the warranting or the necessity or indication for a neurological examination. I had nothing to ask this man why a neurological examination was warranted or necessitated. He was sent to me for that, and so I did it.

20 Q. Did you receive a history from the attorneys, whose names you just mentioned, with reference to the accident before you made this examination? A. No, not before, but I did afterwards.

Q. When did you receive the history? A. Oh, I received it, I think on three different occasions. As a matter of fact, there is more to it than that. It was at my suggestion that this man was sent to another physician, at my request for a check up.

30 Q. Doctor, I'll go back. When did you receive a history of this man's condition from the attorneys you just mentioned? A. I can't tell you that. I don't know.

Q. Do you have a record of it? A. No, I don't know. I have seen what you might call the respondent's file which would contain their idea of what took place on a few occasions. But when I couldn't tell you.

Q. The report which you furnished, was that before or after your examination of the respondent's file? A. The report was after the examina-

Dr. Jack Blumberg—For Petitioner—Cross

tion of the respondent's file. The examination was before.

Q. I say the report which you rendered with respect to your findings was subsequent to the examination of the respondent's file? A. You are correct, yes.

Q. Now, Doctor, you have described an aneurysm as what you in lay language describe as a bulge in an inner tube, is that correct? A. Well, that was about as good a simile as I could give so that it would be properly appraised by the lay mind.

Q. Is such condition usual in a man's mind? A. Yes and no. Such condition is not usual in any person's mind. It is an abnormal condition. An abnormal condition isn't usual in brains.

Q. And when does that occur? A. Of course, you know the question can't be answered.

Q. Under what circumstances can you determine if you are able when an aneurysm exists? A. In many instances you can never determine it until death or some vascular examination takes place.

Q. And with respect to a rupture of which you said, as I understand your testimony, that some ninety percent rupture spontaneously? A. That's right.

Q. It wouldn't be closer to fifty percent, would you say? A. Well, it isn't that—it is closer to my figure. I could show it to you very easily by the literature or bring to you any one of a dozen books.

Q. The reason I make inquiry is because Dr. Grossman apparently testified it was around fifty percent. A. Who am I to testify to that?

Dr. Jack Blumberg—For Petitioner—Cross

Q. Are you differing with his views? A. I am not differing with his views. I give to you an absolute statistical statement.

10 Q. Now, Doctor, what are the causes for a rupture of an aneurysm? A. Progressive weakness of the arterial wall, trauma, inflammation, any degenerative process that hastens the weakening of the wall.

Q. You speak of trauma. I take it you mean a blow to that region? A. You are correct.

Q. How about strain and stress? A. I think that strain and stress are possible factors——

Q. How about emotional—— A. May I have what I was saying, Mr. Stenographer?

20 (The following was read by the reporter:
“The Witness: I think that strain and stress are possible factors——”)

The Witness: In the causation of a rupture of an aneurysm. What was the next question?

By Mr. Spiro:

30 Q. How about excitement and emotion? A. I think that is possible but rather far fetched.

Q. Well, now, Doctor, assuming a man was walking up and down a ladder, such as you have testified to a while ago, and he had performed this type of work for the morning and he had carried out some tin plate, and he fell some four or five feet, would the strain and stress which accompanies the walking up and down the ladder in such a man as Mr. Carr, who has been examined by you, be a competent and producing
40 cause for the rupture of an aneurysm?

Dr. Jack Blumberg—For Petitioner—Cross

Mr. Dill: I object, if your Honor please, on several grounds. In the first place, that is not the theory on which the petitioner's case was advanced. In the second place, if your Honor will recall, this man was not going up and down a ladder. This man was just returning from lunch. He had had a half hour off to eat lunch, and there was no testimony he was under strain and stress at any time during the course of his work.

10

The Court: The objection will be sustained. Those facts do not appear in the record. The question should stick to the facts of this particular case. It is true that morning he had gone up the ladder, but there was an interval of time when he had his lunch. As I recall the testimony, he was on the way up the ladder after having lunch and while on the ladder he claims he fell.

20

Suppose you assume those facts, what is your opinion whether or not from those facts the effort expended by this petitioner walking up the ladder on this particular occasion would cause sufficient stress and strain on the arterial system to cause a rupture of the existing aneurysm?

30

Mr. Dill: I think that it should be stated how far up the ladder he went.

Mr. Spiro: I think it is four or five feet.

Mr. Dill: He said he went half way up, and this is a seven foot ladder.

The Witness: I want to make sure I understand the question. I am assuming that the gentleman whom I examined was work-

40

Dr. Jack Blumberg—For Petitioner—Cross

10 ing in the morning, went to lunch, at whatever period it was, the specification, as I understand it, was half an hour; he returned from lunch, went to walk up a ladder, and am I to assume he fell when he was half way up the ladder which would be a distance of about four feet?

 The Court: That is correct.

 The Witness: And there is one important question now. What effect it had on the aneurysm. I am assuming you are indicating a ruptured aneurysm?

By Mr. Spiro:

20 Q. I say under the circumstances described by the Court, which I have incorporated in the question, would that be a competent and producing cause?

 Mr. Dill: Competent and producing cause of what?

 Mr. Spiro: For a ruptured aneurysm.

30 The Witness: If the man fell half way from the ladder it certainly would be a competent and producing cause for a rupture of an aneurysm.

 Mr. Spiro: That is all, Doctor.

 The Court: Doctor, the testimony indicates that when he was picked up after the accident he was put in an ambulance and taken to the hospital there was noticed by the man who took him to the hospital that he had difficulty in moving is left leg and

Dr. Jack Blumberg—For Petitioner—Cross

arm, there was drooling on the left side of his mouth, no bruises or marks were noted on the head, he had difficulty in talking. There wasn't much response to questions submitted to him. What would be your opinion as to a definition of that condition at that particular time? 10

The Witness: In answer to your question, my answer depends on what I found and what I determined this man to have. And you see, your Honor, it may sound a little like braggadocio, but I happen to know that every examiner who examined this man's ear condition missed it, until I pointed it out to them.

Mr. Spiro: Just a minute, if your Honor please. 20

The Court: Let him finish. We have no jury here to be influenced.

Mr. Spiro: Except we have a record.

The Witness: I have to formulate my opinion on my findings and what I see. I am tracing the entire pathological picture on what I see. Everything this man presented may be and in my opinion was the extension of the terrific cholesteatoma with a brain abscess. And certainly it is not unusual to have bleeding in an abscess, and I think what this man had was some bleeding from the abscess which gave him the convulsive seizure which is described in your hypothetical question. Now, fortunately for him, the abscess again localized as it had been localized previously, but I think 30

Dr. Jack Blumberg—For Petitioner—Cross

10 if you opened up his skull you would find it. You would find it today, and that is my answer to the question. Now, what relationship any accident has to it, I don't know. It is a factual question. If he fell off the ladder certainly it could have irritated it. Did it? I wasn't there. I can't answer such a thing.

The Court: Am I understand you, Doctor, that your opinion is that the middle ear condition was the influencing factor which caused him to fall off the ladder?

20 The Witness: I don't know that. If you said to me, could it, I would say most definitely yes. But whether it did or not, I don't know.

The Court: The condition which I described as noticed by his fellow worker after the accident, is that characteristic of a ruptured aneurysm?

30 The Witness: That is characteristic of brain disturbance on the opposite part of the body. Now, can an aneurysm give you that brain disturbance? Of course it can. Can a cerebral hemorrhage give it to you? Of course it can. Can a subdural hemorrhage give it to you? Certainly. Can a brain abscess give it to you? Of course. In other words, anything that irritates or presses on that particular part of the brain is—you directed it on one side, therefore the irritation of the brain would have to be on the other side.

The Court: All right.

Dr. Jack Blumberg—For Petitioner—Redirect

Redirect examination by Mr. Dill:

Q. What was your diagnosis? Was your diagnosis an aneurysm? A. No.

Q. And was it your opinion that the fall from the ladder caused a striking of the head—I withdraw that.

10

Was your answer to Mr. Spiro's last question based on the thought that the fall from the ladder caused a strain in the head which caused the aneurysm to rupture? A. It wasn't my thought at all. I was asked a hypothetical question and I am answering it.

Q. If the man was in a position when he was found that he couldn't possibly have fallen from the ladder, what in your opinion would be the connection between climbing the ladder and the brain condition?

20

Mr. Spiro: I respectfully object to the form of the question.

The Court: You are asking him to decide a factual matter and one which is not strictly a medical one. If, of course, the facts indicate that the man couldn't have fallen off a ladder and didn't in fact fall off a ladder, then the whole theory of the petitioner's case has fallen. That is a factual matter that I have to decide.

30

Mr. Dill: Of course, your Honor, there is evidence along that line.

The Court: But I am not passing on it now. Naturally if it is found from the testimony that the man didn't fall from the

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Dr. Jack Blumberg—For Petitioner—Redirect

ladder the doctor's theory is the more rational one. I think we will all agree as to that. There can't be any room for argument.

10 *By Mr. Dill:*

Q. Now, Doctor, suppose the petitioner was going up the ladder and he didn't fall off the ladder because he fell when he was going up maybe three or four feet—he didn't fall off the ladder because of any material that was on the ladder, he didn't trip over anything, but he noticed his left leg going numb and he couldn't hold on. What then would you say with respect to a trauma to the head entering into the picture?

20

Mr. Spiro: I respectfully object to the form of the question, because that isn't the proof.

The Court: Where did you get that from?

Mr. Dill: According to my notes the petitioner testified that he was half way up the step ladder when a cramp caught him in the calf of the left leg and he couldn't hold on and he fell off.

30

Mr. Spiro: Your question stated he didn't fall off.

Mr. Dill: Of course I contend he didn't fall off any ladder but I was using the petitioner's statement.

The Court: I think you ought to reframe the question and have it in two parts. While going up this ladder he suddenly caught this cramp. What would that be indicative of?

40

Dr. Jack Blumberg—For Petitioner—Recross

The Witness: You want me to answer that question?

The Court: Yes.

The Witness: In view of this entire situation I would say it is indicative of some brain irritation.

The Court: You can pursue that further, if you wish. 10

Mr. Dill: That is all.

Mr. Spiro: Just one question, if I may, Doctor, with the Court's permission.

Recross examination by Mr. Spiro:

Q. Doctor, this injury to the ear which you described as a cholesteatoma, from your observation about how long would you say it existed when you saw him on April 13, 1944? A. I don't believe it would be possible at all to give an opinion as to how long it existed except to say that it certainly had existed for months and months. 20

Q. Doctor, would a condition such as you have described give some indication that it may become progressively worse have been obvious or apparent on April 30, 1943? 30

Mr. Dill: I object. How would the doctor know? Apparent to whom and what?

Mr. Spiro: To a physician who made an examination.

Mr. Dill: How could the doctor know what the doctor examined him for?

Dr. Jack Blumberg—For Petitioner—Recross

The Court: Well, it is a stab in the dark. I assume if the part was carefully examined it should have been noticed, and if the part was not carefully examined it would not have been noticed.

10 The Witness: There is more than that to it. A couple of examiners with whom I examined him missed it.

Mr. Spiro: That is all.

Mr. Dill: That is all. That is the respondent's case.

The Court: Both sides rest?

Mr. Spiro: Yes.

The Court: I would like to have the petitioner's testimony transcribed for me.

20 Mr. Spiro: I will be glad to do it, your Honor please.

The Court: Have you got it?

Mr. Spiro: No, I haven't, but I will be glad to get it for you.

Mr. Dill: I will get it if you want it.

The Court: Do that. And I will reserve decision for two weeks.

Mr. Spiro: Do you want Dr. Grossman's testimony?

30 The Court: I wouldn't mind having it.

Mr. Spiro: You don't mind, do you?

Mr. Dill: No.

Your Honor, I'll get you the whole transcript.

Certifications

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

ROBERT A. BIRCHMAN,
Certified Shorthand Reporter.

10

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above entitled matter as taken before me at the time, place and date hereinbefore set forth.

Deputy Compensation Commissioner.

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Exhibit P-1 (December 18, 1944)**Record of St. Francis Hospital****Summary Sheet****Progress Notes**

Name
Maid Address
Maiden Name
Place of Birth
Occupation
Relative or
Directions
Location

Admitted by
Previous
Diagnosis
Service
How brought
Admitted to

FINAL DIS

OPERATION

CONDITION

REMARKS:

Previous Record

ST. FRANCIS HOSPITAL

JERSEY CITY, N. J.

SUMMARY SHEET

Hospital No. 17,104

Name Carr, Walter
Mail Address 257 Stanton St., N.Y.

Yellen Name

Place of birth Russia

Occupations

Relative or friend **Wife-Rossie**

Directions for Same

locating

Admitted by	None
Previous admissions	

Diagnosis

Medical
Hospital Ambulance

Admitted by Doris Jones

Room Rate

Room or Ward 217 Trans.

Marital state Married

Sex Male

Age: Date of birth June 1, 1888 55yrs.

Employer F.S.Y.-Port Newark

Father Michael-Russia-Dead

Mother Mary-Russia-Dead

Children	2
----------	---

Religion Jewish ...

white

Date admitted 7/10/43 1:15pm

Date discharged 7/15/43 - TRANS. MED. CENTRE

Priv. Ward Comp.

Home Service

From

Account No.

FINAL DIAGNOSES & COMPLICATIONS

Central neurorhysis

**CATALOGUE
CODE**

[illegible]

OPERATIONS

Spinal Structure

CONDITION ON DISCHARGE

unimproved

REMARKS:

HISTORY	PRENATAL
PHYSICAL	LABOR
PROGRESS	E. D. RECORD
OPERATION	CONSULTATION
NARCOTIC	DIAGNOSIS
AUTOPSY	SIGNATURE
SUMMARY	SPECIAL
COMPLETE	

SIGNED

A. Shurani / Walter

M.D.

Name 2

Date

7/10

13

7-15

all

ST. FRANCIS HOSPITAL
JERSEY CITY, NEW JERSEY

Hosp. No. 17.104

PROGRESS NOTES

Name Valter Carr

Intern Kaufman

Room 217

Doctor Shuman

NOTES

7/10: 53 years old married patient admitted to Dr. Brydowski's from medical service. History is difficult to obtain, because he is only semiconscious.

Pupils do not react to L, Left angle of mouth has dropped down, left nose-labial fold & rt one, reflexes of rt UE and L. B. increased, no definite spastic phenomena rt. Plantar reflex uncertain very much, abdominal reflexes not present, cremasteric can be obtained. Tongue deviating to the left.

Impression: crossed paralysis (probably a lesion in the pons) on the basis of a cerebral vascular lesion. Respiration increased in depth. D.P. = 130/80

It is stated that when he was working, he was dizzy, fell upon knees and could not get up.

7-13 Spinal tap performed. Pressure apparently not raised. A few cc. of slightly bloody liquor withdrawn.

Waller

7-15 Status not changed at all. - Patient tried to commit suicide with a razor blade.

Therefore transferred to Medical Center, N.Y. (over)

PROGRESS NOTES

7-15-43

Patient is irrational, threatens to
commit suicide and disturbs
all the ^{other} patients. Transfer to
Med. Center Mental observation
Hard-refused by wife of patient
As we do not have any facilities
for control of patient to prevent
him from committing suicide, transfer
to Med. Center arranged without
consent of pat. wife
Golan

Exhibit B-1 (Examination Report)
 The Physical Examination Report, dated
 September 10, 1954, is as follows:
 Name: [Name]
 Date: [Date]
 Age: [Age]
 Sex: [Sex]
 Height: [Height]
 Weight: [Weight]
 Blood Pressure: [Blood Pressure]
 Heart: [Heart]
 Lungs: [Lungs]
 Abdomen: [Abdomen]
 Genitalia: [Genitalia]
 Skin: [Skin]
 Bones: [Bones]
 Neurological: [Neurological]
 Mental: [Mental]
 General Appearance: [General Appearance]
 Summary: [Summary]
 Signature: [Signature]
 Date: [Date]

Exhibit P-1 (January 15, 1945)

Physical Examination Record, Federal Shipbuilding and Dry Dock Company

Form 766R-10

10 FEDERAL SHIPBUILDING AND DRY DOCK COMPANY

PHYSICAL EXAMINATION RECORD

Serial Number 30236.

Date 4-30-43.

Name Walter Carr. Nationality Polish. Height
5'6½". Weight 162. Age 54. Class C.

Infectious Diseases denied.

Previous Sicknesses & Injuries denied. T.P.R.

20

Inguinal Rings Both rings relaxed.

Heart ✓.

Auscultation & Percussion ✓.

Right Lung ✓ Left Lung ✓. Duplicate.

Abdominal Organs Pendulous abdomen.

Deformity of Bones or Joints none.

Con. 20/50 20/50. Amputations none.

Right Eye 20/50. Left Eye 20/50. Right Ear

..... Left Ear

30 Other Physical or Mental Defects none.

General Appearance fair.

Signed E. Zabulewski (5) Physician.

Term in Dept. 89—7/7/43.

1/15/45. J B.

6288 M.

Exhibit R-1 (January 15, 1945)

Hospital Record, Federal Shipbuilding and Dry Dock Company

Form 76-10

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY 10

HOSPITAL RECORD

Ambulance Call

Date Jul 10 1943. Serial No. 89-30236. Hosp.
No. C Medical.

Name Walter Carr. Address 251 Stanton St.,
New York.

Date of Injury Time 12:55. Place
Assembly A. 20

History When I arrived pt was in sitting posi-
tion—No complaints of pain.

Complaints and Findings Difficulty in moving
left leg & arm—drooling from left side of mouth
—Complains of tingling sensation in fingers of
rt hand. X-Ray No.

Treatment Taken to St. Francis Hospital.
To Return?

Sent home Back to Work 30
Signed JD.

Date 7/10/43. Subsequent Treatment Family
notified by New York Police. By Whom R.C.M.
6288 M.

Light Work on Discharged on
By

STANDARD FORM NO. 64

OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

1. Name of the person or organization to whom the award is made

2. Title of the award

3. Date of the award

4. Amount of the award

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OCT T. 1946

New Jersey Court of Errors and Appeals

WALTER CARR,
Petitioner-Appellant,

vs.

FEDERAL SHIPBUILDING AND
DRYDOCK Co.,
Respondent-Appellee.

On Appeal
from the
New Jersey
Supreme Court.

**BRIEF ON BEHALF OF RESPONDENT-
APPELLEE.**

This case which arose under the Workmen's Compensation Act is before this Court on appeal of the petitioner-appellant Walter Carr, hereinafter referred to as the petitioner, from a judgment of the Supreme Court against him and in favor of his employer, the respondent-appellee Federal Shipbuilding and Dry Dock Company, hereinafter referred to as the respondent. The petitioner secured an award in the Workmen's Compensation Bureau (Hon. Harry S. Medinets), which on respondent's appeal was affirmed by the Essex County Court of Common Pleas (Hon. Richard Hartshorne), whose judgment was reversed by the Supreme Court on respondent's writ of certiorari.

Statement of Facts.

The statement of facts contained in appellant's brief is replete with argument and a concise statement of the facts is not only desirable but essential.

The petitioner filed a petition in the Workmen's Compensation Bureau in which he alleged that he

was entitled to compensation for the physical consequences of an accident which he alleged arose out of and in the course of his employment by the respondent on July 10, 1943, when "while descending from a wooden ladder, slipped and fell off" (Case, p. 12, ll. 38-39) sustaining a "cerebral concussion" (Case, p. 13, l. 17). The respondent filed an answer in which it denied that the petitioner sustained an accident as alleged and further denied that the petitioner was suffering from any disability attributable to any compensable injury (Case, pp. 17-20).

The petitioner testified that on July 10, 1943, at approximately 12:30 p.m., after a whistle had blown indicating that lunch-time was almost over, he started to go to work and while climbing up a stepladder he felt cramps in his left leg, lost his balance and fell to the ground a distance of about four or five feet (Case, p. 47, ll. 23-35); that he hit his head on some wood beams and also injured his left arm (Case, p. 48, l. 1); that he was picked up by some men, placed in an ambulance and taken to St. Francis Hospital in Jersey City (Case, p. 48, ll. 17-20).

The petitioner and the respondent each produced a neurologist as a witness. They agreed that the petitioner was suffering from some affection of the brain causing him to be disabled, but they differed in their diagnoses, though, as the respondent understands their testimony, neither witness did say or was able to say that the accident alleged was the probable cause of the brain affection.

The respondent presented the testimony of Edward Ahrens, who was the petitioner's leading-man or immediate superior on the date of his alleged accident. He testified that he saw the petitioner between twenty-five minutes after twelve and half past twelve in the afternoon of

the date in question, which was prior to the time that the petitioner was required to resume work after the luncheon period (Case, p. 82, ll. 31-40), and that the petitioner then was lying on the ground, next to a deckhouse, one of the petitioner's legs being under the deckhouse and his body being about seven feet from the base of a ladder (Case, p. 85, ll. 14-26) that went from the ground to a scaffold set out from the deckhouse (Case, p. 81, l. 28—p. 82, l. 17). Mr. Ahrens and some other men helped the petitioner to his feet and assisted him to some planking about fifty feet away on which the petitioner was seated (Case, p. 83, ll. 31-39). Ahrens saw no marks or scars on the petitioner's body (Case, p. 84, l. 6).

Joseph Dainoski testified that he is a registered nurse employed by the respondent and that on July 10, 1943, he answered an ambulance call and picked up the petitioner (Case, p. 91, ll. 16-18), and took him to St. Francis Hospital in Jersey City (Case, p. 91, l. 23). He testified that the petitioner complained of a "tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm" and that "he was drooling from the left side of his mouth" (Case, p. 91, ll. 32-36). He examined the petitioner's head and found no marks, bruises, scratches or bumps (Case, p. 92, l. 3). This witness then inscribed his findings on a plant hospital record which was presented as an exhibit, Ex. R.-1 (Case, p. 121).

The records of St. Francis Hospital were received in evidence, a part of which appear on pp. 118 and 119 of the State of the Case. The diagnosis contained in said records is "cerebral hemorrhage." The hospital record contains a history recorded on July 10, 1943, as follows: "Patient states that when he was working he got dizzy, fell upon knees and could not get up." (S) "D. Kaufmann."

ARGUMENT.

I.

This Court will not review a factual finding of the Supreme Court in a Workmen's Compensation case when the fact found is supported by competent evidence.

The Supreme Court, after a review of the facts of this case, decided the factual question of the occurrence or non-occurrence of the petitioner's alleged fall and blow on his head, which was the accident alleged, in the respondent's favor, and on that ground reversed the judgment of the Court of Common Pleas. It is well settled by numerous decisions of this Court that it will not review facts determined by the Supreme Court in a Workmen's Compensation case when there is any competent evidence to support the Supreme Court's decision. See:

Grant v. Metropolitan Ice Co. (E. & A., 1931), 108 N. J. L. 536;

Criscione v. Iacono (E. & A., 1937), 119 N. J. L. 452;

Berman v. Levenstein (E. & A., 1938), 121 N. J. L. 139;

Jones v. Court of Common Pleas of Essex County (E. & A., 1942), 129 N. J. L. 58;

Wadge v. Crestwood Acres, Inc. (E. & A., 1942), 129 N. J. L. 400;

Tracey v. South River Lumber Co. (E. & A., 1943), 130 N. J. L. 529;

Silberman v. National Egg & Product Co. (E. & A., 1944), 132 N. J. L. 143;

American Cyanamid Co. v. Bortos (E. & A., 1944), 132 N. J. L. 327.

This rule is well stated in *Berman v. Levenstein*, *supra*, where this Court said at page 140:

“The argument presented in the briefs in this court deals solely with the weight of the evidence, and the contention of the prosecutor-appellant is that the proofs require a finding in his favor. However, the rule in cases of this kind is that the Court of Errors and Appeals will not weigh the evidence, and where a question of fact is presented by the proofs in the Supreme Court and determined, the judgment of that court is conclusive in this court on appeal, and will not be reversed. *Helminsky v. Ford Motor Co.*, 111 N. J. L. 369; *Lebits v. General Cable Corp.*, 112 Id. 381; *Kovalchuck v. Simpson & Brown*, 117 Id. 400.”

The principle thus established by the foregoing and many other decisions of this Court applies with equal force where the Supreme Court's factual finding is contrary to one or both the Court of Common Pleas and the Workmen's Compensation Bureau. That was the situation in *Tracey v. South River Lumber Co.*, *supra*, where the Court said,

“Where the determination of the Bureau and the Court of Common Pleas concur, as they do in this case, the judgments of the two tribunals are not lightly disturbed in the Supreme Court.

“However, the findings of fact in the Supreme Court have support in a rational and permissible interpretation of the record and are, therefore, conclusive in this court. *Voorhis v. Terhune*, 50 N. J. L. 147.”

The argument of the petitioner, which seems to be summarized on page 33 of his brief, is in essence that the Supreme Court was bound to accept the petitioner's story no matter how improbable and disregard entirely all the other evi-

dence in the case. The petitioner contends that where there is direct evidence, even though that evidence comes from the petitioner himself, the court is not permitted to consider circumstantial evidence even though it makes the petitioner's version of the occurrence impossible.

As was pointed out by Mr. Justice Bodine in the opinion of the Supreme Court filed in the present case (Case, p. 8, ll. 38-40, p. 9, ll. 1-4), "Unless all the probabilities are rejected and the petitioner's bare statement that he fell, which is not corroborated in any way, is accepted as conclusive, there is no way to sustain the judgment below. * * *"

The petitioner first testified that he had bumps on his head (Case, p. 55, ll. 19-20); later he stated he had one bump (Case, p. 56, l. 14). Edward Ahrens, a witness called by the respondent and who picked the petitioner up, testified that he saw no marks or scars on the petitioner's body (Case, p. 84, l. 6). Joseph Dainoski, a registered nurse, also called by the respondent, testified that he examined the petitioner's head and found no scars, bruises, scratches or bumps (Case, p. 92, ll. 1-3).

When the petitioner was admitted to St. Francis Hospital at 1:15 p.m. July 10, 1943, he was physically examined by a physician and the findings at that time, which were recorded in the hospital record, do not indicate the presence of any bruises or bumps on the petitioner's head (Exhibit P-1, Case, p. 118).

A fair appraisal of this direct testimony which was obviously competent requires the conclusion that the petitioner could not have fallen a vertical distance of four feet and not bear some physical evidence on his body. This fact combined with the uncontradicted testimony of the witness Ahrens that he found the petitioner lying on the ground near the deckhouse with one leg under the deckhouse or bulkhead as he described it (Case,

p. 83, ll. 10-22) which was seven feet from the base of the ladder (Case, p. 82, l. 17), required the rejection of the theory offered by the petitioner and required the finding that under these circumstances he could not have fallen from the ladder.

Despite this testimony the petitioner contends that the finding of the Supreme Court on this controverted point was not supported by competent evidence.

It is, of course, entirely clear under the decisions in this state that circumstantial evidence is no less competent to sustain a judgment than direct evidence. Under certain conditions its probative value is superior to direct evidence. The guiding principles regarding the admission of circumstantial evidence and of the effect to be given it is well stated in the opinion of this court by Mr. Justice Heher in *Jackson v. D. L. & W. R. R. Co.* (E. & A. 1933) 111 N. J. L. 487. In that case the plaintiff in an action to recover against the defendant for the wrongful death of the plaintiff's intestate, appealed from a judgment of non-suit which was entered in the trial court. The testimony offered by the plaintiff established that the decedent was last seen on the steps of one of the defendant's railroad cars; that the train started with a great lurch and that the decedent's body was subsequently found on the road bed. The court in reversing the judgment below said at page 490:

"Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question *necessarily follows*; and *uncertain*, or that from which the conclusion does not necessarily follow, but is *probable* only, and is obtained by a process of reasoning. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side

the weight of the evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied beyond any reasonable doubt of the guilt of the accused, or it is their duty to acquit him, the charge not being proved by that higher degree of evidence which the law demands. In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the accused. In both cases a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce. 1 *Greenl. Evid.* §13-a. It is true that mere guess or conjecture cannot be substituted for legal proof, but it is difficult to mark with precision the line which separates the just and reasonable inference from mere conjecture or surmise. It is sufficient if the circumstantial evidence be such as to afford a fair and reasonable presumption of the facts inferred. 'The claimed conclusion from the offered fact must be probable or a more probable hypothesis, with reference to the possibility of other hypothesis.' " 1 *Wigm. Ev.* (2d ed.) §38.

and again at page 491:

"Circumstantial or presumptive evidence, as a basis for deductive reasoning in the determination of civil causes, is defined as 'a mere preponderance of probabilities, and, therefore, a sufficient basis of decision.' " 1 *Best Ev.* 135.

This case has been followed in subsequent decisions of this court. See for example *Hargrave v. Stockloss*, (E. & A., 1941), 127 N. J. L. 262.

In *Riker v. John Hancock Mutual Life Insurance Co.*, (Sup. Ct., 1943), 129 N. J. L. 508, the court

affirmed a judgment in favor of the plaintiff in an action to recover the accidental death benefits of a life insurance policy issued by the defendant to the plaintiff's decedent. The insured, while on an excursion boat jumped in the water as the boat was nearing the dock with the expressed intention of beating the boat to shore, was drowned. Mr. Justice Heher speaking for the court said at page 511:

"The inquiry is whether there is any evidence which, if accepted and given its fullest probative force, reasonably tends to sustain the pleaded cause of action. Is it such that fair and reasonable men would be justified in concluding that the *onus probandi* had been sustained? *Sivak v. New Brunswick*, 122 N. J. L. 197. It need not have the quality of certainty. Indirect or circumstantial evidence meets the legal standard if it preponderates in favor of the tendered hypothesis. That must be a rational inference, *i. e.*, such as is based upon a preponderance of the probabilities according to the common experience of mankind. It must be a presumption grounded in reason and logic. It is not easy to lay down with precision the line of demarcation between a just and reasonable inference and mere conjecture or surmise. The accepted standard of persuasion governing the triers of the facts is that the determination be probably founded in truth. *Austin v. Pennsylvania Railroad Co.*, 82 *Id.* 416; *Jackson v. Delaware, Lackawanna and Western Railroad Co.*, 111 *Id.* 487. A mere quantitative preponderance does not suffice. It is requisite that the evidence be such as to lead a reasonable cautious mind to that conclusion."

Under the authorities above set forth it is clear that the decision of the Supreme Court was based upon competent evidence. It is submitted that the testimony concerning the location of the peti-

tioner's body and the absence of bruises and cuts on his head negatived the possibility of his falling from a ladder as he testified. This testimony gave rise to the justifiable inference that because of those circumstances he could not have fallen in the manner in which he claimed. In this posture of the proofs a controverted issue of fact was presented. On the one hand there was the testimony of the petitioner that he fell and on the other there were circumstances which raised the logical and rational inference that he did not fall. The Supreme Court resolved that issue of fact against the petitioner. Under the decisions of this court in the cases cited on pages 4, 5, *supra*, and in *Tennant v. Jersey City*, (E. & A., 1939), 123 N. J. L. 200, the decision of the Supreme Court in the present case is controlling. In the *Tennant* case an appeal from a judgment of the Supreme Court on certiorari in a tax matter was taken to this Court. In a *per curiam* opinion this court said at page 200:

"It is a settled rule that findings of fact by the Supreme Court on conflicting evidence, or on uncontroverted evidence reasonably susceptible of conflicting inference, are conclusive on appeal where such findings of fact are based upon competent evidence." (Citing cases.)

Under well-settled principles therefore, since the Supreme Court resolved a controverted question of fact in favor of the respondent, there being competent evidence to support its decision, its findings will not be disturbed on appeal.

II.

The Supreme Court correctly decided the factual question presented to it, concluding that the evidence did not weigh in favor of a finding that the petitioner met with an accident as claimed by him.

If an independent review of the evidence were to be made by this Court, the correctness of the Supreme Court's conclusion that the evidence did not weigh in favor of the accident alleged by the petitioner would be beyond question. Such a review should be prefaced by a clear understanding of the issue presented in the case.

The petitioner pleaded that he fell from a ladder and sustained a cerebral concussion (Case, p. 13, l. 13), and he testified that he fell from a ladder and struck his head (Case, p. 47, ll. 22-40). To establish liability of the respondent it was essential for the petitioner to prove that he fell from the ladder, struck his head, and that the blow on the head caused a rupture of an intracranial blood vessel which produced his disability.

The only evidence presented in support of the fall alleged by the petitioner is his own testimony. He said that he felt a cramp in his left leg while half way up a stepladder while returning to work from lunch, and that, on that account, he lost his balance and fell four or five feet to the ground and struck his head on some wooden beams (Case, p. 47). He claimed that he hurt his left arm and head (Case, p. 48, l. 1) and that he had a "big lump" on his head (Case, p. 56, l. 13).

The petitioner admitted that on July 10, 1943, he had been working on a deckhouse unit (a part of a ship being assembled on the ground) to which he was returning after lunch when the occurrence

complained of took place, and that a scaffold which was about nine feet above the ground (Case, p. 52, l. 18) had been constructed around the deckhouse and that it extended out from the deckhouse three or four feet (Case, p. 52, l. 11). The petitioner further testified that the ladder in question went from the ground to that scaffold and that the base of the ladder extended three or four feet out from a perpendicular dropped from the outside of the scaffold to the ground (Case, p. 52, l. 28). It is evident, therefore, that the base of the ladder on the ground was six to eight feet from the nearest part of the deckhouse. The aforementioned physical situation is very important when the testimony of Edward Ahrens is considered.

Ahrens' testimony respecting the position of the ladder, the scaffold and the deckhouse did not differ materially from that of the petitioner. He testified that the scaffold was four feet wide and that the base of the ladder was situated at a distance of seven to eight feet from the base of the deckhouse (Case, p. 82, l. 17). The deckhouse rested on angle irons which were on the ground leaving an opening between the floor of the deckhouse and the ground (Case, p. 82, ll. 20-25).

Ahrens further testified that between the sounding of the whistle blown at 12:25 p. m. to signal the approach of the end of the lunch hour and the sounding of the whistle blown at 12:30 p. m. terminating the lunch hour, he found the petitioner lying on the ground near the deckhouse with one leg under the deckhouse, or bulkhead as he described it (Case, p. 83, ll. 10-22). The petitioner's body was about seven feet from the base of a ladder which went to the scaffold surrounding the deckhouse (p. 83, l. 26) and was "Laying up against the bulkhead, against the deckhouse unit" (Case, p. 83, l. 18).

The Supreme Court thought that the position of the petitioner's body after his collapse was incompatible with a fall from the ladder as claimed by him. The respondent has urged that contention throughout the case. A misunderstanding of that fact probably was the basis for the Workmen's Compensation Bureau's decision in favor of the petitioner, for the Deputy Commissioner predicated his conclusion upon the thought expressed in his opinion, "* * * There is no dispute of the fact that he fell off the ladder * * *" (Case, p. 29, l. 22). Of course there was such a dispute, and a very serious one.

There is, however, no dispute that the petitioner's body was seven or eight feet from the base of the ladder and against the structure to which was attached the scaffold against which the ladder leaned, one of his feet being under that structure. The petitioner did not in any way contradict Mr. Ahrens' testimony as to the location of his body, though he now argues that Ahrens did not establish that his body was seven feet from the base of the ladder, because it was next to a wooden upright which supported a scaffold against which the ladder leaned. The petitioner argues that the upright was four feet from the deckhouse, the width of the scaffold. But there is no testimony whatsoever as to the location of the upright—whether on the inside of the scaffold next to the deckhouse or outside the scaffold—or where it was laterally with respect to the ladder. On the other hand, Ahrens directly and specifically pointed out where the petitioner was with respect to the ladder. He testified:

"Q. Where was he? Where did you see Mr. Carr? A. When I first saw him I noticed him on the ground.

Q. Where on the ground? A. Laying up against the bulkhead against the deckhouse unit.

Q. Where were his head and feet? A. One leg like was under the back of the deckhouse and the rest of them was out from the deckhouse.

Q. How far was he from the base of the ladder that went from the ground to the first staging? A. About seven foot" (Case, p. 83, ll. 13-22).

* * * * *

"Q. That is the time you saw him on the ground? A. That is right.

Q. Now, you said something about his being a few feet from the ladder? A. Yes.

The Court: 'He said seven feet?'

Q. So that you saw him, am I to understand, about seven or eight feet from the base of the scaffold? A. From the base of the ladder" (Case, p. 85, l. 39; p. 86, l. 20).

If the petitioner slipped after he had climbed the ladder a vertical distance of four feet, it would have been physically impossible for the petitioner's body to have landed in the position in which it was found seven or eight feet horizontally from the base of the ladder in the direction of the deckhouse, which was in back of the ladder, with one of the petitioner's feet under the deckhouse. And that is so regardless of any gyrations through which it is claimed in the petitioner's brief he might have gone, though there is no evidence at all that he went through any gyrations in falling. And the thought that the petitioner might have gone through some gyrations is the only explanation offered by the petitioner as to the manner in which the petitioner's body got where it was found.

Bearing on the question of an alleged fall is the very significant failure of the petitioner himself to have given a history of any fall. The witness, Joseph Dainoski, a trained nurse, accom-

panied the petitioner in an ambulance from the respondent's plant at Port Newark to the St. Francis Hospital in Jersey City. Mr. Dainoski found no marks, bruises, scratches or bumps on the petitioner's head (Case, p. 92, l. 3). The petitioner's complaints which Mr. Dainoski recorded on a plant hospital record (Ex. R-1, Case, p. 121) were of a tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm and drooling from the left side of his mouth (Case, p. 91, ll. 32-36). It should be noted that the petitioner admitted that he was conscious (Case, p. 54, l. 15) and that he talked to the "doctor" in the ambulance (Case, p. 55, l. 6). The history in the St. Francis Hospital record is "Patient states that when he was working he got dizzy, fell upon knees and could not get up" (Case, p. 118). In the ambulance and during his stay at the hospital, immediately after his collapse and before the thought of any law suit, and when he sincerely wanted medical assistance, the petitioner was likely to tell the truth; but he said nothing about any fall from a ladder.

It was not the position of the petitioner's body alone that caused the Supreme Court to believe that the petitioner did not fall from a ladder and suffer a blow on the head. If the petitioner had fallen from the ladder and struck his head on some planks with such severity to have caused the rupture of a blood vessel as claimed by him, there most certainly would have been some mark on the petitioner's head. The petitioner did testify that he had a bump on his head. But the petitioner's testimony in that regard is hardly worthy of credence. The testimony of the witness Ahrens who picked the petitioner up and of the first aid man Dainoski who rode in the ambulance with the petitioner from Port Newark to St. Francis Hospital in Jersey City and the St. Francis Hospital record

are to the effect that there was no bruise, scratch or bump on the petitioner's head. It is inconceivable that the nurse rendering first aid and the examining physician faced with the problem of a diagnosis and the hospital staff rendering treatment would not have seen marks of a blow on the petitioner's head which the petitioner, an entirely inexperienced layman, claimed were present. Certainly, had the petitioner had the big lump (Case, p. 56, l. 13) on his head which he claimed was present, he would have called that to the attention of the hospital attendants.

On the one hand we have the petitioner's testimony that he fell from a ladder and struck his head unsubstantiated by the testimony of any other person, and unsubstantiated by any statement or record that he either fell from any ladder or that he had any mark whatsoever on his body to indicate that he had fallen or that he had struck his head. On the other hand there is very definite evidence that the petitioner was found in a collapsed condition at a point so distant from the ladder and so situated with respect to it that it was impossible for the petitioner to have fallen from it. There is no evidence, in fact, not even from the petitioner, that he ever complained prior to the filing of his petition that he had fallen from the ladder. As to any substantiating marks on the petitioner's body, the credible evidence is overwhelming that there were none.

The petitioner attempts to explain the fact that he was found seven feet away from the ladder by suggesting that the ladder moved. The petitioner's own version of the occurrence contains no suggestion that the ladder moved. The excerpt from the testimony quoted on page 32 is not complete; the portion omitted clearly shows that the petitioner himself did not testify that the ladder moved or

twisted; it was his leg which he claimed twisted (Case, p. 47, ll. 1-14):

“Q. Tell us, please, what happened? A. It was on July 10, 1943, 12:30, after lunchtime when the whistle blow I started to go to work by the step ladder and when I was half way on the step ladder, my left leg, the cramps catch me. *I twisted my leg against the hole and I lost my balance* and I fall on the left side of the step ladder. There was a hole near the step ladder. Well, I hit my head. I hit my head on the wood beams.” (Italics ours.)

The petitioner has attempted to excuse the paucity of his own proof of both the occurrence of the fall and of the blow on the head and of a causal relationship between the alleged fall and blow and his disability by impliedly stating that since the petitioner said he met with an accident and since he admittedly suffers from a disability the burden of proof is upon the respondent to show that the petitioner did not meet with a compensable accident and that his disability did not result from any compensable injury. The fact is that the petitioner has the burden of proof throughout the case, and that burden is to prove by a fair preponderance of the credible evidence every element of a compensable claim. That is well-settled law and unquestionably sound. The leading cases are:

- Belyus v. Wilkinson, Gaddis & Company*
(Sup. Ct., 1935), 115 N. J. L., 43 aff'd
116 N. J., 92;
- Gilbert v. Gilbert Machine Works, Inc.*
(Sup. Ct., 1939), 122 N. J. L., 533;
- Kwaitkowski v. McCabe's Express* (Sup.
Ct., 1943), 129 N. J. L., 305;
- Riley v. Crucible Steel Company* (Sup.
Ct., 1944), 132 N. J. L., 273.

The error into which the petitioner has fallen is to assume that the respondent attempted to prove anything. The respondent attempted to prove nothing. It was not required to prove anything. It merely offered evidence to negative the claimed effect of the petitioner's proof. The respondent's argument was simply that the petitioner's proof was legally and factually insufficient as a basis of liability. The case of *Atchison v. Colgate & Company* (Sup. Ct., 1925), 3 N. J. M. R. 451, aff'd 102 N. J. L. 425 and the other cases following it cited by the petitioner in support of an argument that the respondent had the burden of proof have no applicability whatever.

Insofar as *Atchison v. Colgate*, *supra*, may be said to require a respondent to maintain the burden of proving anything more than affirmative defenses in a Workmen's Compensation case, it is inconsistent with *Belyus v. Wilkinson*, *Gaddis & Company*, *supra*, and *Gilbert v. Gilbert Machine Works*, *supra*, and the very numerous decisions which have followed them, and must yield to those cases.

Not only did the petitioner here fail to prove by a fair preponderance of the credible evidence that he suffered a fall and blow on the head as claimed by him, a burden which he must carry, *Gilbert v. Gilbert Machine Works, Inc.*, *supra*, but as the Supreme Court determined, the evidence concerning the occurrence or nonoccurrence of a fall and blow on the head clearly and overwhelmingly preponderates in favor of the respondent.

III.

There was no competent proof in the case that the petitioner's disability was the result of any fall and blow on the head.

As a matter of law the petitioner failed to establish by competent evidence that the disability he has or the ruptured intracranial blood vessel from which such disability admittedly resulted was caused by the claimed fall from the ladder and blow on the head.

To establish that the petitioner's disability resulted from the accident alleged, the petitioner must rely on the testimony of Dr. Morris Grossman, the sole medical witness who appeared on his behalf. But at no point in his testimony can there be found any opinion expressed by Dr. Grossman that the condition from which the petitioner is suffering is causally related to a fall from a ladder and a blow on the head.

Dr. Grossman did state that, following his examinations of the petitioner on October 6, 1943, and on October 28, 1944, he arrived at a diagnosis of "post concussion syndrome and a focal lesion in the right cerebral hemisphere, a focal vascular lesion in the right hemisphere" (Case, p. 64, ll. 16-19), and he further stated that trauma (a blow) "*could be*" a competent producing cause of such a condition (Case, p. 64, l. 31). However, the doctor immediately qualified that statement by saying, in answer to a hypothetical question put to him by the petitioner's attorney, containing the petitioner's version of his alleged fall and blow to his head, that the trauma described in such hypothetical question "*could have been one of the competent producing causes of the dis-*

ability" (Case, p. 65, ll. 21-24). The Court then asked Dr. Grossman:

"Q. What do you mean by one of the competent producing causes of the disability?"

to which Dr. Grossman replied:

"A. There are others, your Honor. For instance he *could* have a hemorrhage at the base of the brain, which would not be a hemorrhage within the brain substance itself. That would be a competent producing cause. He *could* have a thrombosis of one of the blood vessels eventually leading to a condition such as he presented. That could be another competent producing cause" (Case, p. 65, ll. 25-27). (*Italics ours.*)

Dr. Grossman, in response to another question by the Court, then made the most significant statement, that it was impossible for him to state whether the petitioner suffered his attack (the brain hemorrhage) before his alleged fall or after it (Case, p. 66, ll. 1-6).

Dr. Grossman followed that testimony by the statement that on the morning of the hearing at which he testified, he examined the St. Francis Hospital record and that from the findings set forth in the hospital record he would have to conclude that the petitioner presented "the typical sequence of a ruptured aneurysm producing a sub-arachnoid hemorrhage" (Case, p. 68, ll. 31-33), a hemorrhage produced by a rupture of a blood vessel in the sub-arachnoid space in the cranium but outside of the brain substance. In other words, Dr. Grossman in effect frankly stated that his original diagnosis of a focal vascular lesion was incorrect (Case, p. 66, ll. 21-26) and that his diagnosis was entirely different than anything which he had said even *could* have been caused by a blow on the head.

Dr. Grossman specifically and emphatically stated that the aneurysm—the dilatation or disease of an intracranial blood vessel, was not the result of any fall or blow on the head (Case, p. 73, l. 15). That leads to the next step in the doctor's testimony, namely what testimony is there as to the cause of the rupture of the aneurysm which produced the sub-arachnoid hemorrhage and the resulting disability? The doctor stated that such a rupture could either result spontaneously—he testified 50 percent so resulted (Case, p. 74, l. 2), while Dr. Blumberg, the respondent's medical expert, testified 90 percent so resulted (Case, p. 102, l. 23), or could flow from "some form of physical stress, strain, or emotional stress or strain" (Case, p. 73, ll. 36-40). But nowhere in the case is there any testimony that any trauma to the petitioner's head, any brain concussion caused thereby or any fall did play, probably played or even could have played a part in causing a rupture of an aneurysm—a sub-arachnoid hemorrhage.

The sole testimony of Dr. Grossman of any casual relation between a fall and a brain condition, as previously stated, was that a blow to the head *could* cause a cerebral vascular lesion (Case, p. 64, l. 30; p. 65, l. 21). But as noted Dr. Grossman testified that a cerebral vascular lesion was not his final diagnosis. However, if a cerebral vascular lesion were his diagnosis, or if it were the cause of the petitioner's stroke or disability, his testimony is not of the standard required to establish causation between an injury and a disability if liability therefor is to rest upon an employer. The cases have uniformly held that testimony that an alleged accident *could* have caused the injury, or the alleged injury *could* have caused the disability is not testimony upon which liability can be predicated.

Jacques Wolfe Co. v. Piplin (Sup. Ct., 1935), 14 N. J. M. R. 146;

Azarowicz v. Metropolitan Beef Co. (Sup. Ct., 1937), 118 N. J. L. 89;
Ridgeway v. Real Estate Operating Co. (Sup. Ct., 1937), 15 N. J. M. R. 477, aff'd (E. & A., 1939), 121 N. J. L. 585;
Calicchio v. Jersey City Stock Yards Co. (Sup. Ct., 1940), 125 N. J. L. 112.

In the *Azarowicz* case Mr. Justice Perskie states,

“It is elementary that petitioner was obliged to do more than show that the injuries sustained ‘could have been’ the result of the accident.”

In the *Ridgeway* case the Court said:

“The petitioner must do more than show that the injury could have been the result of the accident.”

Any conclusion that the petitioner's condition or disability resulted from an alleged fall from the ladder fails to find the requisite evidential support in Dr. Grossman's testimony, which the petitioner apparently concedes, as he fails to point out in his brief any competent testimony of Dr. Grossman in support of such a conclusion.

Neither does the petitioner's contention that he suffered a rupture of an intracranial blood vessel as a result of a fall from a ladder and a blow on his head find any support in the testimony of Dr. Jack Blumberg (Case, p. 101, l. 29), the medical expert produced by the respondent. Dr. Blumberg was of the opinion that the petitioner's brain condition was caused by a cholesteatoma, an intracranial condition of the middle ear and adjacent parts, and probably by a brain abscess (Case, p. 100, ll. 2-16) entirely unrelated to trauma (Case, p. 101, ll. 32-36).

The petitioner attempts to find support for his theory of causation from the cross examination of Dr. Blumberg, who admitted—as would any competent physician—that if a person had an aneurysm and fell and struck his head the blow on the head would be a competent cause of an ensuing rupture. But as pointed out, that was not at all Dr. Blumberg's testimony of what in his opinion happened to the petitioner. That testimony was merely that an aneurysm could rupture from a blow on the head—as Dr. Grossman testified, nothing more. Dr. Blumberg categorically stated that statistically 90 percent of aneurysms rupture spontaneously (Case, p. 107, l. 30) and that trauma to the head is one of the causes of the rupture of the remaining 10 percent (Case, p. 108, l. 15). Of course it must be remembered that Dr. Blumberg's opinion was that the petitioner did not have an aneurysm at all. Even the Deputy Commissioner said that Dr. Blumberg “was of the opinion that the petitioner is suffering from a brain condition and that there was nothing in the testimony to justify the conclusion that the trauma to the head was in any way related to the man's disability” (Case, p. 23, ll. 11-16).

Without competent evidential support of course no valid judgment could be entered in favor of the petitioner. *Cirillo v. United Engineers & Constructors, Inc., supra.*

The petitioner has apparently abandoned a theory of liability which he advanced at some length in the Supreme Court and in the Court of Common Pleas, namely, that it was immaterial whether the petitioner suffered a rupture of an aneurysm prior to or after a fall from a ladder for, as the Court of Common Pleas stated, if it (the rupture) preceded a fall it is “connected with the employment on general principles” (Case, p. 37, ll. 19-22). While the petitioner stated in his

brief (p. 9) that he went up and down the ladder eight or ten times, the fact is that the petitioner was returning from lunch and had gone up the ladder about four feet (Case, p. 47, ll. 1-26) to reach his place of work.

This case was not presented on any theory of a stress and strain causing a ruptured blood vessel. Neither the pleadings nor the proofs were directed to any such issue. In fact, an attempt by the petitioner to change the theory of his case during the course of the hearing was rejected by the Deputy Commissioner (Case, p. 67, ll. 22-40). A judgment must find support within the confines of the pleadings and the theory of liability on which the case was tried. *Murphy v. North Jersey Street Railway Co.* (Sup. Ct., 1904), 71 N. J. L. 5; *Gimbel v. Laird & Co.* (E. & A., 1937), 119 N. J. L. 170, 173.

The only medical testimony claimed for the stress and strain theory of liability is some testimony of Dr. Grossman, who himself injected the question into the case (Case, p. 66, l. 36). But his testimony respecting stress and strain, "That could be a competent precipitating cause of the sub-arachnoid hemorrhage, yes" (Case, p. 67, ll. 19-21) is of no value whatsoever. In the first place, it is at best a possibility and ineffectual as a pillar of liability. *Azarowicz v. Metropolitan Beef Co.*, *supra*; *Ridgeway v. Real Estate Operating Co.*, *supra*. In the second place, that testimony was given in response to a legally improper hypothetical question which contained facts never proven in the case. *Daggett v. North Jersey Street Ry. Co.* (E. & A., 1907), 75 N. J. L. 630, and findings in a Workmen's Compensation case must be sustained by competent evidence. *Friese v. Nagle Packing Co.* (E. & A., 1933), 110 N. J. L. 588; *Helminsky v. Ford Motor Co.* (E. & A., 1933), 111 N. J. L. 369.

In connection with his stress and strain argument the petitioner cited *Reynolds v. Passaic Valley Sewerage Commission* (Sup. Ct., 1943), 130 N. J. L., 437, aff'd. 131 N. J. L. 327, a case cited by both the Deputy Commissioner and the Judge of the Court of Common Pleas. But the *Reynolds* case is not authority for the proposition that if the petitioner suffered a hemorrhage as a result of which he was caused to fall from the ladder he is entitled to compensation. It holds merely that an injury caused by a fall from a precarious position induced by a bodily ailment is compensable. With that proposition there is no argument. The *Reynolds* case would be controlling only if the hemorrhage suffered by Carr resulted from a blow on the head caused by a fall. In the *Reynolds* case the injured employee suffered an epileptic fit while in a small shanty in which there was a pot stove. As a result of the fit, he fell against the pot stove and severely burned his face. He was allowed compensation for the effect of the burns, not for the epilepsy. The instant case would be similar if the petitioner fell from a height as a result of a brain hemorrhage, broke his arm in the fall and sought compensation for the broken arm. The brain condition suffered by this petitioner is similar to the epilepsy suffered by Reynolds.

Conclusion.

The petitioner-appellant seeks to have this Court review a finding of facts of the Supreme Court. That cannot be had under the settled law of this State. The evidence the petitioner-appellant seeks to have reviewed does not weigh in his favor, as the Supreme Court correctly decided. The petitioner failed to present any competent proof of causal connection between the

accident alleged and his disability, an essential element of a valid judgment in his favor. The judgment entered by the Supreme Court therefore should be affirmed.

Respectfully submitted,

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To be argued by
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New Jersey Court of Errors and Appeals

WALTER CARR,
Petitioner-Appellant,

vs.

FEDERAL SHIPBUILDING AND
DRYDOCK Co.,
Respondent-Appellee.

On Appeal
from the
New Jersey
Supreme Court

**BRIEF ON BEHALF OF RESPONDENT-
APPELLEE.**

This case which arose under the Workmen's Compensation Act is before this Court on appeal of the petitioner-appellant Walter Carr, hereinafter referred to as the petitioner, from a judgment of the Supreme Court against him and in favor of his employer, the respondent-appellee Federal Shipbuilding and Dry Dock Company, hereinafter referred to as the respondent. The petitioner secured an award in the Workmen's Compensation Bureau (Hon. Harry S. Medinets), which on respondent's appeal was affirmed by the Essex County Court of Common Pleas (Hon. Richard Hartshorne), whose judgment was reversed by the Supreme Court on respondent's writ of certiorari.

Statement of Facts.

The statement of facts contained in appellant's brief is replete with argument and a concise statement of the facts is not only desirable but essential.

The petitioner filed a petition in the Workmen's Compensation Bureau in which he alleged that he was entitled to compensation for the physical consequences of an accident which he alleged arose out of and in the course of his employment by the respondent on July 10, 1943, when "while descending from a wooden ladder, slipped and fell off" (Case, p. 12, ll. 38-39) sustaining a "cerebral concussion" (Case, p. 13, l. 17). The respondent filed an answer in which it denied that the petitioner sustained an accident as alleged and further denied that the petitioner was suffering from any disability attributable to any compensable injury (Case, pp. 17-20).

The petitioner testified that on July 10, 1943, at approximately 12:30 p.m., after a whistle had blown indicating that lunch-time was almost over, he started to go to work and while climbing up a stepladder he felt cramps in his left leg, lost his balance and fell to the ground a distance of about four or five feet (Case, p. 47, ll. 23-35); that he hit his head on some wood beams and also injured his left arm (Case, p. 48, l. 1); that he was picked up by some men, placed in an ambulance and taken to St. Francis Hospital in Jersey City (Case, p. 48, ll. 17-20).

The petitioner and the respondent each produced a neurologist as a witness. They agreed that the petitioner was suffering from some affection of the brain causing him to be disabled, but they differed in their diagnoses, though, as the respondent understands their testimony, neither witness did say or was able to say that the accident alleged was the probable cause of the brain affection.

The respondent presented the testimony of Edward Ahrens, who was the petitioner's leading-man or immediate superior on the date of his alleged accident. He testified that he saw the petitioner between twenty-five minutes after

twelve and half past twelve in the afternoon of the date in question, which was prior to the time that the petitioner was required to resume work after the luncheon period (Case, p. 82, ll. 31-40), and that the petitioner then was lying on the ground, next to a deckhouse, one of the petitioner's legs being under the deckhouse and his body being about seven feet from the base of a ladder (Case, p. 85, ll. 14-26) that went from the ground to a scaffold set out from the deckhouse (Case, p. 81, l. 28—p. 82, l. 17). Mr. Ahrens and some other men helped the petitioner to his feet and assisted him to some planking about fifty feet away on which the petitioner was seated. (Case, p. 83, l. 31-39). Ahrens saw no marks or scars on the petitioner's body (Case, p. 84, l. 6).

Joseph Dainoski testified that he is a registered nurse employed by the respondent and that on July 10, 1943, he answered an ambulance call and picked up the petitioner (Case, p. 91, ll. 16-18), and took him to St. Francis Hospital in Jersey City (Case, p. 91, l. 23). He testified that the petitioner complained of a "tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm" and that "he was drooling from the left side of his mouth" (Case, p. 91, ll. 32-36). He examined the petitioner's head and found no marks, bruises, scratches or bumps (Case, p. 92, l. 3). This witness then inscribed his findings on a plant hospital record which was presented as an exhibit, Ex. R.-1 (Case, p. 121).

The records of St. Francis Hospital were received in evidence, a part of which appear on pp. 118 and 119 of the State of the Case. The diagnosis contained in said records is "cerebral hemorrhage." The hospital record contains a history recorded on July 10, 1943, as follows: "Patient states that when he was working he got dizzy, fell upon knees and could not get up." (S) "D. Kaufmann."

ARGUMENT.

I.

This Court will not review a factual finding of the Supreme Court in a Workmen's Compensation case when the fact found is supported by competent evidence.

The Supreme Court, after a review of the facts of this case, decided the factual question of the occurrence or non-occurrence of the petitioner's alleged fall and blow on his head, which was the accident alleged, in the respondent's favor, and on that ground reversed the judgment of the Court of Common Pleas. The only argument presented by the petitioner to this Court is that the Supreme Court erroneously decided that factual question, failing to accord to certain evidence the weight to which the petitioner believes it is entitled. It is well settled by numerous decisions of this Court that it will not review facts determined by the Supreme Court in a Workmen's Compensation case when there is any competent evidence to support the Supreme Court's decision, and the petitioner neither argues nor even states that the factual findings of the Supreme Court lacked competent evidence to support them. See:

Grant v. Metropolitan Ice Co. (E. & A., 1931), 108 N. J. L. 536;

Criscione v. Iacono (E. & A., 1937), 119 N. J. L. 452;

Berman v. Levenstein (E. & A., 1938), 121 N. J. L. 139;

Jones v. Court of Common Pleas of Essex County (E. & A., 1942), 129 N. J. L. 58;

Wadge v. Crestwood Acres, Inc. (E. & A., 1942), 129 N. J. L. 400;

Tracey v. South River Lumber Co. (E. & A., 1943), 130 N. J. L. 529;
Silberman v. National Egg & Product Co. (E. & A., 1944), 132 N. J. L. 143;
American Cyanimid Co. v. Bortos (E. & A., 1944), 132 N. J. L. 327.

This rule is well stated in *Berman v. Levenstein*, *supra*, where this Court said at page 140:

"The argument presented in the briefs in this court deals solely with the weight of the evidence, and the contention of the prosecutor-appellant is that the proofs require a finding in his favor. However, the rule in cases of this kind is that the Court of Errors and Appeals will not weigh the evidence, and where a question of fact is presented by the proofs in the Supreme Court and determined, the judgment of that court is conclusive in this court on appeal, and will not be reversed. *Helminsky v. Ford Motor Co.*, 111 N. J. L. 369; *Lebits v. General Cable Corp.*, 112 Id. 381; *Kovalchuck v. Simpson & Brown*, 117 Id. 400."

The principle thus established by the foregoing and many other decisions of this Court applies with equal force where the Supreme Court's factual finding is contrary to one of both the Court of Common Pleas and the Workmen's Compensation Bureau. That was the situation in *Tracey v. South River Lumber Co.*, *supra*, where the Court said,

"Where the determination of the Bureau and the Court of Common Pleas concur, as they do in this case, the judgments of the two tribunals are not lightly disturbed in the Supreme Court.

"However, the findings of fact in the Supreme Court have support in a rational and permissible interpretation of the record and are, therefore, conclusive in this court. *Voorhis v. Terhune*, 50 N. J. L. 147."

The appellant contends on page 12 of his brief that "the judgment of the Supreme Court should be reversed because its conclusions of the material facts rest upon erroneous premises." The erroneous premises on which the petitioner contends the Supreme Court's judgment rests are said to be its findings that the petitioner did not fall from a ladder and that he did not strike his head. But it hardly needs stating that the question of whether the petitioner fell from the ladder and whether he struck his head are not premises, but are the ultimate conclusions of fact, which the trier of the facts was called upon to decide.

The cases on which the appellant relies and which are cited on page 24 of his brief do state that this Court will review a determination of the Supreme Court in a Workmen's Compensation case when it is based on an erroneous premise. However, the erroneous premises in three cases cited have been the erroneous understanding of the controlling legal principle and not the occurrence or nonoccurrence of some event. The three cases resulted in reversals because of the application by the Supreme Court of undisputed facts to an erroneous principle of law. For instance, in *Ciocca v. National Sugar Refining Co. of New Jersey* (E. & A., 1939), 124 N. J. L. 329, cited by the appellant, there was no dispute that the petitioner suffered from heat prostration. The Courts below differed as to whether that constituted an accident which arose out of and in the course of his employment, the Supreme Court having held that it did not. In reversing the judgment below, this Court said, by Mr. Justice Perskie, at page 335:

"We are entirely satisfied that the result reached by the court below is based upon an erroneous principle of law. It therefore disregarded the pertinent plenary proofs here summarized, most of which were uncontra-

dicted, supporting the claim of the widow that her husband's employment contributed to his death. He, therefore, died as the result of a compensable accident. * * *"

To like effect is *Mixon v. Kalman* (E. & A., 1945), 133 N. J. L. 113, also cited by the petitioner. There the Supreme Court held that an injury caused to the petitioner by a bolt of lightning did not constitute a compensable accident. The sole question before the Court was whether such an injury constituted an accident which arose out of and in the course of his employment. There was no dispute as to the manner in which the injury or accident occurred.

Bollinger v. Wagaraw Building Supply Co. (E. & A., 1939), 122 N. J. L. 512, also cited by the appellant, is no different. The sole question before this Court in that case was whether a constant irritation of the petitioner's foot over a long period of time by sand and cement which fell into his shoe while at work causing a melanoma or cancer constituted a compensable accident. The Supreme Court had held that the injury was occupational and not compensable under the Workmen's Compensation Act. This Court reversed, holding that the holding below was based on an erroneous premise, namely, the belief that the law was that the occurrence described did not constitute an accident as defined by the Workmen's Compensation Act.

The other cases cited by the petitioner as justifying the intervention of this Court are *Grant v. Metropolitan Ice Co.* (E. & A., 1931); 108 N. J. L. 536; *Rotini v. J. P. Scanlon Inc.* (E. & A., 1941), 126 N. J. L. 419 and *Cirillo v. United Engineers and Constructors Inc.* (E. & A., 1938), 121 N. J. L. 511. None of them is of any assistance to the petitioner. The *Grant* and *Rotini* cases were affirm-

ances by this Court of judgments of the Supreme Court on the ground that the Supreme Court's factual findings would not be reviewed since there was competent evidence to support them. The *Cirillo* case was a reversal by this Court of a Supreme Court judgment on the ground that there was no evidence at all of an essential element of the petitioner's case. As previously pointed out, the petitioner has neither argued nor stated that the present case does not contain some competent evidence which supports the Supreme Court's judgment. He has presented no question for review by this Court.

II.

The Supreme Court correctly decided the factual question presented to it, concluding that the evidence did not weigh in favor of a finding that the petitioner met with an accident as claimed by him.

If an independent review of the evidence were to be made by this Court, the correctness of the Supreme Court's conclusion that the evidence did not weigh in favor of the accident alleged by the petitioner would be beyond question. Such a review should be prefaced by a clear understanding of the issue presented in the case.

The petitioner pleaded that he fell from a ladder and sustained a cerebral concussion (Case, p. 13, l. 13), and he testified that he fell from a ladder and struck his head (Case, p. 47, ll. 22-40). To establish liability of the respondent it was essential for the petitioner to prove that he fell from the ladder, struck his head, and that the blow on the head caused a rupture of an intracranial blood vessel which produced his disability. The peti-

tioner unquestionably agrees with that statement, for in the conclusion to his brief (p. 35) he states: "It is respectfully submitted that the * * * evidence * * * establishes that the petitioner met with an accident * * * when * * * while ascending the ladder * * * he fell off the same, and in falling, he struck his head upon a wooden object which resulted in a rupture (sic) aneurysm, causing a subarachnoid hemorrhage and post-concussional syndrome, from which he is now * * * disabled."

The only evidence presented in support of the fall alleged by the petitioner is his own testimony. He said that he felt a cramp in his left leg while half way up a stepladder while returning to work from lunch, and that, on that account, he lost his balance and fell four or five feet to the ground and struck his head on some wooden beams (Case, p. 47). He claimed that he hurt his left arm and head (Case, p. 48, l. 1) and that he had a "big lump" on his head (Case, p. 56, l. 13).

The petitioner admitted that on July 10, 1943, he had been working on a deckhouse unit (a part of a ship being assembled on the ground) to which he was returning after lunch when the occurrence complained of took place, and that a scaffold which was about nine feet above the ground (Case, p. 52, l. 18) had been constructed around the deckhouse and that it extended out from the deckhouse three or four feet (Case, p. 52, l. 11). The petitioner further testified that the ladder in question went from the ground to that scaffold and that the base of the ladder extended three or four feet out from a perpendicular dropped from the outside of the scaffold to the ground (Case, p. 52, l. 28). It is evident, therefore, that the base of the ladder on the ground was six to eight feet from the nearest part of the deckhouse. The aforementioned physical situation is very important when the testimony of Edward Ahrens is considered.

Ahrens' testimony respecting the position of the ladder, the scaffold and the deckhouse did not differ materially from that of the petitioner. He testified that the scaffold was four feet wide and that the base of the ladder was situated at a distance of seven to eight feet from the base of the deckhouse (Case, p. 82, l. 17). The deckhouse rested on angle irons which were on the ground leaving an opening between the floor of the deckhouse and the ground (Case, p. 82, ll. 20-25).

Ahrens further testified that between the sounding of the whistle blown at 12:25 p. m. to signal the approach of the end of the lunch hour and the sounding of the whistle blown at 12:30 p. m. terminating the lunch hour, he found the petitioner lying on the ground near the deckhouse with one leg under the deckhouse, or bulkhead as he described it (Case, p. 83, ll. 10-22). The petitioner's body was about seven feet from the base of a ladder which went to the scaffold surrounding the deckhouse (p. 83, l. 26) and was "Laying up against the bulkhead, against the deckhouse unit" (Case, p. 83, l. 18).

The Supreme Court thought that the position of the petitioner's body after his collapse was incompatible with a fall from the ladder as claimed by him. The respondent has urged that contention throughout the case. A misunderstanding of that fact probably was the basis for the Workmen's Compensation Bureau's decision in favor of the petitioner, for the Deputy Commissioner predicated his conclusion upon the thought expressed in his opinion, "* * * There is no dispute of the fact that he fell off the ladder * * *" (Case, p. 29, l. 22). Of course there was such a dispute, and a very serious one.

There is, however, no dispute that the petitioner's body was seven or eight feet from the base of the ladder and against the structure to which

was attached the scaffold against which the ladder leaned, one of his feet being under that structure. The petitioner did not in any way contradict Mr. Ahrens' testimony as to the location of his body, though he now argues that Ahrens did not establish that his body was seven feet from the base of the ladder, because it was next to a wooden upright which supported a scaffold against which the ladder leaned. The petitioner argues that the upright was four feet from the deckhouse, the width of the scaffold. But there is no testimony whatsoever as to the location of the upright—whether on the inside of the scaffold next to the deckhouse or outside the scaffold—or where it was laterally with respect to the ladder. On the other hand, Ahrens directly and specifically pointed out where the petitioner was with respect to the ladder. He testified:

“Q. Where was he? Where did you see Mr. Carr? A. When I first saw him I noticed him on the ground.

Q. Where on the ground? A. Laying up against the bulkhead against the deckhouse unit.

Q. Where were his head and feet? A. One leg like was under the back of the deckhouse and the rest of them was out from the deckhouse.

Q. How far was he from the base of the ladder that went from the ground to the first staging? A. About seven foot” (Case, p. 83, ll. 13-22).

* * * * *

“Q. That is the time you saw him on the ground? A. That is right.

Q. Now, you said something about his being a few feet from the ladder? A. Yes.

The Court: ‘He said seven feet?’

Q. So that you saw him, am I to understand, about seven or eight feet from the

base of the scaffold? A. From the base of the ladder'' (Case, p. 85, l. 39; p. 86, l. 20).

If the petitioner slipped after he had climbed the ladder a vertical distance of four feet, it would have been physically impossible for the petitioner's body to have landed in the position in which it was found seven or eight feet horizontally from the base of the ladder in the direction of the deckhouse, which was in back of the ladder, with one of the petitioner's feet under the deckhouse. And that is so regardless of any gyrations through which it is claimed in the petitioner's brief he might have gone, though there is no evidence at all that he went through any gyrations in falling. And the thought that the petitioner might have gone through some gyrations is the only explanation offered by the petitioner as to the manner in which the petitioner's body got where it was found.

Bearing on the question of an alleged fall is the very significant failure of the petitioner himself to have given a history of any fall. The witness, Joseph Dainoski, a trained nurse, accompanied the petitioner in an ambulance from the respondent's plant at Port Newark to the St. Francis Hospital in Jersey City. Mr. Dainoski found no marks, bruises, scratches or bumps on the petitioner's head (Case, p. 92, l. 3). The petitioner's complaints which Mr. Dainoski recorded on a plant hospital record (Ex. R-1, Case, p. 121) were of a tingling sensation in the fingers of his right hand and difficulty in moving his left leg and arm and drooling from the left side of his mouth (Case, p. 91, ll. 32-36). It should be noted that the petitioner admitted that he was conscious (Case, p. 54, l. 15) and that he talked to the "doctor" in the ambulance (Case, p. 55, l. 6). The history in the St. Francis Hospital record is "Patient states that when he was working he got dizzy, fell upon

knees and could not get up'' (Case, p. 118). In the ambulance and during his stay at the hospital, immediately after his collapse and before the thought of any law suit, and when he sincerely wanted medical assistance, the petitioner was likely to tell the truth; but he said nothing about any fall from a ladder.

It was not the position of the petitioner's body alone that caused the Supreme Court to believe that the petitioner did not fall from a ladder and suffer a blow on the head. If the petitioner had fallen from the ladder and struck his head on some planks with such severity to have caused the rupture of a blood vessel as claimed by him, there most certainly would have been some mark on the petitioner's head. The petitioner did testify that he had a bump on his head. But the petitioner's testimony in that regard is hardly worthy of credence. The testimony of the witness Ahrens who picked the petitioner up and of the first aid man Dainoski who rode in the ambulance with the petitioner from Port Newark to St. Francis Hospital in Jersey City and the St. Francis Hospital record are to the effect that there was no bruise, scratch or bump on the petitioner's head. It is inconceivable that the nurse rendering first aid and the examining physician faced with the problem of a diagnosis and the hospital staff rendering treatment would not have seen marks of a blow on the petitioner's head which the petitioner, an entirely inexperienced layman, claimed were present. Certainly, had the petitioner had the big lump (Case, p. 56, l. 13) on his head which he claimed was present, he would have called that to the attention of the hospital attendants.

On the one hand we have the petitioner's testimony that he fell from a ladder and struck his head unsubstantiated by the testimony of any other person, and unsubstantiated by any state-

ment or record that he either fell from any ladder or that he had any mark whatsoever on his body to indicate that he had fallen or that he had struck his head. On the other hand there is very definite evidence that the petitioner was found in a collapsed condition at a point so distant from the ladder and so situated with respect to it that it was impossible for the petitioner to have fallen from it. There is no evidence, in fact, not even from the petitioner, that he ever complained prior to the filing of his petition that he had fallen from the ladder. As to any substantiating marks on the petitioner's body, the credible evidence is overwhelming that there were none.

The petitioner has attempted to excuse the paucity of his own proof of both the occurrence of the fall and of the blow on the head and of a causal relationship between the alleged fall and blow and his disability by impliedly stating that since the petitioner said he met with an accident and since he admittedly suffers from a disability the burden of proof is upon the respondent to show that the petitioner did not meet with a compensable accident and that his disability did not result from any compensable injury. The fact is that the petitioner has the burden of proof throughout the case, and that burden is to prove by a fair preponderance of the credible evidence every element of a compensable claim. That is well settled law and unquestionably sound. The leading cases are:

Belyus v. Wilkinson, Gaddis & Company
(Sup. Ct., 1935), 115 N. J. L., 43 aff'd
116 N. J., 92;

Gilbert v. Gilbert Machine Works, Inc.
(Sup. Ct., 1939), 122 N. J. L., 533;

Kwaitkowski v. McCabe's Express (Sup.
Ct., 1943), 129 N. J. L., 305;

Riley v. Crucible Steel Company (Sup. Ct., 1944), 132 N. J. L., 273.

The error into which the petitioner has fallen is to assume that the respondent attempted to prove anything. The respondent attempted to prove nothing. It was not required to prove anything. It merely offered evidence to negative the claimed effect of the petitioner's proof. The respondent's argument was simply that the petitioner's proof was legally and factually insufficient as a basis of liability. The case of *Atchison v. Colgate & Company* (Sup. Ct., 1925), 3 N. J. M. R. 451, aff'd 102 N. J. L. 425 and the other cases following it cited by the petitioner in support of an argument that the respondent had the burden of proof have no applicability whatever.

Insofar as *Atchison v. Colgate*, *supra*, may be said to require a respondent to maintain the burden of proving anything more than affirmative defenses in a Workmen's Compensation case, it is inconsistent with *Belyus v. Wilkinson, Gaddis & Company*, *supra*, and *Gilbert v. Gilbert Machine Works*, *supra*, and the very numerous decisions which have followed them, and must yield to those cases.

Not only did the petitioner here fail to prove by a fair preponderance of the credible evidence that he suffered a fall and blow on the head as claimed by him, a burden which he must carry, *Gilbert v. Gilbert Machine Works, Inc.*, *supra*, but as the Supreme Court determined, the evidence concerning the occurrence or nonoccurrence of a fall and blow on the head clearly and overwhelmingly preponderates in favor of the respondent.

I I I .

There was no competent proof in the case that the petitioner's disability was the result of any fall and blow on the head.

As a matter of law the petitioner failed to establish by competent evidence that the disability he has or the ruptured intracranial blood vessel from which such disability admittedly resulted was caused by the claimed fall from the ladder and blow on the head.

To establish that the petitioner's disability resulted from the accident alleged, the petitioner must rely on the testimony of Dr. Morris Grossman, the sole medical witness who appeared on his behalf. But at no point in his testimony can there be found any opinion expressed by Dr. Grossman that the condition from which the petitioner is suffering is causally related to a fall from a ladder and a blow on the head.

Dr. Grossman did state that, following his examinations of the petitioner on October 6, 1943, and on October 28, 1944, he arrived at a diagnosis of "post concussion syndrome and a focal lesion in the right cerebral hemisphere, a focal vascular lesion in the right hemisphere" (Case, p. 64, ll. 16-19), and he further stated that trauma (a blow) "*could be*" a competent producing cause of such a condition (Case, p. 64, l. 31). However, the doctor immediately qualified that statement by saying, in answer to a hypothetical question put to him by the petitioner's attorney, containing the petitioner's version of his alleged fall and blow to his head, that the trauma described in such hypothetical question "*could have been one of the competent producing causes of the dis-*

ability” (Case, p. 65, ll. 21-24). The Court then asked Dr. Grossman:

“Q. What do you mean by one of the competent producing causes of the disability?”

to which Dr. Grossman replied:

“A. There are others, your Honor. For instance he *could* have a hemorrhage at the base of the brain, which would not be a hemorrhage within the brain substance itself. That would be a competent producing cause. He *could* have a thrombosis of one of the blood vessels eventually leading to a condition such as he presented. That could be another competent producing cause” (Case, p. 65, ll. 25-27). (Italics ours.)

Dr. Grossman, in response to another question by the Court, then made the most significant statement, that it was impossible for him to state whether the petitioner suffered his attack (the brain hemorrhage) before his alleged fall or after it (Case, p. 66, ll. 1-6).

Dr. Grossman followed that testimony by the statement that on the morning of the hearing at which he testified, he examined the St. Francis Hospital record and that from the findings set forth in the hospital record he would have to conclude that the petitioner presented “the typical sequence of a ruptured aneurysm producing a sub-arachnoid hemorrhage” (Case, p. 68, ll. 31-33), a hemorrhage produced by a rupture of a blood vessel in the sub-arachnoid space in the cranium but outside of the brain substance. In other words, Dr. Grossman in effect frankly stated that his original diagnosis of a focal vascular lesion was incorrect (Case, p. 66, ll. 21-26) and that his diagnosis was entirely different than anything which he had said even *could* have been caused by a blow on the head.

Dr. Grossman specifically and emphatically stated that the aneurysm—the dilatation or disease of an intracranial blood vessel, was not the result of any fall or blow on the head (Case, p. 73, l. 15). That leads to the next step in the doctor's testimony, namely what testimony is there as to the cause of the rupture of the aneurysm which produced the sub-arachnoid hemorrhage and the resulting disability? The doctor stated that such a rupture could either result spontaneously—he testified 50 percent so resulted (Case, p. 74, l. 2), while Dr. Blumberg, the respondent's medical expert, testified 90 percent so resulted (Case, p. 102, l. 23), or could flow from "some form of physical stress, strain, or emotional stress or strain" (Case, p. 73, ll. 36-40). But nowhere in the case is there any testimony that any trauma to the petitioner's head, any brain concussion caused thereby or any fall did play, probably played or even could have played a part in causing a rupture of an aneurysm—a sub-arachnoid hemorrhage.

The sole testimony of Dr. Grossman of any causal relation between a fall and a brain condition, as previously stated, was that a blow to the head *could* cause a cerebral vascular lesion (Case, p. 64, l. 30; p. 65, l. 21). But as noted Dr. Grossman testified that a cerebral vascular lesion was not his final diagnosis. However, if a cerebral vascular lesion were his diagnosis, or if it were the cause of the petitioner's stroke or disability, his testimony is not of the standard required to establish causation between an injury and a disability if liability therefor is to rest upon an employer. The cases have uniformly held that testimony that an alleged accident *could* have caused the injury, or the alleged injury *could* have caused the disability is not testimony upon which liability can be predicated.

Jacques Wolfe Co. v. Piplin (Sup. Ct., 1935), 14 N. J. M. R. 146;
Azarowicz v. Metropolitan Beef Co. (Sup. Ct., 1937), 118 N. J. L. 89;
Ridgeway v. Real Estate Operating Co. (Sup. Ct., 1937), 15 N. J. M. R. 477, aff'd (E. & A., 1939), 121 N. J. L. 585;
Calicchio v. Jersey City Stock Yards Co. (Sup. Ct., 1940), 125 N. J. L. 112.

In the *Azarowicz* case Mr. Justice Perskie states,

"It is elementary that petitioner was obliged to do more than show that the injuries sustained 'could have been' the result of the accident."

In the *Ridgeway* case the Court said:

"The petitioner must do more than show that the injury could have been the result of the accident."

Any conclusion that the petitioner's condition or disability resulted from an alleged fall from the ladder fails to find the requisite evidential support in Dr. Grossman's testimony, which the petitioner apparently concedes, as he fails to point out in his brief any competent testimony of Dr. Grossman in support of such a conclusion.

Neither does the petitioner's contention that he suffered a rupture of an intracranial blood vessel as a result of a fall from a ladder and a blow on his head find any support in the testimony of Dr. Jack Blumberg (Case, p. 101, l. 29), the medical expert produced by the respondent. Dr. Blumberg was of the opinion that the petitioner's brain condition was caused by a cholesteatoma, an intracranial condition of the middle ear and adjacent parts, and probably by a brain abscess (Case, p. 100, ll. 2-16) entirely unrelated to trauma (Case, p. 101, ll. 32-36).

The petitioner attempts to find support for his theory of causation from the cross-examination of Dr. Blumberg, who admitted—as would any competent physician—that if a person had an aneurysm and fell and struck his head the blow on the head would be a competent cause of an ensuing rupture. But as pointed out, that was not at all Dr. Blumberg's testimony of what in his opinion happened to the petitioner. That testimony was merely that an aneurysm could rupture from a blow on the head—as Dr. Grossman testified, nothing more. Dr. Blumberg categorically stated that statistically 90 percent of aneurysms rupture spontaneously (Case, p. 107, l. 30) and that trauma to the head is one of the causes of the rupture of the remaining 10 percent (Case, p. 108, l. 15). Of course it must be remembered that Dr. Blumberg's opinion was that the petitioner did not have an aneurysm at all. Even the Deputy Commissioner said that Dr. Blumberg “was of the opinion that the petitioner is suffering from a brain condition and that there was nothing in the testimony to justify the conclusion that the trauma to the head was in any way related to the man's disability” (Case, p. 23, ll. 11-16).

Without competent evidential support of course no valid judgment could be entered in favor of the petitioner. *Cirillo v. United Engineers & Constructors, Inc., supra.*

As the petitioner stated in the conclusion to his brief (p. 34) that the petitioner's accident was a fall from a ladder and consequent striking of his head with a resulting rupture of a blood vessel, it appears that he has abandoned a theory of liability which he advanced at some length in the Supreme Court and in the Court of Common Pleas, namely, that it was immaterial whether the petitioner suffered a rupture of an aneurysm prior to or after a fall from a ladder for, as the

Court of Common Pleas stated, if it (the rupture) preceded a fall it is "connected with the employment on general principles" (Case, p. 37, ll. 19-22). However, the petitioner did intimate on page 32 of his brief that if his ruptured blood vessel did not result from a fall from the ladder it might have resulted from stress and strain of going up the ladder. While the petitioner stated in his brief (p. 32) that he went up and down the ladder eight or ten times, the fact is that the petitioner was returning from lunch and had gone up the ladder about four feet (Case, p. 47, ll. 1-26) to reach his place of work.

This case was not presented on any theory of a stress and strain causing a ruptured blood vessel. Neither the pleadings nor the proofs were directed to any such issue. In fact, an attempt by the petitioner to change the theory of his case during the course of the hearing was rejected by the Deputy Commissioner (Case, p. 67, ll. 22-40). A judgment must find support within the confines of the pleadings and the theory of liability on which the case was tried. *Murphy v. North Jersey Street Railway Co.* (Sup. Ct., 1904), 71 N. J. L. 5; *Gimbel v. Laird & Co.* (E. & A., 1937), 119 N. J. L. 170, 173.

The only medical testimony claimed for the stress and strain theory of liability is some testimony of Dr. Grossman, who himself injected the question into the case (Case, p. 66, l. 36). But his testimony respecting stress and strain, "That could be a competent precipitating cause of the sub-arachnoid hemorrhage, yes" (Case, p. 67, ll. 19-21) is of no value whatsoever. In the first place, it is at best a possibility and ineffectual as a pillar of liability. *Azarowicz v. Metropolitan Beef Co.*, *supra*; *Ridgeway v. Real Estate Operating Co.*, *supra*. In the second place, that testimony was given in response to a legally improper

hypothetical question which contained facts never proven in the case. *Daggett v. North Jersey Street Ry. Co.* (E. & A., 1907), 75 N. J. L. 630, and findings in a Workmen's Compensation case must be sustained by competent evidence. *Friese v. Nagle Packing Co.* (E. & A., 1933), 110 N. J. L. 588; *Helminsky v. Ford Motor Co.* (E. & A., 1933), 111 N. J. L. 369.

In connection with his stress and strain argument the petitioner cited *Reynolds v. Passaic Valley Sewerage Commission* (Sup. Ct., 1943), 130 N. J. L., 437, aff'd 131 N. J. L. 327, a case cited by both the Deputy Commissioner and the Judge of the Court of Common Pleas. But the *Reynolds* case is not authority for the proposition that if the petitioner suffered a hemorrhage as a result of which he was caused to fall from the ladder he is entitled to compensation. It holds merely that an injury caused by a fall from a precarious position induced by a bodily ailment is compensable. With that proposition there is no argument. The *Reynolds* case would be controlling only if the hemorrhage suffered by Carr resulted from a blow on the head caused by a fall. In the *Reynolds* case the injured employee suffered an epileptic fit while in a small shanty in which there was a pot stove. As a result of the fit, he fell against the pot stove and severely burned his face. He was allowed compensation for the effect of the burns, not for the epilepsy. The instant case would be similar if the petitioner fell from a height as a result of a brain hemorrhage, broke his arm in the fall and sought compensation for the broken arm. The brain condition suffered by this petitioner is similar to the epilepsy suffered by Reynolds.

Conclusion.

The petitioner-appellant seeks to have this Court review a finding of facts of the Supreme Court. That cannot be had under the settled law of this State. The evidence the petitioner-appellant seeks to have reviewed does not weigh in his favor, as the Supreme Court correctly decided. The petitioner failed to present any competent proof of causal connection between the accident alleged and his disability, an essential element of a valid judgment in his favor. The judgment entered by the Supreme Court therefore should be affirmed.

Respectfully submitted,

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Respectfully submitted,

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New Jersey Court of Errors and Appeals

WALTER CARR, Petitioner-
Defendant-in Certiorari,

Appellant,

vs.

FEDERAL SHIPBUILDING AND DRY-
DOCK COMPANY, Respondent-
Prosecutor-in Certiorari,

Appellee.

On Appeal From
the New Jersey
Supreme Court

BRIEF FOR APPELLANT

Statement

This is a Workmen's Compensation case. The Workmen's Compensation Bureau granted an award to the petitioner which was affirmed by Judge Hartshorne of the Essex County Court of Common Pleas. The Supreme Court granted certiorari on application therefor by respondent and reversed the Common Pleas which had affirmed the Bureau and the case is now here on appeal.

The errors alleged in the Supreme Court's determination involve principally two propositions of law, as follows:

I. The Supreme Court reversed the two lower tribunals on the facts without any competent evidence to support its conclusions particularly in that its conclusions were inherently faulty and in disregard of plain, undisputed and direct proof to the contrary.

II. There was no disputed issue of fact before the Supreme Court for its determination and upon the undisputed facts, petitioner was entitled to an award as a matter of law.

These questions, presented for consideration to this Court, will be argued in this brief under two points corresponding to the two questions as above enumerated and stated.

Facts

On July 10th, 1943, the petitioner, Walter Carr, while employed as a sheet metal worker helper by respondent-appellee, met with an accident. In the forenoon of that day, before he went to lunch, the petitioner, as a helper, was bringing all kinds of material—pieces of steel—about two feet long and three inches wide, in and out all morning, walking about fifty feet to the place where he had to deliver the material. He also climbed ladders that morning before the accident, making about eight or ten trips on the ladders, the ladders being about seven to ten feet in height (Case, pp. 78 and 79). He felt all right that morning (Case, p. 80). His superior Ahrens corroborated this activity by petitioner (Case, p. 85, ll. 17, 18 and 19). The accident occurred between 12:25 and 12:30 P. M. after the end of a twenty-five minute lunch period (Case, pp. 47, 51, 83 and 84). When the first whistle had blown at 12:25 P. M., which was an indication that lunch was over and the men had to return to their work within the five minutes intervening until 12:30 P. M. (Case, p. 84), the petitioner who had eaten his lunch at a point 25 feet away from the place where he worked commenced ascending a ladder, which at its top

rested against the first platform of a scaffold, the ladder being about nine feet in length or height. The scaffold consisted of about three platforms each on top of another, and went all around a deck house, which deck house rested a little off the ground on angle iron braces, there being an open area under the deck house (Case, pp. 47, 52 and 82). The first platform of the scaffold, against which the top of the ladder rested, was about seven or eight feet off the ground (Case, p. 81) supported by wooden up-rights (Case, p. 86), and extended out from the deck house a distance of about three or four feet (Case, pp. 52 and 82). The ladder rested against the scaffold at an angle, so that the base of the ladder was about three or four feet out from the bottom of an imaginary perpendicular line dropped down from the outside edge of the first platform of the scaffold. In other words, the base of the ladder, which the petitioner was ascending to go back to work, was extended about seven or eight feet out from the base of the deck house, which was being constructed off ship (Case, pp. 52 and 81). When the petitioner had progressed half way up the ladder, a distance of four or five feet, he was seized with a bad painful cramp in his left leg, his left leg starting to twist and the ladder also twisting, so that he couldn't hold on and he lost his balance and fell off the left side of the ladder to the ground, striking his head on wooden beams, injuring the left side of his head, his left arm and his left leg. He had a lump on his head and bruises on his left leg (Case, pp. 47, 48, 55 and 56). The petitioner's testimony as to the manner of the occurrence of the accident is as follows:

“Q. Tell us, please, what happened? A. It was on July 10th, 1943, 12:30, after lunchtime

when the whistle blew. I started to go to work by the step ladder, and when I was half way on the step ladder, my left leg, the cramps catch me. I twisted my leg against the hole and I lost my balance and I fall on the left side of the step ladder. There was a hole near the step ladder. Well, I hit my head. *I hit my head on the wood beams.*" (Case, pp. 47, ll. 4 to 13, inclusive) (Italics ours.)

* * * * *

"Q. Now, what happened when you walked up this ladder? Tell us again, please. A. I was on it, half way on the step ladder about four or five feet high. The cramp, I got a cramp in my leg.

"Q. Which leg? A. The left leg.

"Q. The left leg? A. Yes.

"Q. And what happened? A. *We started to twist and my leg, I couldn't hold it and I couldn't stand on the ladder any more and I lost my balance and I fell.*" (Case, p. 47, ll. 23 to 33, inclusive) (Italics ours.)

The petitioner testified that there were many men behind him as he started to climb the ladder and when he struck the ground, somebody picked him up, took him to the side and an ambulance then came and he was removed to St. Francis Hospital (Case, pp. 48 and 49). The respondent-appellee called as a witness one Edward Ahrens, the petitioner's lead man or superior (Case, p. 81), who did not see the petitioner fall. In fact, the respondent-appellee did not call anybody to deny that the petitioner fell off the ladder as he testified. The respondent's witness Ahrens testified that he recalled seeing the petitioner the

first time, after the 12:25 P. M. whistle blew, on the ground (Case, p. 82, ll. 31 to 34, inclusive). On this point, Ahrens testified on direct examination as follows:

"Q. Now, do you remember the lunch period on that day when Mr. Carr was taken to the hospital? A. Yes, I do.

"Q. Do you recall seeing Mr. Carr? A. I do.

"Q. As the lunch hour drew to a close, where did you see him? A. *The first I saw him was after the twenty-five after twelve whistle blew on the ground.*" (Case, p. 82, ll. 27 to 34, inclusive) (Italics ours.)

* * * * *

"Q. And did you hear the twenty-five after whistle blow? A. I did.

"Q. And did you see Mr. Carr? A. I did not take particular notice of him, no, not at that time.

"Q. Well, did you see him after the twenty-five whistle? A. Yes.

"Q. How long after that whistle blew? A. A few minutes after; between 12:25 and 12:30.

"Q. Where was he? Where did you see Mr. Carr? A. When I first saw him I noticed him on the ground.

"Q. Where on the ground? A. Laying up against the bulkhead against the deck house unit.

"Q. Where were his head and feet? A. One leg like was under the back of the deck house and the rest of them was out from the deck house.

"Q. How far was he from the base of the ladder that went from the ground to the first staging? A. About seven foot.

"Q. And when you saw him what did you do? A. There were a few men there and we sort of ran over to him and picked him up.

"Q. Did you get there as soon as anybody? A. About as soon as anybody else.

"Q. And did you help pick him up? A. I did. I think I did.

"Q. Where did you take him? A. We sort of walked him over about fifty feet to some planking and set him on there.

"Q. Did you men assist him? A. Yes, I had to assist him.

"Q. Did he talk? A. No." (Case, p. 83, ll. 1 to 40, inclusive) (Italics ours.)

* * * * *

"Q. Could he talk? A. I don't think he could. He didn't seem to say anything.

"Q. Did you see any marks or scars on his body? A. No, sir, I didn't notice any.

"Q. Did somebody send for the ambulance? A. Yes, somebody did.

"Q. Do you recall what kind of a day it was? A. A clear day and warm.

"Q. Do the men eat their lunch around that neighborhood? A. Yes, they sit all around that area." (Case, p. 84, ll. 4 to 14, inclusive) (Italics ours.)

This witness Ahrens testified under cross-examination that *when he saw Carr on the ground for the first time, the petitioner "was laying next to the wooden uprights"* which supported the scaffold and which ran from the ground up (Case, p. 87). Ahrens further testified under

cross-examination that there wasn't any material other than the uprights lying around the immediate ladder nor around the deck house because "they are not supposed to pile anything underneath any scaffolding." (Case, pp. 86 and 87) Ahrens testified further on this point as follows:

"Q. Well, was there any? A. *No, there wasn't any that I noticed.*

"Q. *You are sure of that?* A. *I wouldn't say positive, no.*

"The Court: *Were there any wooden beams close to the ladder?*

The Witness: *Not that I noticed, no, sir.*" (Case, p. 87, ll. 6 to 10, inclusive) (Italics ours.)

Ahrens also testified that when he saw Carr he was in a semi-conscious condition (Case, p. 87). On reaching St. Francis Hospital in Jersey City, where he was taken by company ambulance, the petitioner could not give a history to the hospital doctors because he was semi-conscious (Case, p. 118, Ex. P-1). The petitioner was also semi-conscious when the male nurse, Joseph Dainoski, responded with the company ambulance and took him to the hospital. Dainoski testified that the petitioner was drooling from the left side of his mouth, complained of difficulty in moving his left arm and leg and that "a cursory examination" of petitioner's head disclosed no bumps or other marks thereon. He also testified that the petitioner had difficulty *in talking and communicating with him* (Case, pp. 90 to 92, inclusive). When the witness Dainoski was cross-examined, he stated that he had no independent recollec-

tion of the occurrence or of the petitioner's injuries except by looking at a card which was marked in evidence as Exhibit R-1 (Case, pp. 92, 94 and 121). Dainoski also admitted under cross-examination that there wasn't any notation on the card which he had written up in his own hand after returning to the respondent's yard from St. Francis Hospital about no injury to petitioner's head (Case, p. 94).

The petitioner remained at St. Francis Hospital from July 10th, 1943 until July 15th, 1943, when he was transferred to the Mental Observation Ward of the Jersey City Medical Center, because he had become irrational and threatened and attempted to commit suicide with a razor blade (Case, p. 118, Ex. P-1). He remained at the Medical center for about three or four days and then he was taken home. Thereafter, no further medical treatment was furnished by the respondent, although the petitioner was under treatment by his own doctors, Doctor Rich and Doctor Tyson, who were unavailable at the trial because of service with the armed forces (Case, p. 49).

As the result of this accident, the petitioner now complains that he cannot use his left hand; that he is very weak on his left leg; that his head bothers him very much; that he gets dizzy spells like drunk, and he feels drunk all the time; that he cannot look down; that when he looks down he gets dizzy in his head; that there is something in his head like some noise in the same. This noise continues all the time and never leaves him (Case, pp. 49 to 50). Petitioner never suffered from any of these symptoms before the happening of the aforementioned accident (Case, p. 50).

Petitioner, prior to this accident, was a healthy individual and passed a physical examination

made by the respondent's doctor on April 30th, 1943—approximately two and one-half months before the accident occurred—preparatory to being hired and employed (Case, pp. 50, 120).

Prior to his employment by respondent on April 30th, 1943, petitioner's trade was that of a brick layer and he followed this trade on tall buildings such as the Empire State Building (Case, p. 51). The petitioner's duties as a sheet metal worker helper required that he bring all kinds of pieces of steel in and out to the workers. He would get these pieces of steel from the outside. Some times he would have to walk about fifty feet to deliver the same. His duties required that he climb ladders from time to time and on the morning of the accident he had made some eight to ten trips up and down ladders. In making these trips there were always two ladders involved, the first ladder being some seven to nine feet high, the second ladder about seven feet high (Case, p. 79). Some of the duties performed by the petitioner required that he lift and carry heavy materials with the aid and assistance of a fellow worker. He likewise cut material. With reference to the small materials it was part of his function to carry them up the ladder by hand, and on the morning of the accident he performed all that kind of work (Case, pp. 78-79, 84-85, 60).

As the result of his injuries, petitioner has never returned to work and is incapable of so doing.

The petitioner was examined by Doctor Morris Grossman, a Neurologist, who made two medical and neurological examinations of the petitioner—the first on October 6th, 1943 and the second on October 28th, 1944 (Case, p. 61). Doctor

Grossman testified that he found the petitioner's intelligence and attention poor, his cooperation fair. Petitioner was emotionally very unstable, and depressed. His memory was poor and he was apprehensive (Case, pp. 62 to 63). At the time of the first examination, Doctor Grossman found the petitioner to be pale and plethoric. The petitioner walked with a cautious gait and there was a slight limp on the left side. The associated movements were diminished in the left arm. His ear drums were intact. There was an old healed perforation of the left drum. There was tenderness to percussion in the right occipital region of the skull (Case, p. 62). When Doctor Grossman re-examined the petitioner on October 28th, 1944, which was approximately a year after his first examination, he found the petitioner with a definite hemiplegic gait on the left side. There was clumsiness in the finer movement of the left hand. His speech was slurring. There were twitchings in the left hand, and tremors in both hands, more on the left than on the right side. He showed a positive Hoffman on the left side. His associated movements were diminished in the left arm. The weakness was still present in the arm and leg and the increased tone and irritability were likewise present. He showed a left central facial weakness. There was generalized tenderness most marked on the left side of the skull. He was still emotionally unstable and apprehensive. Otherwise there was no change in his mental status (Case, pp. 62 to 64). Doctor Grossman further indicated that the first diagnosis he made of the petitioner was a post-concussion syndrome and a focal lesion in the right cerebral hemisphere, a focal vascular lesion in the right hemisphere, and that remained his

diagnosis after the second examination (Case, p. 64).

Doctor Grossman explained to the Court that after reading the St. Francis Hospital record he found that the petitioner had an aneurysm which with reasonable probability was in existence prior to the accident (Case, p. 73). This aneurysm was located in the subarachnoid area surrounding the substance of the brain. An aneurysm is medically described as a defect of the wall of a blood vessel. It is best described to the lay person as a bulge in an inner tube (Case, p. 102). This aneurysm ruptured, causing a subarachnoid hemorrhage and the subarachnoid hemorrhage was the competent producing cause of the petitioner's condition which Doctor Grossman found the petitioner had (Case, p. 66). It was what the petitioner was doing the day of his accident that played a very definite part in producing this rupture of the aneurysm (Case, p. 66).

Doctor Grossman's final diagnosis that the petitioner suffered from a subarachnoid hemorrhage is confirmed by the records of St. Francis Hospital which indicated "the man on lumbar puncture showed a bloody spinal fluid and subsequently became irrational and noisy and disturbing and suicidal" (Case, pp. 68, 118). This is the typical sequence of a ruptured aneurysm producing a subarachnoid hemorrhage (Case, p. 68).

Doctor Grossman, in his opinion, found that the petitioner's condition would be stationary; that he is completely disabled (Case, p. 76); that he could never do any physical work of any kind or any skilled work with his hands, with the exception of taking a position as a watchman. He found and determined that the petitioner was 100% disabled due to his subarachnoid hemorrhage (Case, pp. 68, 76-77).

The respondent produced at the trial before the Compensation Bureau a Neurologist, Doctor Jack Blumberg. He too examined the petitioner on two occasions—the first on April 13th, 1944 and the other on October 30th, 1944. He found that the petitioner had a definite brain condition (Case, p. 101), and that the petitioner's difficulty was due to a cholesteatoma of the left ear and probably a brain abscess (Case, p. 100). He described a cholesteatoma as a collection of debris and epithelial tissue due to a chronic infection, and characterized not only by a purulent discharge but by a peculiar foul putrid acrid odor (Case, p. 100).

Regardless of this, none of the medical records offered in evidence, establish or confirm this so-called cholesteatoma described by the Doctor (Case, pp. 118 to 121), especially since the Doctor indicated that it was in existence for months and months and should have been obvious or apparent on April 30th, 1943, when the petitioner first commenced work for the respondent, if the ear was carefully examined (Case, pp. 115 to 116).

Doctor Blumberg, nevertheless, admitted that the petitioner told him on April 13th, 1944, when he first examined him, *that he fell off a step ladder* (Case, p. 103). *The Doctor likewise admitted that taking into consideration the circumstances and facts relating to what had occurred to the petitioner on July 10th, 1943, that the falling half way from the ladder would certainly be a competent and producing cause for the rupture of an aneurysm* (Case, pp. 108 to 110). The Doctor did not know whether this middle ear condition or cholesteatoma was the influencing factor which caused the petitioner to fall off the

ladder (Case, p. 112). *He admitted that a fall off the ladder could* certainly irritate a pre-existing cholesteatoma (Case, pp. 111-112). (*Italics ours.*)

The proofs showed without any doubt that the petitioner suffered a serious brain injury. In this aspect of the case, the Supreme Court concurred with the findings of the lower tribunals by stating, "There is no question in the case as to the petitioner's injury" (Case, p. 7, ll. 36 and 37). The uncontradicted evidence also was that prior to the accident there was no indication whatsoever that the petitioner was suffering from any potential or actual brain or vascular disturbance. If there was such a condition it manifestly was aggravated by the accident, and if there was no such condition the subsequent disorder was caused solely by the accident. In either case, the injury would be compensable. The pertinent testimony of the doctors is as follows:

Direct examination of Dr. Morris Grossman:

"Q. Assuming, Doctor, if you will, that the man was climbing up a ladder, and when he reached the ladder—he had gotten up about four or five feet and he gets a cramp in the left leg and falls down, and falls that distance. He strikes, the left side of his head striking some planks or boards on the floor. Would you say that this injury which I just described would be the kind of accident that would be a competent producing cause for that injury?

"Mr. Dill: I object. I think it is a leading question.

"The Court: The question is so framed that it is leading. I think you had better

leave the facts as contained in the hypothetical question as is, and reframe the last part of your question.

"Assuming the facts, Doctor, contained in the hypothetical question, what in your opinion was the competent producing cause of the disability that you found?

"The Witness: That could have been one of the competent producing causes of the disability.

"The Court: What do you mean by one of the competent producing causes of the disability?

"The Witness: There are others, your Honor. For instance, he could have a hemorrhage at the base of the brain, which would not be a hemorrhage within the brain substance itself. That would be a competent producing cause. He could have a thrombosis of one of the blood vessels eventually leading to a condition such as he presented. That could be another competent producing cause.

"The Court: I will simplify it, Doctor. Do you think this man suffered an attack before he fell or after he fell?

"The Witness: Your Honor, you are not simplifying it. That is the age old question. It is very difficult to say that. Nobody can answer that question, your Honor.

"The Court: He suffered what may commonly be described as a stroke, did he not?

"The Witness: I don't think so from the additional facts given to me. That was my original feeling in the matter,

but from the subsequent facts given me and from the hospital record this man didn't have what we ordinarily call a stroke.

"The Court: Was this focal vascular lesion caused by striking his head or was it due to an organic disease unrelated to the accident?

"The Witness: In view of the additional facts given to me only recently this man had a sub-arachnoid hemorrhage, and this sub-arachnoid hemorrhage was a competent producing cause of the conditions that I found.

"The Court: What caused the sub-arachnoid hemorrhage?

"The Witness: That is due in all probability to a rupture of intracranical aneurysm.

"The Court: Was that spontaneous, preceding the fall or was it due to the fall? What is the greater probability in view of the facts?

"The Witness: *In all probability I think what he was doing played a very definite part in producing this rupture of the aneurysm.*

"The Court: What was he doing that caused it?

"The Witness: *He was climbing a ladder up and down as was indicated in the hypothetical question.*" (Case, pp. 64, ll. 36 to 40, inclusive, 65, 66 and 67, ll. 5 to 7, inclusive) (Italics ours.)

"Q. Have you made an examination of the hospital records, Doctor? A. I did review them this morning, yes.

“Q. And from your examination of the hospital records—withdraw that.

With some degree of particularity, did the hospital records of which you have spoken a moment ago confirm the judgment which you have expressed? A. The man was brought into the hospital, he had a sudden seizure. He was brought into the hospital in a semi-conscious state. The man on lumbar puncture showed a bloody spinal fluid and subsequently became irrational and noisy and disturbing and suicidal. That is the typical sequence of a ruptured aneurysm producing a subarachnoid hemorrhage.” (Case, p. 68, ll. 18 to 33, inclusive)

Cross examination of Dr. Morris Grossman:

“Q. Doctor, this petitioner had a cerebral hemorrhage, didn’t he? A. He had a subarachnoid hemorrhage.

“Q. Is that one of the classes of cerebral hemorrhage? A. It is an intra-cranial hemorrhage, but it isn’t what we ordinarily call a cerebral hemorrhage. The ordinary cerebral hemorrhage is a hemorrhage within the substance of the brain. And a sub-arachnoid hemorrhage is not per se inside the brain itself.

“Q. You say a hemorrhage inside the skull? A. Yes.

“Q. Close to the brain? A. Within the cranium.” (Case, p. 69, ll. 17 to 29, inclusive)

“Q. Well, going back to the hospital record, you find him better now than he was then, Doctor? A. Oh, yes.

“Q. He had a paralysis of the left side at that time? A. He is better in this way:

I can't evaluate what degree of paralysis he had, but he is better in this way, that the man recovered his mental faculties and his equilibrium. He is not disturbed as he was when he was in the hospital.

"Q. And that is rather typical of cerebral hemorrhage? A. No. That is typical of a sub-arachnoid hemorrhage." (Case, p. 70, ll. 9 to 20, inclusive)

"The Court: From your testimony, Doctor, I assume that you are of the opinion that there was an aneurysm present preceding the accident?

"The Witness: With reasonable probability.

"The Court: The accident certainly did not cause the aneurysm?

"The Witness: Oh, no.

"The Court: For the record, I think you should state just what an aneurysm is. I understand it, but I think the record should be clear.

"The Witness: An aneurysm is a defect of the wall of a blood vessel resulting either in a saculation of one side of the wall or a general dilatation known as a fusiform dilatation of the vessel itself. Those are the two common types of aneurysm.

"The Court: What is generally accepted to be the cause of a rupture of such a condition as an aneurysm?

"The Witness: I have had a great deal of experience in these things, your Honor. I was the first man to describe the probability of intra-cranial aneurysm twenty-seven years ago, and since then I have

had an experience extending over many hundreds of cases. In the majority of these cases some form of physical stress, strain or emotional stress or strain was the precipitating cause." (Case, p. 73, ll. 8 to 39, inclusive)

"The Court: Would you mind explaining the mechanism of fear, fright, emotion or strain or effort bringing about the climax?

"The Witness: Yes. Any cause that produces an increase in the tension in the blood vessels and physical stress, excitement, emotional excitement, and so forth, are definite causes of an increase in the pressure and is apt to produce a leaking or a rupture of an aneurysm.

"The Court: Would that require a great amount of effort, Doctor, or a moderate or a slight amount of effort to bring about a rupture of an aneurysm?

"The Witness: That is an entirely independent situation, your Honor. That would vary with every individual, depending on the condition of the vessel wall at the time of this stress." (Case, p. 74, ll. 9 to 27, inclusive)

"The Court: Let's clear up another point. Independent of that ear condition, what is your opinion as to the extent of this permanent disability?

"The Witness: Independent of that I would say that the man was completely disabled." (Case, p. 76, ll. 35 to 40, inclusive)

"The Court: Due to the effects—

"The Witness: *Due to his sub-arachnoid hemorrhage.*

"That will be all, Doctor.

"Mr. Dill: Just a minute, Doctor.

"Q. Doctor, you didn't know anything about the work this man was doing prior to the time that he collapsed, did you? I mean are you basing some of your opinion on the history that the man gave you? A. No, I am basing my opinion entirely on what happened to this man, and that is the only thing I am basing my opinion on." (Case, p. 77, ll. 3 to 18, inclusive) (Italics ours.)

"Q. I say you didn't base your opinion on anything except what was contained in the hypothetical question, did you? A. No, I didn't." (Case, p. 77, ll. 25 to 27, inclusive)

Doctor Blumberg did not dispute the permanent total disability of the petitioner and no question of fact was thereby raised as to whether the petitioner is 100% totally and permanently disabled.

Direct examination of Dr. Jack Blumberg:

"Q. Doctor, did you make an examination of the petitioner, Walter Carr? A. Yes.

"Q. Or did you make more than one examination? A. I made two examinations: One on April 13th, 1944, and the second on October 30th, 1944.

"Q. Now, at the time of your first examination, did you get a history from the petitioner, Doctor? A. Yes.

"Q. Did the petitioner tell you that he had injured his head? A. Well, he didn't men-

tion that he had injured his head. He mentioned the part that he injured as his left shoulder." (Case, p. 99, ll. 15 to 26, inclusive)

"Q. And did you make a diagnosis? A. Yes.

"Q. What was it? A. I felt that this man had a chronic purulent otitis media, a cholesteatoma, and probably a brain abscess." (Case, p. 100, ll. 37 to 40, inclusive)

"Q. The difficulty that this petitioner experienced was in the use of the left side of his body principally, wasn't it— A. Yes.

"Q. (continuing) —and was caused by some brain condition, was it not?

"Mr. Spiro: I object to the form of the question.

"The Court: Suppose we let the doctor answer the question?

"Mr. Dill: I am sorry.

"Q. In your opinion do your findings indicate some difficulty in the use of the left side of the body? A. That is true." (Case, p. 101, ll. 3 to 18, inclusive)

"Q. What is the fundamental or basic cause of the difficulty in the use of those parts of his body? A. This man has a definite brain condition causing the difficulty.

"Q. Are they produced by any traumas to the arms, legs or back, or what not?

"Mr. Spiro: I object to the form of the question.

"The Court: I will allow it.

"The Witness: No.

"Mr. Spiro: Exception.

"The Witness: The difficulty that the man experiences or to put it in another way, the signs and symptoms that I elicited and manifested in certain parts of the body, I will say the underlying cause, of course, is not in the specific parts, but within the brain. I will clear up that situation." (Case, p. 101, ll. 26 to 40, inclusive, p. 102, ll. 4 to 7, inclusive)

Cross Examination of Dr. Jack Blumberg:

"Q. Dr. Blumberg, you were asked by counsel for the respondent with respect to the man's history. You indicated that all he told you was something happened to his left shoulder, is that correct? A. That is incorrect.

"Q. *What did he tell you, please?* A. *The man told me on July 10th, 1943, he fell off a step ladder. He doesn't know how he fell. He injured his left shoulder. He doesn't know whether or not he was unconscious. He was taken to St. Francis Hospital.*" (Case, p. 103, ll. 6 to 16, inclusive) (Italics ours.)

"Q. Doctor, the condition which you described with respect to this man's brain, would you say positively it is caused by what you have described to us as an ear condition? A. I would say insofar as the frailty of humanity is concerned I'll make it as a definite statement realizing that a doctor is never absolute in his remarks, diagnoses or statements. I am not infallible. I make too many mistakes." (Case, p. 104, ll. 32 to 40, inclusive)

"Q. Then may I infer you may be mistaken now? A. I may be; the same as every

other human being that ever lived and every doctor that ever lived." (Case, p. 105, ll. 5 to 8, inclusive)

"Q. Now, Doctor, what are the causes for a rupture of an aneurysm? A. *Progressive weakness of the arterial wall, trauma, inflammation, any degenerative process that hastens the weakening of the wall.*

"Q. You speak of trauma. I take it you mean a blow to that region? A. You are correct.

"Q. How about strain and stress? A. I think that strain and stress are possible factors—

"Q. How about emotional— A. May I have what I was saying, Mr. Stenographer?

"(The following was read by the reporter: 'The Witness: I think that strain and stress are possible factors—')

"The Witness: In the causation of a rupture of an aneurysm. What was the next question?" (Case, p. 108, ll. 7 to 25, inclusive) (*Italics ours.*)

"Q. Well, now, Doctor, assuming a man was walking up and down a ladder, such as you have testified to a while ago, and he had performed this type of work for the morning and he had carried out some tin plate, and he fell some four or five feet, would the strain and stress which accompanies the walking up and down the ladder in such a man as Mr. Carr, who has been examined by you, be a competent and producing cause for the rupture of an aneurysm?

"Mr. Dill I object, if your Honor please, on several grounds. In the first

place, that is not the theory on which the petitioner's case was advanced. In the second place, if your Honor will recall, this man was not going up and down a ladder. This man was just returning from lunch. He had had a half hour off to eat lunch, and there was no testimony he was under strain and stress at any time during the course of his work.

"The Court: The objection will be sustained. Those facts do not appear in the record. The question should stick to the facts of this particular case. It is true that morning he had gone up the ladder, but there was an interval of time when he had his lunch. As I recall the testimony, he was on the way up the ladder after having lunch and while on the ladder he claims he fell.

Suppose you assume those facts, what is your opinion whether or not from those facts the effort expended by this petitioner walking up the ladder on this particular occasion would cause sufficient stress and strain on the arterial system to cause a rupture of the existing aneurysm?

"Mr. Dill: I think that it should be stated how far up the ladder he went.

"Mr. Spiro: I think it is four or five feet.

"Mr. Dill: He said he went half way up, and this is a seven foot ladder.

"The Witness: I want to make sure I understand the question. I am assuming that the gentleman whom I examined was working in the morning, went to

lunch, at whatever period it was, the specification, as I understand it, was half an hour; he returned from lunch, went to walk up a ladder, *and am I to assume he fell when he was half way up the ladder which would be a distance of about four feet?*

"The Court: *That is correct.*

"The Witness: *And there is one important question now. What effect it had on the aneurysm. I am assuming you are indicating a ruptured aneurysm?*

"Q. *I say under the circumstances described by the Court, which I have incorporated in the question, would that be a competent and producing cause?*

"Mr. Dill: Competent and producing cause of what?

"Mr. Spiro: For a ruptured aneurysm.

"The Witness: *If the man fell half way from the ladder it certainly would be a competent and producing cause for a rupture of an aneurysm.*

"Mr. Spiro: That is all, Doctor.

"The Court: Doctor, the testimony indicates that when he was picked up after the accident he was put in an ambulance and taken to the hospital there was noticed by the man who took him to the hospital that he had difficulty in moving his left leg and arm, there was drooling on the left side of his mouth, no bruises or marks were noted on the head, he had difficulty in talking. There wasn't much response to questions submitted to him. What would be your opinion as to a defini-

tion of that condition at that particular time?

"The Witness: In answer to your question, my answer depends on what I found and what I determined this man to have. And you see, your Honor, it may sound a little like braggadocio, but I happen to know that every examiner who examined this man's ear condition missed it, until I pointed it out to them.

"Mr. Spiro: Just a minute, if your Honor please.

"The Court: Let him finish. We have no jury here to be influenced.

"Mr. Spiro: Except we have a record.

"The Witness: I have to formulate my opinion on my findings and what I see. I am tracing the entire pathological picture on what I see. Everything this man presented may be and in my opinion was the extension of the terrific cholesteatoma with a brain abscess. And certainly it is not unusual to have bleeding in an abscess, and I think what this man had was some bleeding from the abscess which gave him the convulsive seizure which is described in your hypothetical question. Now, fortunately for him the abscess again localized as it had been localized previously, but I think if you opened up his skull you would find it. You would find it today, and that is my answer to the question. *Now, what relationship any accident has to it, I don't know. It is a factual question. If he fell off the ladder certainly it could have irritated it. Did it? I wasn't there. I can't answer such a thing.*

"The Court: Am I to understand you, Doctor, that your opinion is that the middle ear condition was the influencing factor which caused him to fall off the ladder?

"The Witness: I don't know that. If you said to me, could it, I would say most definitely yes. But whether it did or not, I don't know.

"The Court: *The condition which I described as noticed by his fellow worker after the accident, is that characteristic of a ruptured aneurysm?*

"The Witness: *That is characteristic of brain disturbance on the opposite part of the body. Now, can an aneurysm give you that brain disturbance? Of course it can.*" (Case, pp. 108, ll. 31 to 40, inclusive, pp. 109, 110, 111 and 112, ll. 7 to 30, inclusive) (Italics ours.)

POINT I

The Supreme Court reversed the two lower tribunals on the facts without any competent evidence to support its conclusions particularly in that its conclusions were inherently faulty and in disregard of plain, undisputed and direct proof to the contrary.

There was absolutely no testimony in the cause by the respondent below that the petitioner had not sustained the accident as he claimed and testified had occurred to him on July 10th, 1943. The direct testimony of the petitioner, as shown above, was that he had fallen from the ladder and struck his head on wooden beams, sustaining his

brain injuries. There was no direct testimony by the respondent's witnesses that the petitioner had not fallen from the ladder, and there was no testimony introduced by the respondent from which any rational or proper inference could be deduced that the petitioner did not meet with his accident. The only witnesses, other than its medical witness (Dr. Blumberg), who testified for the respondent were Ahrens (petitioner's superior) and the male nurse in respondent's employ, Dainoski, who appeared on the scene after petitioner had been removed to a position some fifty feet from where petitioner was found after his fall, and who thereupon took the injured petitioner to St. Francis Hospital in respondent's ambulance. Neither Ahrens nor Dainoski witnessed his fall, nor did the respondent produce anyone of the numerous employees who were about the vicinity of the accident to testify with regard to the happening or non-happening of the accident. Ahrens, on direct examination, testified that when he first saw the petitioner on the ground, "there were a few men there and we sort of ran over to him and picked him up" (Case, p. 83, ll. 28 and 29), and on page 84 of the State of Case, lines 13-15, Ahrens testified as follows:

"Q. Do the men eat their lunch around that neighborhood? A. Yes, they sit all around that area."

Again on redirect examination, Ahrens testified as follows:

"Q. Do you know who helped you take him from there? A. No, I don't. There was quite a few men around and I couldn't say who was there at the time." (Case, p. 87, ll. 36-39, incl.)

The latter was a lame attempt to explain away the failure by respondent to produce one or more of these other employees to testify regarding the accident and what they had seen. Here we are treated to the picture of a boss in Ahrens' position going to the assistance of a man—the petitioner—on the ground, obviously badly injured, semi-conscious and even unable to talk (Case, p. 84, ll. 5 and 6), who tried to convey the impression that he didn't know the men who were about the vicinity or even the names of those employees who helped him with the injured petitioner. His explanation does not carry conviction under the circumstances, and the respondent's failure to produce these people gives rise to the inference that their testimony would support the petitioner and not the respondent. *Breheny v. Essex County*, 134 New Jersey Law, 129, a decision by this Court.

Ahrens testified on direct examination that the petitioner was about seven feet away from the ladder lying up against the bulkhead against the deck house unit when he first saw him, but on cross-examination he changed this and then testified that at the time the petitioner "was laying next to the wooden uprights", which were supports on which the scaffolding rested (Case, p. 87, ll. 27-30, incl.). With regard to marks on petitioner's body, Ahrens testified as follows on direct examination:

"Q. Did you see any marks or scars on his body? A. No, sir, I didn't notice any" (Case, p. 84, ll. 7 and 8).

Ahrens did not say that there were no marks on petitioner's body, and he did not say that he didn't notice or that there were any marks or

lumps on petitioner's head. It should be remembered that the petitioner's body was clothed at that time. Dainoski did testify on direct examination that he made a cursory examination of petitioner and looked his head over when he reached him, and he did not find any marks or bumps on his head (Case, pp. 91 and 92). On cross-examination, Dainoski said that he did not remove any of the petitioner's clothing. He did not testify at any time about marks on petitioner's body, as obviously he couldn't because he had only looked at petitioner's head. Dainoski, on cross-examination, admitted that he had no recollection about the petitioner, except by refreshing it from a card in his own handwriting, which he had completed after he returned from his trip to the hospital with the petitioner (Case, pp. 92, 93, 94 and 95). The card in question was marked in evidence as Exhibit R-1, and is to be found on page 121 of the State of Case. The following are pertinent parts of Dainoski's testimony on cross-examination:

"Q. How were you able to determine there were no marks on his body if you didn't remove his clothing?

"Mr. Dill: I object. That wasn't the witness' testimony, your Honor.

"The Court: That is right. He only testified to the absence of marks on his head.

"Q. *Did you make an examination of his body at all?* A. *Only of his head.*

"Q. *You don't know whether he had any marks on his legs or his arms or anything else?* A. *No, sir.*

“Q. Now, you have said that you had no definite independent recollection of what happened there or this man’s injury except by looking at this card. Is that correct? A. Yes, sir.

“Q. I want you to show me on this card where it says anything about no injury to the head. A. I don’t see anything on here about that, sir.

“Q. *Thus you cannot positively say at this time that there was no injury to the head, isn’t that correct, sir?* A. Yes, sir.

“Q. Now, on this card you have a reference to difficulty in moving the left leg. Did you test this man’s ability to move his left leg or did he tell you so? A. I don’t remember that, sir.

“Q. *Well, will you be good enough to tell us what do you personally remember with regard to this man and this particular incident?* A. *All I remember is what I read on the card there.*

“Q. Nothing else? A. No, sir.” (Case, p. 94, italics ours.)

The Supreme Court in its opinion stated:

“If the petitioner had fallen 4 or 5 feet and struck his head, there would have been bruises and scratches on his head and body.” (Case, p. 8, ll. 31, 32 and 33.)

This inference, we respectfully submit, is not deducible from any evidence adduced in the case, because there was no competent evidence produced by respondent that there were no marks, bumps or scratches on petitioner’s head and body, the only direct evidence being by the peti-

tioner that he did have a lump on his head and marks and bruises on his left leg—certainly, neither Ahrens nor Dainoski's testimony, as we have pointed out, is competent evidence to this effect, although the Supreme Court, in its opinion, relied on the alleged testimony of these two witnesses to this effect. In its opinion, the Supreme Court said:

“There were no marks or scars on petitioner's body when Ahrens found him” (Case, p. 8, ll. 19 and 20).

“Joseph Dainoski * * *. The nurse found no marks, bruises, scratches or bumps on his head or body” (Case, p. 8, ll. 27, 28 and 29).

We further submit that there is no testimony on the part of any of the medical men who were heard at the trial of this cause in the Bureau that the presence or absence of such bumps or marks is of any significance. In fact, Dr. Blumberg stated that “If the man fell half way from the ladder it certainly would be a competent and producing cause for a rupture of an aneurysm” (Case, p. 110, ll. 29 to 33, inclusive). We desire to point out that in the case of

Azarowicz v. Metropolitan Beef Co., 118
N. J. L. 89

decided by the Supreme Court, which case was cited in the Supreme Court opinion herein, the petitioner in the *Azarowicz* case had claimed that he had sustained an injury to his heart as a result of being struck by an automobile. The prosecutor proved that the injured man showed no evidence of a blow to his chest and complained of no injury to his chest on hospital admission.

Yet the Supreme Court, in that case, did not raise any inference from such contradiction and granted an award to the injured man.

The Supreme Court, in its opinion in the next sentence after its statement last above quoted, stated:

“Further, if he had fallen off the ladder it is difficult to understand how he could have been found 7 feet away from it” (Case, p. 8, ll. 33 to 36, inclusive).

How, we ask, could the Supreme Court draw such an inference as negating a fall because of the location of petitioner’s body following his fall, when the direct and uncontradicted testimony of the petitioner as to what happened when he was on the ladder is as follows:

“Q. And what happened? A. *We started to twist and my leg, I couldn’t hold it and I couldn’t stand on the ladder any more and I lost my balance and I fell*” (Case, p. 47, ll. 30 to 33, inclusive). (Italics ours.)

This testimony indicates that the ladder moved or twisted from where it rested at the top against the wooden scaffold, at the same time that his leg got the cramp and twisted, so that he couldn’t stand on the ladder, and losing his balance, he fell off. He was found about seven feet away because he was on a teetering or moving ladder and he fell from the left side of the ladder. Where is this difficulty in understanding “how he could have been found 7 feet away from it (the ladder) if he had fallen off”. Assuming for the moment that there was an absence of direct testimony of the fall, is it a defi-

nite law of physics that a body falls straight downward? Does a person who has lost his balance and falls from the side of a ladder while trying to hold on fall without contortions and gyrations of his body, which certainly would throw or whirl him out and away from the ladder?

While inferences from testimony may be the legal basis of proof, there must be definite testimony before the Court upon which these inferences can be arrived at and the matters in proof must not be left to such an inference as will amount to a mere guess. In this cause, there was no need for inference. There was the direct, affirmative and uncontradicted testimony of the happening of the accident—the petitioner was not a perjurer and no one claimed that he lied—consequently, there was no need for inference by the Court below. There was no direct proof offered by the respondent that the petitioner did not fall from the ladder—in fact, the respondent-appellee herein, when before the Supreme Court in its briefs and arguments, made the point that the respondent attempted to prove nothing; that it was not required to prove anything and that it merely offered evidence to negative the effect of the petitioner's evidence.

We contend that the Supreme Court disregarded the testimony and proofs offered by the petitioner, and reversed the two lower tribunals upon unwarranted inferences unsupported by any competent evidence, and in this regard, we respectfully contend that the Supreme Court committed error.

POINT II

There was no disputed issue of fact before the Supreme Court for its determination and upon the undisputed facts, petitioner was entitled to an award as a matter of law.

As we have pointed out in the statement of facts, hereinbefore set forth, and the excerpts from the testimony quoted from the record, as well as the argument under Point I, we contend that the Supreme Court committed error in reversing the two lower tribunals, because there was no disputed issue of fact before it.

The Determination of the Workmen's Compensation Bureau is to be found on pages 26 to 32, inclusive, of the State of Case. In the Determination of the Bureau, Deputy Commissioner Medinets found, among other things, as follows:

"That there is no dispute of the fact that he fell off the ladder a distance of about four feet to the ground, and that he struck his head. Although this is disputed by respondent, nevertheless no evidence to the contrary was presented" (Case, p. 29, ll. 22 to 27, inclusive).

"I am further of the opinion that even if the fall from the ladder, which resulted from the cramp in his leg, was not associated with his employment, nevertheless, his employment placed him in an unusual position of hazard on a ladder about four feet from the ground at the time of the happening of the accident; that the ultimate physical injury suffered by the petitioner was

not the result of the cramp in the leg, but was the result of the fall from the ladder. He would not have fallen from the precarious position on the ladder were it not that his employment put him there in that hazardous position, therefore his employment was the cause of his ultimate disability. The principle of law enunciated in *Reynolds v. Passaic Valley Sewerage Commission* applies with equal effect here even though there may be some question as to whether or not the petitioner actually struck his head. The fact is that the fall unquestionably shook him up a great deal, and the reasonable probability is that he did strike his head either on the ground, the upright or the wooden beams" (Case, p. 30, ll. 1 to 27, inclusive). (*Italics ours.*)

Judge Hartshorne, of the Essex County Court of Common Pleas, affirmed the Workmen's Compensation Bureau by his Determination, which is to be found on pages 39 to 44, inclusive of the State of Case, and which Determination of the Essex County Court of Common Pleas followed in language, for the most part, the opinion of Judge Hartshorne, which is to be found on pages 35 to 38, inclusive, of the State of Case. Among other things, Judge Hartshorne, in his opinion, found as follows:

"As to the matter of petitioner's fall from the ladder, he testifies in detail in that regard and that he hit the left side of his head when he fell. No witness directly denies this, respondent's argument to the contrary being based upon the fact that when he was

found on the ground one of his legs was some seven feet from the ladder, his body being closer to it. But this hardly proves petitioner a perjurer, since the evidence is he tried to hold on as he was falling, which may well have whirled his legs away from the foot of the ladder. Both the written record and the conclusion of the trier of the facts, who heard and saw the witnesses, lead to the conclusion that petitioner was climbing the ladder as he fell” (Case, p. 36, ll. 6 to 22, inclusive). (Italics ours.)

We contend that these two lower tribunals considered the facts and decided in the petitioner's favor, as indicated above, by granting an award to the petitioner of total permanent disability, to which the petitioner was entitled as a matter of law. We desire to point out that not only has the Supreme Court on many occasions indicated in its decisions that the findings of fact of the two lower tribunals, which were in accord, should not be lightly disturbed, but this Court has also affirmed this rule in the case of

Hentz v. Janssen Dairy Co., 122 N. J. L. 494

which was a case appealed to this Court from a judgment of the Supreme Court setting aside the Bureau and the Common Pleas, both of which had granted an award. This Court, in reversing the Supreme Court, stated:

“Both the Bureau and the Court of Common Pleas properly awarded compensation for the deceased and his widow. Such findings should not be lightly disturbed.”

The Supreme Court, as we have pointed out hereinabove, did not rest its conclusions upon competent evidence but upon unwarranted and fallacious inferences unsupported by any evidence, in finding that the petitioner did not meet with an accident, thereby disregarding direct, uncontradicted and unimpeached evidence as to the happening of the accident in question. This holding by the Supreme Court deprives the petitioner-appellant of an award to which he is entitled as a matter of law. While it is true that this Court will not interfere where the Supreme Court has rendered judgment in a Workmen's Compensation case where there is a dispute of fact and there is competent evidence to sustain the judgment of the Supreme Court, nevertheless, where, as here, there is an absence of competent evidence this Court will reverse the Supreme Court. See *Cirillo v. United Engineers and Constructors, Inc.*, 121 N. J. L. 511. It is in cases where there is a dispute of facts, and the Supreme Court, having the duty of weighing and finding the facts, determines what the facts are, that this Court has held it will not interfere with such findings of fact by the Supreme Court. Such a case is

Tracey v. South River Lumber Co., 129
N. J. L. 546

affirmed by this Court in

130 N. J. L. 529.

In this *Tracey* case, the petitioner, a man 65 years of age, had suffered a cerebral hemorrhage which caused partial paralysis. *Tracey testified that he was stricken while he was engaged in the laborious work of loading lumber on a truck*

on a hot day. This testimony was not corroborated. There was a flat denial by the employer, which was corroborated by other witnesses, of any such occurrence as the petitioner claimed took place both as to the duties of the petitioner and as to the presence of a truck in the yard of the employer at that time. Mr. Justice Dinges, writing for the Supreme Court, on page 548 of 129 Law, stated:

“Both these witnesses were emphatic in their denial that the petitioner had done any loading of a truck on the day in question, and further testified that it was not part of the work of the petitioner to load trucks at any time. He was an elderly man, whose duties were light and worked pretty much to suit himself, receiving what is little more than nominal compensation.

“In this situation, we are of the opinion that the petitioner has failed to sustain the burden cast upon him to establish that there was an accident arising out of and in the course of his employment. His testimony is vague and not satisfactory. The denial of the defendant’s witnesses is categorical.”

The Writ of Certiorari in the *Tracey* case brought up for review a judgment of the Common Pleas, which had affirmed the Bureau, which in turn had awarded compensation to the petitioner. The Supreme Court reversed the judgment of the Pleas. Because the Supreme Court had before it a dispute of facts and resolved the dispute as it did in the *Tracey* case, this Court refused to interfere. *In the instant case, however, there is no dispute of fact.*

This Court in the case of

Kovalchuck v. Simpson & Brown, 117
N. J. L. 400

held:

“Suffice it to say that where, as here, the testimony is susceptible of conflicting inferences, the findings of fact by the Supreme Court are conclusive on appeal.”

This holding in the *Kovalchuck* case is a statement of the second instance wherein the judgment of the Supreme Court on uncontroverted evidence reasonably susceptible of divergent inferences is conclusive on error, *but an examination of the unreported opinion of the Supreme Court in the Kovalchuck case shows clearly that the application of this rule is to such cases where there is no direct proof as to the happening of an accident in a Workmen's Compensation case.* It is clearly inapplicable in the instant case, because the petitioner, Walter Carr, furnished direct, uncontradicted and uncontroverted evidence that he met with his accident while in the respondent's employ and in the performance of his duties as an employee of the respondent. In the unreported opinion of the Supreme Court in the *Kovalchuck* case, which was affirmed by this Court, and which is to be found in the State of Case on the appeal taken therein to this Court, which is on file in the State Library at Trenton, New Jersey, the Supreme Court stated:

“The prosecutors are dependents of Harry Kovalchuck, in his lifetime an employee of defendant, and whose body was found floating in Overpeck Creek, Bergen County. As-

suming the death was caused by accident, the question remained whether the accident arose out of and in the course of the employment. Referee Wegner in the Bureau held there was no proof of this, and Judge Leyden in the Common Pleas reached the same result. We have carefully examined the evidence and briefs and see no reason to differ from the concurring conclusions of these two tribunals. The Writ will accordingly be dismissed with costs."

A further examination of the said filed State of Case discloses that Referee John C. Wegner, on pages 13 and 14 of the said State of Case found as follows in the *Kovalchuck* case:

"I find as a matter of fact from the testimony and proof in this cause that decedent was last seen at his place of employment on May 18th, 1929, and that all the witnesses have testified that the decedent was missing after May 18th, 1929, *but there is no testimony before me as to the time, place or under what circumstances the decedent met his death.* His body was recovered on May 21st, 1929 badly decomposed in Overpeck Creek at Ridgefield, New Jersey. * * * *There is not one iota of testimony in this cause that the decedent met with an accident, nor is there one bit of presumptive or circumstantial evidence which would form the basis for a rational inference, tantamount to legal proof of the fact that the accident arose out of and in the course of employment.* * * * Petition is therefore dismissed." (Italics ours.)

Judge Leyden of the Bergen County Common Pleas, in his Determination of affirmance of the Bureau, which is to be found on page 19 of the filed State of Case in the *Kovalchuk* case, stated:

“The County Physician after an examination of the body was of the opinion that the cause of death was accidental drowning.

“The petitioner-appellant insists she has shown sufficient facts to raise a presumption that decedent met his death by accident arising out of and in the course of his employment since it should be inferred from the condition of the weather and the fact that equipment was scattered on the deck of the barge that the deceased, in the course of his employment either tripped, fell or was thrown into the water and drowned. Such a conclusion upon my part would be conjecture. The body of the decedent was not found under circumstances reasonably connected with the employment as in *DeFazio's Estate v. Goldschmidt Detinning Company*, 87 N. J. L. 317, 88 Atl. Rep. 705; *Muzik v. Erie Railroad Company*, 85 N. J. L. 129, 89 Atl. Rep. 248, and in many cases collected and analyzed by Mr. Justice Perskie in *Nardone v. Public Service Electric & Gas Company*, 113 N. J. L. 540, 174 Atl. Rep. 745.

“*After an examination of the entire record upon this appeal, I agree with the conclusion reached by Referee Wegner that ‘There was not one iota of testimony in this cause that the decedent met with an accident, nor is there one bit of presumptive or circumstantial evidence which would form the basis for*

a rational inference, tantamount to legal proof, of the fact that the accident arose out of and in the course of employment." (Italics ours.)

In the face of the affirmative, direct, uncontradicted, uncontroverted and unimpeached testimony of the petitioner as to the happening of the accident, with the consequent sustaining of the burden of proof by the petitioner, the respondent was thereupon placed under the burden of proving that the accident did not occur, if it so contended. This the respondent did not do. It not only did not call witnesses to contravert the petitioner, but it attempted to rely upon the inference that the accident could not have happened because the petitioner was found on the ground seven feet away from the ladder, as well as attempting to show that the petitioner did not fall because of the lack of marks on his head and body. As we have pointed out hereinbefore, the respondent's evidence does not even show that there were no marks, aside from the fact that medically there need not have been any marks upon the petitioner's head and body.

Atchison v. Colgate and Co., 3 N. J. Misc. 451

affirmed by this Court on the opinion below in
102 N. J. L. 425.

In the *Atchinson* case, the Supreme Court stated:

"If the prosecutor seeks to avoid liability for a cause for which it is not responsible, the burden of proof is on the employer to show such cause."

The rule in the *Atchinson* case has been followed many times by the Supreme Court among the recent cases being *Pierce v. Jersey Central Power and Light Co.*, 127 N. J. L. 71, 73 and *El v. Newark Star Ledger*, 131 N. J. L. 373, and in passing, we would like to point out that the respondent-appellee in its briefs and argument before the Supreme Court in the instant case quarreled with the doctrine of the *Atchinson* case, and suggested to the Supreme Court that it should repudiate the doctrine of that case.

CONCLUSION

The judgment of the Supreme Court should be reversed and the judgment of the Court of Common Pleas, which affirmed the Workmen's Compensation Bureau, should be affirmed.

Respectfully submitted,

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To be argued by
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