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Notice of Appeal.

Served—January 8, 1920.

Filed—January 15, 1921.

New Jersey Supreme Court

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THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor, against THE COURT OF COMMON PLEAS, in and for the County of Essex, and JOHN H. SCOTT, Clerk of Common Pleas, and RICHARD OBSER, Defendants.	On Certiorari. Notice of Appeal.

20

To HOWARD S. DODD,
Attorney of Defendant:

Sir:

PLEASE TAKE NOTICE, that the Prosecutor in the above stated cause hereby appeals from the whole of the judgment entered therein to the New Jersey Court of Errors and Appeals in the last resort in all causes.

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LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutor.

Dated, December 31, 1920.

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Grounds of Appeal.

Filed—May 19, 1921.

NEW JERSEY SUPREME COURT.

THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor-Appellant, vs. THE COURT OF COMMON PLEAS, in and for the County of Essex, and JOHN H. SCOTT, Clerk of the Court of Common Pleas, and RICHARD OBSER, Defendants-Respondents.	On Appeal, etc. Grounds of Appeal.

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To HOWARD S. DODD, Esq.,
Attorney of Defendants.

Sir:

PLEASE TAKE NOTICE that the following are the grounds upon which the prosecutor-appellant appeals from the judgment heretofore rendered in the above named cause and from every part thereof:

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1. The Court erroneously affirmed the judgment of the Essex County Court of Common Pleas, whereas it should have reversed said judgment.

2. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that

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> "the case is not within the schedules in subdivision (c) of paragraph 11 of Section II of the Compensation Act, which are confined to disability partial in character where the question would be the extent of disability."

whereas it should have been determined that the case is governed by the schedules contained in subdivision (c) of paragraph 11 of Section II of the Workmen's Compensation Act of 1911, as amended by Chapter 174 of the Laws of 1913. 10

3. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that

> "the matter is not controlled by the mere physical member removed, but the disability incurred," 20

whereas it should have been determined that the amount of compensation to be awarded is determined by the nature and extent of the particular injury suffered by the defendant, Richard Obser as a result of the accident arising out of and in the course of his employment by respondent on August 30, 1917. 30

4. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that the Legislature in enacting subdivision (c) of paragraph 11 of Section II of the Compensation Act, meant by "an eye" the first eye if a man had two eyes, whereas it should have been determined that in enacting said subdivision (c) of paragraph 11 of Section II

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of the Compensation Act, the Legislature meant by "an eye" one eye, whether the injured employee had one or two eyes prior to the occurrence of the accident.

5. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that the Legislature, in enacting subdivision (c) of paragraph 11 of Section II of the Compensation Act, meant by "an eye" the first eye if a man had two eyes, whereas it should have been determined that the Legislature, in enacting said subdivision (c) of paragraph 11 of Section II of the Compensation Act, meant by "the loss of an eye" the loss of one eye whether or not the injured employee had formerly lost the sight of his other eye or was in possession of the use of both eyes prior to the accident which resulted in the loss of one of them.

6. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that the Compensation Act makes no specific provision for the loss of the second eye, whereas it should have been determined that the Compensation Act specifically provides for the loss of an eye whether it be the first or second eye, in subdivision (c) of paragraph 11 of Section II thereof.

7. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that the Compensation Act makes no specific provision for the loss of the second eye, but does provide in substance that

total blindness shall constitute total disability by providing that where there is the loss of both eyes, a total and permanent disability is incurred, whereas it should have been determined that the Compensation Act does make specific provision for the loss of the second eye in subdivision (c) of paragraph 11 of Section II thereof, and only provides that the loss of both eyes shall constitute total and permanent disability when the loss of both eyes reulted from one and the same accident arising out of and in the course of the injured person's employment.

8. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that as a result of the said accident the defendant, Richard Obser, suffered an injury total in character and permanent in quality, whereas it should have been determined that the said defendant suffered an injury partial in character but permanent in quality, consisting of "the loss of an eye."

9. The Court erroneously sustained the judgment of the Essex County Court of Common Pleas whereby it was determined that the defendant, Richard Obser, is entitled to compensation for an injury total in character and permanent in quality, in the sum of $10.00 per week for a period of 400 weeks, whereas it should have been determined that the said defendant was entitled to compensation in the sum of $10.00 per week for a period of 100 weeks.

10. The judgment of the Court is in all respects illegal and void.

11. Said judgment is contrary to law.

10 LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutor-Appellant.

Dated, January 12th, 1921.

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Affidavit for Writ of Certiorari.

Filed, September 30, 1919. 10

New Jersey Supreme Court

THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor-Respondent, vs. RICHARD OBSER, Defendant-Petitioner.	On Certiorari. 20

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

JAMES E. M. TAMS, of full age, being duly sworn according to law on his oath, says: I am 30 an attorney-at-law of this state and am employed by Messrs. Lindabury, Depue & Faulks, attorneys for the above named prosecutor-respondent, and have had actual charge of the defense of the above named suit in its behalf.

On or about April 5, 1918, a petition was filed in the Essex County Court of Common Pleas by Howard S. Dodd, Esq., attorney for Richard Obser, the petitioner therein, under Chapter 95 of the 40

Laws of 1911 and the amendments thereof and supplements thereto, otherwise known as the "Workmen's Compensation Act," against the prosecutor-respondent, the material averments of which were that on or about August 30, 1917, the said petitioner was employed by The Combination Rubber Manufacturing Company, the respondent named therein, as a machinist; that while so employed, on or about said date, a piece of emery flew into his right eye from a machine which was being operated by another employee, a grinding tool man, as a result of which the petitioner's said right eye became affected and he was rendered totally blind, having previously lost the sight of his left eye; that the respondent therein had actual knowledge of the said injury; that the wages of said petitioner at the time of the said injury and prior thereto, were at the rate of $3.55 per day or $21.29 per week; that the petitioner and the respondent therein had failed to agree upon the amount of compensation due to the petitioner for his said injuries and that the said respondent disputed the petitioner's claim that he is entitled to receive compensation for a permanent total disability due to the loss of his entire sight, it being the claim of the respondent that it is liable to pay compensation for a permanent partial disability for the loss of one eye.

By an order dated April 5, 1918, the hearing of the said petition was set down for Wednesday, the first day of May, 1918, at the Court House (Common Pleas Room) in the City of Newark at 10 o'clock in the forenoon or as soon thereafter as counsel could be heard, and it was further provided in the said order that a true but uncertified copy thereof, together with a copy of the said petition, should be served upon the respondent within six days thereafter. A copy of the said petition

and order fixing the time and place of hearing were duly served upon the prosecutor-respondent on April 8, 1918, and thereafter, on or about May 17, 1918, an answer was filed by the said respondent, consent having been given to the filing of the same as within time.

The said answer admitted all of the allegations of the said petition and further alleged that the respondent had paid doctor's bill and other medical expenses to the extent of $50.00 incurred by the petitioner during the first two weeks after the occurrence of the injuries suffered by him, and that it had paid compensation to the petitioner at the rate of $10.00 per week for a period of 11 weeks beginning two weeks after the occurrence of the accident and continuing up to and including November 29, 1917, on account of temporary disability which ceased and ended on the said date, and that such facts were not disputed by the petitioner.

The hearing of said petition, having been set down for May 1, 1918, was at that time heard by the court in the presence of the attorneys representing the respective parties thereto. At the said hearing no testimony was offered on behalf of either of the said parties, who agreed upon the following facts, namely:

That on August 30, 1917, the petitioner was employed by the respondent as a machinist and was receiving wages at the rate of $21.29 per week; that on August 30, 1917, while so employed in the respondent's factory, a piece of emery flew from a machine which was being operated by a grinding tool man and embedded itself in the petitioner's right eye, causing an injury which resulted in the loss of the sight of petitioner's right eye, thereby rendering him totally blind, the sight of his left eye having been lost many years before he entered

the employment of the respondent; that said injury was the result of an accident which arose out of and in the course of the petitioner's employment by respondent, who had actual knowledge of the occurrence of said accident; that the respondent had paid medical expenses incurred by the petitioner during the first two weeks after the occurrence of the said injury, together with compensation for temporary disability suffered as a result of the said accident as alleged in its said answer.

At the said hearing and in its memorandum submitted to the court, the respondent maintained that the amount of compensation to which the petitioner is entitled for the injury sustained by him as a result of said accident, is specifically fixed by the "Workmen's Compensation Act" and is payable thereunder on the basis of "the loss of an eye," being a disability partial in character but permanent in quality, included in the schedule of compensation therein set forth, at the rate of $10.00 per week for a period of 100 weeks, and admitted liability to that extent.

The court having heard the facts as stipulated, and having considered the arguments presented by the respective attorneys, took the matter under consideration and on June 26, 1919, filed a determination of facts and rule for judgment, a certified copy of which is hereto annexed, wherein he found and determined that the facts were as stipulated and heretofore set forth; that

> "The case is not within the schedules in subdivision (c) of paragraph 11 of section II of the Compensation Act, which are confined to disability partial in character, where the question would be the extent of disability. The

matter is not controlled by the mere physical member removed, but the disability incurred. The Legislature in this subdivision meant by an 'eye' the first eye, if a man had two eyes. The Compensation Act makes no specific provision for the loss of the second eye, but does provide in substance that total blindness shall constitute total disability by providing that where there is the loss of both eyes, a total and permanent disability is incurred";

that

"As a result of the said accident the petitioner suffered an injury total in character and permanent in quality, and is entitled to compensation therefore from the respondent in the sum of $10 per week for a period of 400 weeks, from November 29, 1917, the date on which the temporary disability resulting from said accident admittedly ceased and terminated."

and judgment was thereupon entered in favor of the petitioner against the respondent in the sum of $4,000.00, payable at the rate of $10.00 per week for a period of 400 weeks, beginning November 29, 1917, together with petitioner's costs to be taxed. Neither the respondent nor its attorneys have consented to the filing of the said determination and rule for judgment.

Wherefore, respondent prays that a writ of certiorari may be allowed to review the determination of the said Essex County Court of Common Pleas,

and the judgment entered thereon, to the end that the same may be set aside and reversed.

JAMES E. M. TAMS.

Sworn to and subscribed before me
10 this sixth day of September, 1919.

B. S. HORNER,
Attorney at Law of New Jersey.

Writ of Certiorari.

Filed, October 25, 1919.

20 New Jersey, ss.:

The State of New Jersey to the Court of Common Pleas in and for the County of Essex and John H. Scott, Esq., Clerk of said Court of Common Pleas, and Richard Obser.

(Seal)

GREETING:

30 We being willing for certain reasons to be certified of and concerning a certain determination of facts and rule for judgment rendered on the 26th day of June, 1919, by William P. Martin, Esq., one of the judges of the said Court of Common Pleas in and for the County of Essex, in a certain proceeding brought on behalf of Richard Obser, petitioner, against The Combination Rubber Manufacturing Company, a corporation, respondent, for the determination and recovery of compensation under an
40 act of the Legislature of the State of New Jersey,

entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating the procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, do command you that the said determination of facts and rule for judgment, together with all proceedings for the making of the same, and all things touching and concerning the same as fully and entirely as before you they remain or are in your custody or control, you do certify and send together with this writ, to our Justice of our Supreme Court of Judicature at Trenton, on the 24th day of October, 1919, and that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, Honorable William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, this 27th day of September, 1919.

ENOCH L. JOHNSON.
Clerk.

LINDABURY, DEPUE & FAULKS,
Attorneys.

A true copy.
ENOCH L. JOHNSON,
Clerk.

Service of a copy of the within writ is hereby acknowledged this 1st day of October, 1919.

HOWARD S. DODD,
Attorney of Defendant,
Richard Obser.

Return to Writ of Certiorari.

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

We, William P. Martin, Judge of the Court of Common Pleas, Essex County, New Jersey, and John H. Scott, Clerk of said Court of Common Pleas, Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the pleadings, determination and statement of facts and judgment record, together with all things touching and concerning the same and as and by within writ to us directed, we are commanded.

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In Witness Whereof, we have hereunto set our hands and the seal of said Court at Newark, New Jersey, this 24th day of October, 1919.

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(Seal)

WM. P. MARTIN,
Judge of the Court of Common Pleas,
Essex County, New Jersey.

JOHN H. SCOTT,
Clerk of the Court of Common Pleas,
Essex County, New Jersey.

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Order.

Filed, September 30, 1919.

NEW JERSEY SUPREME COURT.

THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Essex and JOHN H. SCOTT, Esq., Clerk of said Court of Common Pleas, and RICHARD OBSER, Defendants.	On Certiorari. Order.

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Application having been made on behalf of the prosecutor of the writ of certiorari heretofore issued in the above entitled cause for an order that a transcript of the stipulations of fact entered into at the hearing before the Court of Common Pleas in and for the County of Essex, be certified and returned with the said writ,

IT IS, on this day of September, 1919, ORDERED that a transcript of the stipulations of fact entered into at the hearing before the said Court of Common Pleas in and for the County of Essex upon the petition of Richard Obser against The Combination Rubber Manufacturing Company, a corporation, be certified and returned into this court, together with the determination and statement of facts and the order, and all other proceedings for the making of the same, which are re-

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turned into court in accordance with the command of the said writ of certiorari.

WM. S. GUMMERE,
C. J.

Dated, Sept. 27, 1919.

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Entered on motion of
LINDABURY, DEPUE & FAULKS,
Attorneys.

Reasons.

Filed, October 25, 1919.

20 NEW JERSEY SUPREME COURT.

THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Essex and JOHN H. SCOTT, Esq., Clerk of said Court of Common Pleas, and RICHARD OBSER, Defendants.	On Certiorari. Reasons.

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The above named prosecutor presents the following reasons for setting aside the proceedings, determination of facts and rule for judgment brought before this honorable court by the Writ of Certiorari allowed in the above entitled cause.

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1. Because in the said determination of facts and rule for judgment it was ordered that judgment be entered in favor of the defendant, Richard Obser and against the said prosecutor, with costs, whereas it should have been ordered that judgment be entered in favor of said prosecutor and against the said Richard Obser. 10

2. Because by the said determination of facts and rule for judgment it was determined that

> " the case is not within the schedules in subdivision (c) of paragraph 11 of section II of the Compensation Act, which are confined to disability partial in character, where the question would be the extent of disability,"

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whereas it should have been determined that the case is governed by the schedules contained in subdivision (c) of paragraph 11 of section II of the Compensation Act.

3. Because by the said determination of facts and rule for judgment it was determined that

> "the matter is not controlled by the mere physical member removed, but the disability incurred,"

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whereas it should have been determined that the amount of compensation to be awarded is determined by the nature and extent of the particular injury suffered by the defendant, Richard Obser.

4. Because by the said determination of facts and rule for judgment it was determined that the Legislature in enacting subdivision (c) of paragraph 11 of section II of the Compensation Act, meant 40

by an "eye" the first eye if a man had two eyes, whereas it should have been determined that in enacting said subdivision (c) of paragraph 11 of section II of the Compensation Act, the Legislature meant by "an eye" one eye, whether the injured employee had one or two eyes prior to the occurrence of the accident.

5. Because by the said determination of facts and rule for judgment it was determined that the Legislature, in enacting subdivision (c) of paragraph 11 of section II of the Compensation Act, meant by an "eye" the first eye if a man had two eyes, whereas it should have been determind that the Legislature, in enacting said subdivision (c) of paragraph 11 of section II of the Compensation Act, meant by "the loss of an eye" the loss of one eye whether or not the injured employee had formerly lost the sight of his other eye or was in possession of the use of both eyes prior to the accident which resulted in the loss of one of them.

6. Because by the said determination of facts and rule for judgment it was determined that the Compensation Act makes no specific provision for the loss of the second eye, whereas it should have been determined that the Compensation Act specifically provides for the loss of an eye whether it be the first or second eye, in subdivision (c) of paragraph 11 of section II thereof.

7. Because by the said determination of facts and rule for judgment it was determined that the Compensation Act makes no specific provision for the loss of the second eye, but does provide in substance that total blindness shall constitute total disability by providing that where there is the loss of both eyes, a total and permanent disability is incurred,

whereas it should have been determined that the Compensation Act does make specific provision for the loss of the second eye in subdivision (c) of paragraph 11 of section II thereof, and only provides that the loss of both eyes shall constitute total and permanent disability when the loss of both eyes resulted from one and the same accident arising out of and in the course of the injured person's employment.

8. Because by the said determination of facts and rule for judgment it was determined that as a result of the said accident the defendant, Richard Obser, suffered an injury total in character and permanent in quality, whereas it should have been determined that the said defendant suffered an injury partial in charcater but permanent in quality, consisting of "the loss of an eye."

9. Because by the said determination of facts and rule for judgment it was determined that the defendant, Richard Obser, is entitled to compensation for an injury total in character and permanent in quality, in the sum of $10.00 per week for a period of 400 weeks, whereas it should have been determined that the said defendant was entitled to compensation in the sum of $10.00 per week for a period of 100 weeks.

10. Because by the said determination of facts and rule for judgment it was determined that the prosecutor herein has paid compensation to the defendant, Richard Obser, for a temporary disability suffered as a result of said accident at the rate of $10.00 per week for a period of 11 weeks, beginning two weeks after the occurrence of the said accident and continuing down to and including November 29, 1917, and it was ordered that judgment final

be entered in favor of the defendant, Richard Obser, and against the prosecutor, The Combination Rubber Manufacturing Company, in the sum of $4,000.00, payable at the rate of $10.00 per week for a period of 400 weeks, beginning November 29, 1917, thus making a total of 411 weeks, whereas
10 paragraph 14 (a) of section 2 of the Compensation Act specifically provides that

> "in no case shall the total number of weekly payments be more than 400."

11. Because the said determination of facts and rule for judgment is in other respects illegal and void.

20 LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutor.

Dated, September 6th, 1919.

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Petition.

Filed, April 9, 1918.

ESSEX COUNTY COURT OF COMMON PLEAS.

RICHARD OBSER, Petitioner, vs. THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Respondent.	On Petition for Compensation, &c., under the Employers Liability Act. Petition.

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TO THE JUDGES OF THE COURT OF COMMON PLEAS OF THE COUNTY OF ESSEX:

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Your petitioner, Richard Obser, respectfully shows:

FIRST.—That he resides at No. 346 South Warren Street, in the City of Trenton, County of Mercer, and State of New Jersey, and that on or about the thirtieth day of August, 1917, he was employed by the defendant at its place of business, in the Town of Bloomfield, County of Essex, and State of New Jersey, at his trade as a machinist.

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SECOND.—That on the day and year aforesaid while so employed, a piece of emery flew into his right eye from a machine being operated by a grinding tool man.

THIRD.—That as a result of said accident and a resulting infection in said eye, your petitioner was

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rendered totally blind, having previous to this said accident lost the sight of his left eye.

FOURTH.—That the said defendant, Combination Rubber Manufacturing Co., has had actual knowledge of his said injury.

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FIFTH.—That at the time of said injury and prior thereto, your petitioner received as compensation from the said defendant wages at the rate of Three and 55/100 dollars per day or Twenty-one and 29/100 dollars per week.

SIXTH.—That your petitioner and the said defendant have failed to agree upon the amount of compensation due to your petitioner for his said injuries, but on the contrary said defendant disputes the claim of your petitioner on the ground that it is liable to payment for a permanent partial disability for the loss of one eye, whereas your petitioner contends that he is entitled to receive payments for a permanent total disability due to the loss of his entire sight.

20

SEVENTH.—Your petitioner therefore prays that this court will determine the amount of compensation due to your petitioner from the said defendant under the act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder; approved April 4, 1911, and the acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this

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proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

RICHARD OBSER,
Petitioner. 10

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

Richard Obser, of full age, being duly sworn according to law, on his oath, deposes and says that he is the petitioner named in the foregoing petition; that the same has been read to him and he 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. 20

RICHARD OBSER.

Subscribed and sworn to before
me this 20th day of March, 1918.

S. H. CAIN,
(Seal) Notary Public, N. J. 30

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Order Fixing Time and Place of Hearing.

Filed, April 9, 1918.

ESSEX COUNTY COURT OF COMMON PLEAS.

10 On petition for compensation under "An Act prescribing the liability of an employer to make compensation for injuries, received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the several supplements thereto and acts amendatory thereof.

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RICHARD OBSER,
Petitioner,
vs.
THE COMBINATION RUBBER MANUFACTURING CO., a corporation,
Respondent.

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ORDER FIXING TIME AND PLACE OF HEARING.

A petition having been filed in this cause by the Petitioner praying for the compensation payable by the Respondent, it is on this 5th day of April, 1918.

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ORDERED, that the hearing of said matter be and hereby is set down for Wednesday, the 1st day of May, 1918, at the Court House (Common Pleas Court Room), in the City of Newark, at Ten o'clock in the forenoon, or as soon thereafter as counsel can be heard. And it is further

ORDERED, that a true, but uncertified copy of this order (together with a copy of the petition, upon which this order is based) be served upon the Respondent, within six days after the date of this order. 10

H. V. OSBORNE,
President Judge of the Essex County
Court of Common Pleas.

On motion of Howard S. Dodd,
Attorney for Petitioner. 20

Answer.

Filed, May 17, 1918.

ESSEX COUNTY COURT OF COMMON PLEAS.

RICHARD OBSER, Petitioner, vs. THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Respondent.	On Petition for Compensation &c. Answer.

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The answer of the Combination Rubber Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the 40

State of New Jersey, having its principal office and place of business in the Town of Bloomfield, in the County of Essex and State of New Jersey, the above named respondent, says that:

1. It admits the allegations of paragraphs 1, 2, 3, 4, 5 and 6 of the petition.

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2. It further alleges that it has paid doctor bill and other medical expenses to the extent of Fifty Dollars incurred by the said petitioner during the first two weeks after the occurrence of the injuries suffered by him, and further alleges that it has paid to the petitioner compensation at the rate of Ten Dollars per week for a period of eleven weeks beginning two weeks after the occurrence of the accident and continuing up to and including November 29th, 1917, on account of temporary disability which ceased and ended on the said date, which facts are not disputed by the petitioner.

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COMBINATION RUBBER
MANUFACTURING COMPANY,
By Fred L. Conover, Secy,
Respondent.

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

Fred L. Conover, being duly sworn according to law on his oath deposes and says: I am Secretary of the Combination Rubber Manufacturing Company, the respondent named in the foregoing answer; I have read the petition and the said answer and am familiar with the facts therein contained

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which are true to the best of my knowledge and belief.

FRED L. CONOVER.

Subscribed and sworn to
before me this day

of May, A. D., 1918. 10
JOHN SCHNEIDER,
Notary Public.
(Seal).

Consent to the filing of the within answer as in time is hereby given this 16th day of May, 1918.

HOWARD S. DODD,
Attorney of Petitioner.

20

Statement of Facts.

ESSEX COUNTY COURT OF COMMON PLEAS.

May 29, 1918.

RICHARD OBSER,
Petitioner,
vs.
THE COMBINATION RUBBER MANUFACTURING COMPANY,
Respondent.

30

Transcript of shorthand notes of proceedings taken before his Honor, William P. Martin, Judge, at the court house in the City of Newark, New Jersey. 40

APPEARANCES:

HOWARD S. DODD, Esq., for Petitioner.
JAMES E. M. TAMS, Esq., (Messrs. Lindabury, Depue & Faulks) for Respondent.

10 Mr. Dodd: The facts are that Richard Obser entered the employ of The Combination Rubber Company having previously been blind in his left eye by reason of an accident, that while in the employ of The Combination Rubber Manufacturing Company a piece of emery flew into his right eye, an inflammation resulted and he lost the total sight of his right eye, rendering him totally blind.

20 The respondent has paid the doctor's bill and medical expenses to the extent of Fifty Dollars and has paid to petitioner compensation at the rate of Ten Dollars a week for the period of eleven weeks. This compensation is in full of temporary disability which ceased on November 29th, 1917.

The Court: As the court understands the pleadings and the agreement of counsel the facts are that the petitioner was em-
30 ployed by the respondent at a time when he only had the sight of one eye and that he was injured by an accident arising out of and was in the course of the employment, in that while using an emery wheel something flew into the good eye and as a result of the injury he has now lost the sight of the good eye and that at the present time he is totally blind, the blindness in the eye the sight of which he lost first having been
40 caused by some other fact and the second one having been directly caused by the ac-

cident at present, and the question is one of law, as to whether he is entitled to compensation for a permanent and partial disability of one hundred weeks or a total and permanent disability of something more. That is the point, is it?

Mr. Dodd: Yes, sir. 10

The Court: Are there any other facts to be put in the case?

Mr. Tams: The additional facts are that he has received all the compensation to which he is entitled on account of temporary disability and he is now receiving compensation on account of the permanent disability.

The Court: Whatever that may be.

Mr. Tams: Our claim being, of course, that it is on the basis of the loss of one eye. 20

I, F. L. Salmon, official stenographer for the Essex County Court of Common Pleas, Part 1, do hereby certify that the foregoing is a true copy of the proceedings taken before Judge William P. Martin, Judge; that no testimony was taken.

Dated, October 24, 1919.

F. L. SALMON. 30

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Opinion of Court.

Filed, June 6, 1919.

ESSEX COUNTY COURT OF COMMON PLEAS.

RICHARD OBSER, Petitioner, vs. THE COMBINATION RUBBER MANUFACTURING COMPANY, Respondent.	Opinion. Summary Proceedings Under Workmen's Compensation Act.

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Mr. HOWARD C. DODD, for Petitioner.

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Messrs. LINDABURY, DEPUE & FAULKS (Mr. James E. M. Tams, of Counsel), for Respondent.

MARTIN, J.:

This is a proceeding by Richard Obser, petitioner, against The Combination Rubber Manufacturing Company, respondent, under the Workmen's Compensation Act. Respondent answered, substantially admitting all the material facts.

30

Petitioner lost the sight of his left eye many years before he entered the employment of respondent. He apparently, from the time of the loss of the first eye, had the full use of the second eye until this accident. While performing the duties of his employment an accident occurred, arising out of and in the course of the employment causing an injury to his right eye which resulted in the loss of the second eye, thus *rendering him totally blind.*

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Petitioner contends that he is entitled to compensation of one-half his wages for a disability total in character and permanent in quality for four hundred weeks. Respondent contends that petitioner is entitled to compensation for a disability partial in character and permanent in quality, to wit, the loss of any eye for a period of one hundred weeks. 10

The determination of the question involves the construction of paragraph 11 of the act, which provides:

> "11. Following is the schedule of compensation." * * *
>
> "(b) For disability total in character and permanent in quality fifty per centum of the wages * * *. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks." 20
>
> "(c) For disability partial in character but permanent in quality the compensation shall be based upon the extent of disability.
>
> "In cases included by the following schedule the compensation shall be that named in the schedule, to wit. * * *
>
> "For the loss of any eye, fifty per centum of daily wages during one hundred weeks.
>
> "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability to be compensated according to the provisions of clause (b)." 30

It is urged that petitioner is entitled to compensation for four hundred weeks, because the result of the accident is disability total in character and permanent in quality and that the disability falls within the class described in clause subdivision (b). 40

New Jersey State Library

It is claimed that by the generosity of nature petitioner was provided with two eyes, that when he lost the first the second performed "double work," known as compensation, and that he had fair vision, and that by the accident the result is total blindness. The contention is that the act broadly
10 and liberally construed, as it should be in accordance with numerous decisions, gives compensation for the disability incurred and that compensation should not be unduly restricted to the specific injury alone.

It is contended by respondent that the act establishes an agreement whereby the employer promises to pay a specific compensation for the particular physical injury suffered by the employee regardless of the result to the employee and not for
20 the impairment of his earning capacity or general disability caused by the injury; that the accident caused the loss of an eye only and that the accident alone would not have resulted in total disability if petitioner had another eye and that this present respondent should not be held responsible for the result contributed to by a prior injury.

The question to be decided is whether an employer is responsible for total and permanent disability occasioned by the loss of the second eye,
30 hand, arm or leg in a case where he is clearly not responsible in any way for the loss of the first eye, hand, arm or leg. This question is one of novel impression in New Jersey. The courts of other states with statutes containing like provisions have been called upon to decide the question. In Minnesota the statute is like that of New Jersey, except for an additional provision that if an employee receives an injury which of itself would only cause permanent and partial disability but which, combined
40 with a prior injury, does in fact cause permanent

and total disability, the employer shall be liable for the permanent and partial disability only caused by the second injury; hence the statute of that state shows that the legislature believed that if the proviso were not inserted the proper construction of the act would be that the second injury caused a permanent and total disability. See State ex rel. Carwin vs. District Court of Cass County, 151 N. W., 910. The Legislature of New York, Laws 1915, Chap. 615, similarly amended the compensation act of New York because the courts had already construed the original act to give compensation for a total and permanent disability.

In Schwab vs. Emporium Forestry Co. and Travelers Ins. Co., 167 App. Div., 614; 153 N. Y. Supp., 234; aff. Ct. Appeals, 216 N. Y., 712; 111 N. E., 1099, decided before the amendment of 1915, the second accident happened while the employee was working for a different employer in another character of employment from the first accident. The facts showed the loss of the second hand. The opinion states:

> "If a man has two hands, he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand. The method of * * * compensation for the loss of one hand is to allow sixty-six and two-thirds per centum of the salary * * * for 244 weeks. If the injured party had two hands and were earning $20 a week, if he lost one hand he would recover $3253.33. Another workman having lost one hand before entering the employment would be receiving say $10 a week for less efficient service. If that workman lost the second hand in the service,

if the claim of the insurance carrier is right, he would receive for 244 weeks at $10 a week or $1626.67. *So that for the loss of the second hand, which had its double value on account of the previous loss of the first hand, under this system he would be entitled to receive only half as much as for the loss of the first hand.* This anomalous result would indicate that the legislature could not so have intended. By subdivision 1 of Section 15, the loss of both hands shall presumably constitute total disability. As compensation for that total disability he is to receive sixty-six and two-thirds per cent. of the average weekly wages that he is then earning. As the man with one hand is presumably earning less wages than a man with two hands, to allow for the loss of the second hand as a permanent disability, a percentage of the weekly wage that he was then earning would be in complete harmony with the compensation to one who had lost both hands by the accident who receives his sixty-six and two-thirds per cent. upon the greater wages that he was earning at the time of the accident."

In Kriegham vs. Buffalo Wire Works, 169 N. Y. S., 307, the Appellate Division, Third Department, rendered a very interesting opinion in relation to the loss of the second eye, in which the court says:

"It appeared that in 1901, the claimant had suffered an accidental injury to the left eye which had resulted in the permanent total loss of the vision of that eye except as to 8/200 minus. This rendered the sight of that eye useless for any vocational purpose. The fact

of the left eye having been injured was not taken into account by the commission. * * *

The commission, understanding the case to be one of permanent partial disability only, made the award of 1914. That the claim was in fact one entitling the claimant to an award for permanent total disability cannot be questioned, nor can it be doubted that such award would have been made had the commission been fully informed as to the facts."

In Massachusetts, in the case in Re: Branconnier, 223 Mass., 273; 111 N. E., 792, the opinion states:

"*The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties, but, nevertheless, it was the employee's capacity.* It enabled him to earn the wages which he received. He became an employee under the Act and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time "while the incapacity for the work resulting from the injury is total". It establishes no other standard. *It fixes no method for dividing the effect of the injury and attributing part of it to the employment and another part to the pre-existing condition, and it gives no intention that the legislature intended any such division.*

The total capacity of this employe was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man, but that capacity which was all he had, had been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury."

In Rhode Island, In Re: J. & P. Coats, 103 Atl., 833, the Rhode Island statute similar to that of New Jersey, the court followed the opinion in the Branconnier case, citing the quotation above with approval in the New York case, supra, and the English case, infra.

Respondent cites the case of Weaver vs. Maxwell Motor Company, 152 N. W., 993, where the Supreme Court of Michigan holds that the compensation should be for a permanent and partial disability only. The court in that case states:

*"It must be confessed that the provisions of the Michigan statute are so ambiguous as not to be free from doubt. * * *"*

The reasoning of the court is not satisfactory and the court itself appears not to be satisfied with its own decision. The case proceeds upon the theory that the words of the statute should be implicitly followed, disregarding a broad and liberal construction which endeavors to find the real intention of the legislature from the whole act.

A later case in Michigan, Purchase vs. Grand Rapids Refrigerator Company, 160 N. W., 391 is very interesting. The court states in part as follows:

"In Weaver vs. Maxwell Motor Co. claimant's left eye was destroyed—the vision lost—

by the injury. Due to a previous injury, he could not see with his right eye, and after the last injury vision was limited in both eyes to a perception of light. It was held that total disability was not the result of the injury to the left eye, and that compensation should be limited to the amount fixed in the statute, for the loss of one eye, because claimant lost only one eye in the particular employment.

Nature has generously furnished some organs of the body in pairs. *A man can get along pretty well with one of them, as with one good eye, or ear or lung, or kidney, and it is probable that most men, in most vocations, could and would earn quite as much with one of either of these organs removed.* If a man with one good eye is able to earn as much as he would if possessed of two eyes, and loses, by accident, the remaining eye, *it is actually that injury which wholly disables him from pursuing his previous vocation since the previous loss of the other eye did not so disable him. This view, in the case last above cited, would have permitted claimant to receive compensation as for permanent total disability,* but for the fact that in all these cases the industrial accident board administers a law by the terms of which the board and the court are bound. The legislature has declared that the loss of both eyes (by the particular injury) shall constitute total and permanent disability, and that for the loss (by the particular injury) of one eye the compensation shall be 50 per cent of the average weekly wages during 100 weeks. It will be perceived that a man with two eyes might lose one of them without affecting his capacity to earn wages except for

a few days or weeks, and another, with but one good eye might be by its loss totally disabled to earn anything in his usual vocation. In either case his compensation, under the law, would be the same. If such a result is regarded as unjust, in determining which the rights of the employer must be considered, the remedy must be administered by the legislature.

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The legislature has not attempted a definition or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs in some degree the functions of a normal eye. A mere sightless organ might perhaps be considered no eye at all. Claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects. As a result of the injury, there was disability, and the disability is "deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified. * * *"

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The court in that case then allows for the loss of an eye notwithstanding that by the particular accident he lost only half of his vision, he having previously lost the one half of the vision of that eye in a prior accident. The injury was the loss of one half vision of one eye. The court held the disability to be the total loss of vision of that eye. The principle of this second decision is inconsistent with the principle of the first decision in Michigan because the respondent is held responsible for

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the loss of one half vision which the accident in his employment did not produce. See also to same effect Industrial Com. vs. Johnson, 172 Pacific, 422 (Colorado).

The great weight of highly respected opinion is in favor of the contention of petitioner and that the real purpose of the statute is to fully compensate the employee where the result of the accident is disability total in character and permanent in quality. 10

Respondent further contends that the Supreme Court of New Jersey in Bateman vs. Smith, 85 N. J. L., 409, holds that the injured workman's general condition prior to the accident may not be combined with the effect of the injury sustained for the purpose of supporting an award of greater compensation. In that case the county court held that petitioner was injured by the falling of a radiator which "broke both bones of his right leg and crushed and dislocated the ankle of the right leg and also caused a shock to his nervous system which has enfeebled and aged the petitioner" and caused at total disability, permanent in quality. The learned court there states: 20

> "The total disability is, to use the words of the act, a disability total in *character,* words which necessarily refer to the character of the disability considered in itself and not to the effects produced which have no fixed character, but follow with the peculiarities of each individual." 30

The Supreme Court held that the facts and evidence sustained only the permanent and partial disability of the loss of the leg. Apparently there was no satisfactory evidence to prove that the 40

nervous condition was (1) a total and permanent disability or (2) that it was caused by the loss of the leg. In that case if it had been shown by evidence that petitioner incurred not only the disability of the loss of the leg but a greater disability in a serious affection of his nervous system it is
10 probable that the decision would have been otherwise. If the scope of that opinion is, as respondent contends, that the ordinary result only that usually flows from a particular physical injury to an ordinary or normal person may be considered, then all judicial construction intended to apply the act as a whole is at an end. If a man loses his leg he will receive one hundred seventy-five weeks, if another man loses his leg and as a result also suffers from an affection of the blood which
20 permanently affects the action of the heart, making him totally unfit for all work, he would receive only one hundred seventy-five weeks, not four hundred. The learned Justice was then speaking only in relation to the particular case before him.

In the case at bar the petitioner lost his vision, a total disability in character. If he had been born with only one eye the effect of the accident would have been the same. The case is not within the
30 schedules in subdivision (c) which are confined to disability partial in character where the question would be the extent of disability. The matter is not controlled by the mere physical member removed but the disability incurred. Any one who suffers the loss of the second eye will always suffer total loss of vision, hence the injury has a fixed character in all cases and falls within the statement of law quoted from the opinion. The act makes no specific provision for the loss of the sec-
40 ond eye but does provide in substance that total blindness shall constitute total and permanent dis-

ability. The English statute gives compensation for the personal injury our statute gives compensation for the disability incurred by accident.

The implicit following of the precise words of the statute has not been approved by the Court of Errors and Appeals. In the case of Orlando vs. Ferguson, 90 N. J. L., 553, where it is held that where there are several disabilities involving the hands and an eye, for each of which a specific compensation is fixed by the schedule for compensation of partial permanent disabilities, that notwithstanding the comparison should be made with total and permanent disability. This case approves the decision in Vishney vs. Empire Steel Co., 87 N. J. L., 481, where there was an injury of a certain percentage to both eyes, and it was held that comparison should not be the precise percentage of loss of each eye but should be made with total and permanent disability. (Recently followed by International Motor Co. vs. Purcell, 103 Atl., 860). The court says in the Orlando case, page 557:

> "*It is not strictly a mathematical problem.* It is not to be solved by adding up the fractional parts but upon the basis of the percentage of total and permanent disability reasonably found to be produced by the several injuries considered collectively and with due regard to their cumulative effect."

These cases show the broad and liberal construction to be given a highly remedial statute.

The reasoning of respondent results in the legal proposition that if a person has some latent defect or other physical injury and meets with an accident causing further injury which alone, without

the prior disability, would not be very great, that the prior disability may not be considered in connection with the actual final disability which the employee suffers. In a case in this court an employee suffered slightly from a latent tuberculosis of the bones but enjoyed fair health and probably would have continued to do so except for the additional injury caused by the accident. As a result of the accident there was an extraordinary strain which brought to activity the dormant bacteria, greatly accelerating the existing disease, causing it to assume an active condition resulting in total and permanent disability. The court held respondent was responsible for total and permanent disability. McManus vs. Barbour Flax Co., 40 N. J. L. J., 118; Workmen's Compensation Act. Corpus Juris Treatise page 94, Sections 82-83 (1917) page 69, Section 58, notes 46-48. Winters vs. Atkinson Frizelle Co., 88 N. J. L., 401, 96 Atl., 360; 38 N. J. L. J., 195; Voorhees vs, Smith, 86 N. J. L., 500; 92 Atl., 280.

In Massachusetts this question has been carefully considered in an extraordinarily learned and able opinion, citing many of the English and American cases. Madden's case, 222 Mass., 487, holds that the accident which caused a severe strain to a preexisting weak and diseased heart condition does not confine compensation to the ordinary effect of the mere injuries sustained by the accident but that the employee is entitled to compensation for the particular disability to him caused by the accident and injury. At page 495 the court says:

> "The substantial question is whether the diseased condition was the cause or whether the employment was a proximate contributing

cause * * *. In this respect the same rule governs under the English act, where acceleration of a diseased bodily condition to the point where it constitutes a personal injury by reason of the strain or exertion of the employment is ground for recovery. See Clover, Clayton & Co. Ltd. vs. Hughes (1910) a. c., 242, 243; 127 L. T. J., 322, 2 B. W. C. C., 15 House of Lords, 3 B. W. C. C. 275, and like cases cited above" (at pages 493-4, and Brightman's Case 220 Mass., 17).

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The case of Hughes vs. Clover, Clayton & Co. was cited by Judge Tennant in Winters vs. Atkinson-Frizelle Co., 38 N. J. L. Journal, 195, and quoted at length 202, and the Court of Errors and Appeals affirmed substantially on the opinion below, 88 N. J. L., 401, at page 202, Judge Tennant quotes in part from Lord Loreburn as follows:

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"In one sense, every event is preceded by many causes. There is the causa proxima, the causa causans and the causa sine qua non. The causa proxima is alone considered on actions on a policy as a general rule. I do not think that is the proper rule for cases under the section now under discussion, for the reasons explained by Lord Lindley in Fenton vs. Thorley. It seems to me enough, if it appears that the employment is one of the contributing causes, without which the accident which actually happened would not have happened; and if the accident is one of the contributing causes, without which the injury which actually followed, would not have followed. And if this be so, it affords a guidance through the formidable arguments propounded on behalf of the appellant. * * * When the man's

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condition was such that he might have died in his sleep and the mere tightening of the nut with no more strain than ordinary in such work caused the accident, can it be said that the accident was one arising out of the employment? That seems to me to be the crucial point. * * * It is found by the County Court Judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain, the rupture would not have occurred when it did. * * * An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. * * * In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would have probably come all the same, or whether the employment contributed to it. In other words, did he die from disease alone, or from the disease and the employment taking together, looking at it broadly? * * * Was it the disease that did it or did the work he was doing help in any material degree?"

In Lee vs. Baird & Co., 1908, 45 S. L. R., 717 1 B. W. C. C., 38, Lord McKenzie says:

"It is the law that if a man who is already afflicted with an infirmity is injured by an accident and thereby incapacitated from carrying on the work which he was previously fit to do then that is an injury which results from the accident, even though that accident would not have incapacitated him had he been other-

> *wise sound.* The case may be figured of an injury to a man who to begin with had only one eye, that renders him more liable to be disabled, but if an accident happens and there is an injury to the sound eye, those responsible for the accident will be liable for the consequences although if he had the other eye the result would not have been the same."

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In Martin vs. Burnett, the Court of Appeals, England, 3 B. W. W. C., 146, where the employee suffered a blow on the temple some years before the accident in question which partly injured his eye and by the second accident he was injured and the eye was removed, it was argued that the removal of the eye was caused by reason of the first injury and not by the second accident. Cozens-Hardy, M. R., said:

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> "We think he still would have been in possession of his eye but for the accident" (second).

Petitioner in the case at bar would have had almost complete vision if it had not been for the second accident. The statute by providing that where there is the loss of both eyes a total and permanent disability is incurred provides in substance that where there is total loss of vision or blindness it is a total and permanent disability.

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In Purchase vs. Grand Rapids Refrigerator Co., supra., cited as an authority by respondent, the court points out with great clearness the generosity of nature in providing man with two eyes, two arms, two legs, two kidneys, &c. and goes on to show that the loss of one is usually a slight loss comparatively because it is compensated by the double work of the remaining one and that the

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loss of the second results in a total disability. It therefore demonstrates with the utmost clearness the vast difference between the value of the first member and of the second member that is lost. It seems only necessary to add that the Legislature must have known and understood this difference and that it meant by "an eye" the first eye, if a man had two eyes. The weight of authority in England, Massachusetts, Rhode Island and New York upholds that contention, which, in part, seems to be supported by the liberal construction of the Court of Errors and Appeals, particularly in the case of Orlando vs. Ferguson, supra.

The criterion of the extent of disability under the New Jersey statute is not the degree of the loss of earning capacity alone; sometimes the disability may not decrease earning capacity, Burbage vs. Lee, 87 N. J. L., 36; DeZang Standard Co. vs. Pressey, 86 N. J. L., 469; sometimes earning capacity may be materially decreased and the disability will remain the same; International Motor Co. vs. Purcell, supra., but the fact that earning capacity is decreased still remains a fact to be considered with all other circumstances of the case in determining the nature or extent of disability. The act gives "employees" the compensation. No distinction is made of healthy or sick, weak or strong, young or old. Each case should rest upon the facts of that particular case.

The court is constrained to hold in a broad and liberal construction of a highly remedial statute that the truth is that a permanent and total disability to the particular employee resulted from the injury, the proximate contributing cause being the accident, and that petitioner is entitled to recover for a disability total in character and permanent in quality.

Determination and Finding of Facts and Rule for Judgment.

Filed, June 26, 1919.

ESSEX COUNTY COURT OF COMMON PLEAS.

RICHARD OBSER, Petitioner, vs. THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Respondent.	On Petition for Compensation, etc.

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This is a proceeding brought by Richard Obser, petitioner, against The Combination Rubber Manufacturing Company, a corporation, under an Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, and I do hereby find and determine as follows:

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1. A petition was duly filed and an order fixing the time and place of hearing was served upon the respondent on April 8, 1918, and respondent filed an answer on May 17, 1918, consent to the filing thereof in time having been endorsed thereon by the attorney for the petitioner.

2. The hearing having been set down for May 1, 1918, was at that time held in the presence of

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Howard S. Dodd, Esq., attorney for the petitioner, and James E. M. Tams, Esq., representing Messrs. Lindabury, Depue & Faulks, attorneys for the respondent.

10 3. On August 30, 1917, petitioner was employed by the respondent as a machinist, and was receiving wages at the rate of $21.29 per week.

4. On August 30, 1917, while so employed in the respondent's factory, a piece of emery flew from a machine which was being operated by a grinding tool man, and embedded itself in the petitioner's right eye, causing an injury which resulted in the loss of the sight of petitioner's right eye, thereby
20 rendering him totally blind, the sight of his left eye having been lost many years before he entered the employment of the respondent.

5. Said injury was the result of an accident which arose out of and in the course of petitioner's employment by respondent, who had actual knowledge of the occurrence of said injury.

6. The case is not within the schedules in subdivision (c) of paragraph 11 of Section II of the
30 Compensation Act, which are confined to disability partial in character, where the question would be the extent of disability. The matter is not controlled by the mere physical member removed, but the disability incurred. The Legislature in this subdivision meant by an "eye" the first eye, if a man had two eyes. The Compensation Act makes no specific provision for the loss of the second eye, but does provide in substance that total blindness
40 shall constitute total disability by providing that

where there is the loss of both eyes, a total and permanent disability is incurred.

7. As a result of the said accident the petitioner suffered an injury total in character and permanent in quality, and is entitled to compensation therefor from the respondent in the sum of $10 per week for a period of 400 weeks, from November 29, 1917, the date on which the temporary disability resulting from said accident admittedly ceased and terminated.

8. Respondent has paid the medical expenses incurred by petitioner during the first two weeks after the occurrence of the said accident, together with compensation for a temporary disability suffered as a result of the said accident at the rate of $10 per week for a period of 11 weeks, beginning two weeks after the occurrence of the said accident and continuing down to and including November 29, 1917.

9. The petitioner's attorney is entitled to compensation, in addition to his costs allowed by law, in the sum of Three hundred fifty Dollars ($350) to be paid in the following manner: Two Dollars ($2.00) each week out of the weekly payments as and when paid, including those payments heretofore paid.

10. Costs will be allowed to the petitioner.

IT IS, therefore, on this twenty-sixth (26th) day of June, 1919, ORDERED that judgment final be entered in favor of the petitioner, Richard Obser, and against the respondent, The Combination Rubber Manufacturing Company, in the sum of

$4,000, payable at the rate of $10 per week for a period of 400 weeks, beginning November 29, 1917, together with petitioner's costs to be taxed.

WM. P. MARTIN,
Judge of the Essex County
Court of Common Pleas.

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The foregoing determination and finding of facts and rule for judgment is hereby approved as to form.

HOWARD S. DODD,
Attorney for Petitioner.

LINDABURY, DEPUE & FAULKS,
Attorneys for Respondent.

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ESSEX COUNTY COMMON PLEAS COURT.

28522

RICHARD OBSER, Petitioner, vs. THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Respondent.	On Petition. On Determination of Court After Hearing. Judgment entered June 26th, A. D. 1919.

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HOWARD S. DODD, Attorney of Petitioner.

Judgment on determination of court after hearing in the above entitled action was rendered on the twenty-sixth day of June, A. D. Nineteen hundred and nineteen in favor of the said petitioner, Richard Obser, and assess the damage against the respondent in the sum of Ten Dollars a week payable for a period of three hundred and eighty-nine weeks beginning Nov. 29, 1917, together with costs.

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And the court further allows the attorney of the petitioner the sum of Three hundred and fifty Dollars ($350.00) in addition to his costs allowed by law, to be paid in the following manner: Two Dollars each week out of the weekly payments as and when paid, including those payments heretofore paid.

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WM. P. MARTIN,
Judge.

Judgment entered and signed June 26th, 1919.
Q-2 page 26

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Opinion of Supreme Court.

Filed—November 16, 1920.

NEW JERSEY SUPREME COURT,

No. 224 June Term, 1920.

COMBINATION RUBBER MANUFACTURING CO., Prosecutor, vs. RICHARD OBSER, et al., Defendants.	10

Submitted July 1, 1920; decided November , 1920.

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1. A workman having already lost one eye at the time of entering on a new employment, sustained an accident arising out of and in the course of such employment which caused the loss of his remaining eye, and thereby rendered him totally blind. Held, that an award as for total and permanent disability was justified by paragraph 11 of the Workmen's Compensation Act of 1911, as amended by Chapter 174 of the Laws of 1913 (P. L., page 302).

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2. The Workmen's Compensation Act is to be treated as a remedial statute and should be liberally construed like other statutes of that character.

On certiorari to Essex Common Pleas of an award of workman's compensation.

Before: Justices SWAYZE, PARKER and BLACK.

For the Prosecutor: JOHN W. BISHOP, Jr.

For the Defendant Obser: HOWARD S. DODD.

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The opinion of the Court was delivered by PARKER, Justice.

The question is whether the Trial Court properly awarded compensation as for total and permanent disability for the loss of petitioner's remaining eye, he having already lost one eye before entering prosecutor's employ. The relevant provisions of Section 11 of the Act, as amended in 1913 (P. L., page 302) are as follows:

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"For the loss of an eye, 50 per cent. of daily wages during 100 weeks."

(b) "For disability total in character and permanent in quality, 50 per cent of the wages received at the time of injury * * *. The compensation shall be paid during the period of such disability, not, however, beyond 400 weeks."

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"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).

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"In all other cases in this class, or where the usefulness of a member or any physical function is permanently impaired, the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

It is claimed for prosecutor that what the employe lost by the accident was "an eye" and inasmuch as the act prescribes specific compensa-

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tion for the loss of an eye, that clause should be applied. But this we conceive to be too literal an application of the letter of the statute, with results quite inconsistent with its spirit. That the act is remedial in character appears by the entire trend of decision in this state in cases arising under it, of which it is sufficent for present purposes to cite Jensen vs. F. W. Woolworrth Co., 92 N. J. L., 529, a very recent decision of the Court of Errors and Appeals. As a remedial act it should be liberally construed; and applying this rule, we are clear that as respects major injuries, like the loss of an eye, an arm, or a leg, the legislature was dealing with a situation in which the other eye, arm, or leg, would still be available. The case of Bateman Mfg. Co. vs. Smith, 85 N. J. L., 409, is not at variance with this view; for, in that case, the claim was for loss of one of two legs plus nervous shock caused by the injury. We think this is not parallel with a case in which a one-legged man is deprived of his only remaining leg, or a one-eyed man of his sole eye. Such cases come within the general clause of subdivision (c) of Section II of paragraph 11, as amended in 1913, already quoted. "In all other cases in this class, *or where * * * any physical function is permanently impaired.*" The petitioner had eyesight when he entered on his employment; that eyesight was a physical function; it was destroyed utterly. True, the word "impair" taken literally, does not cover total destruction of a function; but here again the spirit should not be killed by the letter. The compensation prescribed by the clause is the same proportion of that provided for loss of both eyes (involving total blindness) as the disability produced by the injury in question (total blindness) bears to that produced by the loss of

both eyes, i. e. the same. Such a view was enunciated by the Supreme Court of Massachusetts under the statute of that state In re Branermier, 223 Mass., 273.

The Trial Judge was manifestly entitled to find that petitioner had suffered a total loss of the function of vision, and that this entitled him to the same compensation as a disability produced by the loss of both eyes. This was the method applied in Vishney vs. Empire Steel & Iron Co., 87 N. J. L., 481; Orlando vs. Ferguson, 90 N. J. L., 553, and Purcell vs. International Motor Co., 91 N. J. L., 707, all of which cases arose after the amendment of 1913.

The judgment will be affirmed.

Rule for Judgment in Supreme Court.

Filed—December , 1920.

NEW JERSEY SUPREME COURT,

June Term, 1920.

COMBINATION RUBBER MANUFACTURING CO., Prosecutor, vs. RICHARD OBSER, et al., Defendants.	On Certiorari to Essex Common Pleas of an Award of Workmen's Compensation. Remittitur

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This cause having been duly argued before the Supreme Court at the present term by John W. Bishop, Jr., Esq., appearing for the prosecutor, and Howard S. Dodd, Esq., appearing for the defendant Richard Obser, and the Court having considered the matter.

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It is, thereupon, ORDERED and ADJUDGED that the judgment of the Essex Common Pleas be affirmed with costs.

By the Court,
Dec. 1, 1920.
F. J. SWAYZE,
Justice.

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On motion of
Howard S. Dodd,
Attorney for Defendant, Richard Obser.

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PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

New Jersey Court of Errors and Appeals

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THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, Prosecutor-Appellant, vs. THE COURT OF COMMON PLEAS in and for the County of Essex and JOHN H. SCOTT, Clerk of the Court of COMMON PLEAS, and RICHARD OBSER, Defendants-Respondents.	On Certiorari. Appeal from Supreme Court.

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BRIEF OF PROSECUTOR-APPELLANT.

This case comes up on appeal from the judgment of the Supreme Court (Case, page 51), affirming the judgment of the Essex County Court of Common Pleas (Case, page 41) in a proceeding to determine the amount of compensation payable under Chapter 95, of the Laws of 1911, known as the Workmen's Compensation Act, and the supplements thereto and amendments thereof, wherein Richard Obser was the petitioner and The Combination Rubber Manufacturing Company was respondent.

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Prior to his employment by the prosecutor Richard Obser had lost the sight of his left eye.. On or about August 30, 1917, he lost his right eye as the result of an accident arising out of and in the course of his employment by the prosecutor. The sole question presented to the trial court for its determination was whether he is entitled to compensation under the Workmen's Compensation Act for a partial and permanent disability during a period of 100 weeks or for a total and permanent disability during a period of 400 weeks. The trial court found that the petitioner therein had suffered an injury total in character and permanent in quality and awarded compensation on that basis in the sum of $10.00 per week for a period of 400 weeks (Case, page 43, line 7), holding that

> "The case is not within the schedules in subdivision (C) of Paragraph 11 of Section II of the Compensation Act, which are confined to disability partial in character, where the question would be the extent of disability. The matter is not controlled by the mere physical member removed but the disability incurred. The legislature in this subdivision meant by an 'eye' the first eye if a man had two eyes. The Compensation Act makes no specific provision for the loss of the second eye but does provide in substance that total blindness shall constitute total disability by providing that where there is the loss of both eyes a total and permanent disability is incurred" (Case, page 42, line 29).

The prosecutor-appellant intends to rely upon all of the Grounds of Appeal set forth on pages ii to vi of the State of Case.

The question presented thereby is simply one of interpretation of the statute and may be briefly stated as follows:

Where an employee, who has previously suffered an injury or is laboring under a disability for which his employer is in no way responsible under the statute, suffers another injury as the result of an accident arising out of and in the course of his employment, does the New Jersey Workmen's Compensation Law entitle him, to compensation for total permanent disability during a period of 400 weeks or only for "the loss of an eye" during a period of 100 weeks?

The prosecutor-appellant contends that since the injury is one of those specifically enumerated in the schedule, the award should be for the specific amount fixed therein, and, that although total permanent incapacity may have followed the second injury, it was caused by a combination of the effects of the first and second injuries and therefore is not a disability "resulting from an accident arising out of and in the course of petitioner's employment."

The title of our Compensation Act describes it as:

> "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation * * *."

Paragraph 7, which is the first paragraph under Section II, further provides that when an employer and employee agree to accept the provisions of Section II,

> "* * * *compensation for personal injuries to* or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, *according to the schedule contained in paragraph* 11 * * *."

Paragraph 11, so far as is applicable to this case, is as follows:

> "11. Following is the schedule of compensation:
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> (b) For disability total in character and permanent in quality, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of $10.00 per week and a minimum of $5.00 per week; *provided,* that if at the time of injury the employee receives wages of less than $5.00 per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.
>
> (c) For disability partial in character but permanent in quality, the compensation shall be based upon the *extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule* to wit: * * *
>
> For the loss of an eye, fifty per centum of daily wages during 100 weeks.
>
> The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b)."

As the Act itself declares, its purposes is to compensate an injured workman for injuries accidentally received by him in the course of his employment and compensation is to be awarded "according to the schedule contained in Paragraph 11." Consequently, any award made under Section II must be limited by the terms of that schedule. The injury in this case was the loss of an eye. The loss of an eye is one of the "cases included by the sched-

ule" contained in Paragraph 11 (c) and by the specific language of that clause in such cases "the compensation shall be that named in the schedule to wit: * * * For the loss of an eye, fifty per centum of daily wages during 100 weeks."

The only injury for which compensation is payable is that which is the result of the accident, *Hargrave* vs. *Haughhead Coal Company, Ltd.*, L. R. 1912, A. C., 319. In that case the petitioner having lost his right eye by accident later suffered a cataract in his left eye from another cause and claimed additional compensation for the disability resulting from the injury to his right eye. The House of Lords held that as the cataract was not caused by the accident the mere fact that the petitioner would not have been blind had the accident to his right eye not occurred was no reason for awarding additional compensation for that injury and Lord Atkinson, in his opinion, said, on page 321:

> "Now the compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation. The function of the schedule is to supply a measure of damages for that compensation; but a man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets."

The disability contemplated by the New Jersey Statute for which compensation is awarded is determined solely by the nature and extent of injury to or limitation of the use of a physical function as the result of an accident and not by the impaired earning power or incapacity for work which the employe may have after the accident. Capacity

for work or ability to earn wages may or may not be affected by the injury. The compensation is the same. The Act makes no difference in the amount payable for the loss of a member by reason of a greater or lesser capacity for work, according to the condition of the workman or nature of his employment. Although totally incapacitated by the loss of the little finger on his left hand, a violinist could recover no more than 15 weeks' compensation, whereas for the loss of both feet, which would have practically no effect upon his capacity to work, he would be entitled to 400 weeks' compensation.

The title of the Act and the Sections above quoted make it clear that "disability" and "injury" are synonymous terms as used therein, and in the case of *Bateman* vs. *Smith,* 85 New Jersey Law, 409, the Supreme Court has so construed the statute. In that case, the facts as found by the trial judge were that the petitioner, while engaged in his duties in the polishing department of respondent's factory, was injured by the falling of a radiator, which broke both the bones of his right leg, crushed and dislocated the ankle and caused a shock to his nervous system which enfeebled and aged him, and caused a total disability permanent in quality. The Supreme Court held that the trial judge erroneously awarded compensation on the basis of total disability and should have given judgment for 175 weeks only, that being the amount provided by the statute "for the loss of a leg." In his opinion, Mr. Justice Swayze said,

> "Section 2, placitum 7 (Pamp. L. 1911, page 136), provides for compensation according to the schedule contained in paragraph 11. Necessarily, any award under this section must be limited by the terms of the schedule. The probable reason for the distinction

made by the legislature between proceedings under the two sections is that Section 1 requires proof of the employer's negligence, and Section 2 gives the employe an absolute right to compensation for injury by accident arising out of and in the course of employment. The greater certainty of recovery under Section 2 was probably supposed by the legislature to be an equivalent for the possibility of a larger recovery under Section 1. It seems to have been thought necessary or advisable to make the amount also certain, as far as possible, and for this reason an elaborate schedule was adopted. *This schedule, in order to serve its purpose, must be applicable alike to all ages and to all classes of employees.* There is no suggestion that the amount to be awarded to a man should be larger because on account of his age the permanent injury to him may be greater, nor that it should be less because on account of his youth and probability of complete recovery the pecuniary injury may be less; nor is there any suggestion that the award should be diminished where as in the present case, the expectation of life is less than the four hundred weeks for which pay is permitted in case of total disability. The only variance contemplated by the statute is that caused by a difference in wages earned. The total disability is, to use the words of the act, a disability total in *character, words which necessarily refer to the character of the disability considered in itself and not to the effects produced which have no fixed character but vary with the peculiarities of each individual.* Were it otherwise, we should have to determine what kind of a man was meant by the legislature to receive the standard

statutory compensation—whether a young and vigorous man or an old and decrepit man or someone between the two extremes; and we should then have to vary the award in each individual case and perhaps never find the typical normal standard. If it is, as we think cannot be doubted, *the character of the injury not the peculiar and varying character of the individual injured, that the statute means,* we must look to subdivision C, of paragraph 11, Section 2. The character of a total disability is there fixed as the loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof. *Whether this statutory definition of a total disability is exhaustive or not, it is clear that the loss of one leg is not, in view of the statute, of the same character as the loss of both. If there could be any doubt on this subject, it would be removed by the fact that the statute carefully provides for the loss of one leg as a partial disability.*"

In *De Zeng Standard Company* vs. *Pressey,* 86 New Jersey Law, 469, affirmed without opinion in 88 New Jersey Law, 382, which was followed and re-affirmed in *Burbage* vs. *Lee,* 87 New Jersey Law, 36, the court, said:

> "As we read the Act the disability intended thereby is a disability due to loss of a member, or part of a member, or of a function rather than to mere loss of earning power."

As in *Bateman* vs. *Smith,* supra, the disability was the loss of a leg, so here the only disability resulting from the accident was "the loss of an eye," which paragraph 11 of the statute has specifically

catalogued as a partial disability, thereby excluding it from the provision of that other paragraph which provides compensation for a total permanent disability. The amount of compensation payable for such disability is fixed by that schedule and the Legislature alone can change it. *Purchase* vs. *Grand Rapids Refrigerator Company,* infra.

The Schedule makes no distinction between the loss of an eye by a workman who had both eyes prior to the accident and the loss of an eye where the other has been lost in a previous accident. In either case the disability actually caused by the loss of one eye is partial in character and so declared by the statute. Bateman vs. Smith, supra. The cause of the total disability which a man suffers after the loss of both eyes is attributable partly to the loss of the one and and partly to the loss of the other; consequently, when both eyes are lost as the result of a single accident arising out of and in the course of the employment, the employer is responsible for the whole resulting disability, which paragraph 11 of the statute declares to be total in character. This clause of the statute, however, goes no farther than to declare that the *loss* of *both* eyes constitutes total disability. It does not provide that an accident which causes the loss of one eye shall be held to have caused total disability, when such disability actually results partly from the pre-existing loss of one eye in a former accident and partly from the loss of the second eye in the recent accident. The question is not whether the loss of both eyes causes total disability, but this: Does the loss of petitioner's right eye alone cause total disability?

It is submitted that the learned trial judge confused a class of cases where total disability results from several concurrent causes with another class in which the injury has aggravated a pre-existing con-

dition or disability, resulting in an injury which in its nature and extent is thereby greater than it would have been had such pre-existing condition been absent. Such cases as *Purchase* vs. *Grand Rapids Refrigerator Company,* 160 N. W., 391, and *Industrial Commission* vs. *Johnson,* 172 Pacific, 422, where the injured men lost the full sight of an eye already materially affected are of this latter class, in which there is no question but that the employer is liable for the full extent of the injury, no matter how great it may be.

The distinction between these two classes of cases is clearly shown in the *Purchase Case* cited above and in *Lewis* vs. *Wrexham & Acton Collieries, Ltd.,* 9 B. W. C. C., 518, Court of Appeal, England, July 18, 1916, in which a workman over 65 years of age, in ill health generally, who had not been able to work regularly, was injured by a fall of coal in a colliery. Three of his ribs were broken and the county judge found that while he was totally incapacitated, the accident only produced partial incapacity, the rest being due to other causes. The following are excerpts from the opinion of Lord Justice Pickford:

> "It has been contended, as I understand, that if there be a total incapacity of the workman arising from a partial incapacity as the result of the accident and a partial incapacity arising from something else, the employers must pay for the total incapacity. I certainly do not accept that argument. I think, really that the argument for the appellant proceeded on this ground: That that was not what the county judge found, but that what he had found was that the total incapacity resulted from the accident and from the age and ill health of the man, and that the result

would not have been so great if the man had not been of an age and in a condition of health such as he was. If the learned county judge had found that, I should be inclined to think that probably his decision was wrong."

The evidence showed that "his condition was really owing to the accident and to the fact of his being an old and unhealthy man." 10

"* * * the learned judge found this: I find the applicant is at present wholly incapacitated, but that his incapacity is not now wholly due to the accident, but partially due to other causes. * * * Reading that, one may speculate that possibly the learned judge may have a little confused the two positions, the position of partial incapacity due to the accident, and an additional incapacity due to other causes altogether, with the position of an incapacity resulting from the accident, but only resulting from the accident because the man was old and in an unhealthy state. I only speculate as to that. The learned judge has not said that. He has distinctly said that the man's incapacity is not wholly due to the accident, but partially due to other causes. I should take the meaning of that to be that the results of the accident have passed away except to a partial extent; that is all that is now due to the accident, but there are other causes which have produced a state which makes him wholly incapacitated. That being the finding. I think, that the learned judge was right in saying. 'I can only give him part compensation and not the whole.' " 20 30

This is a case of novel impression in the courts of this state and is one which depends entirely upon the construction of the statute in effect on 40

August 30, 1917, the date on which the accident, which resulted in the loss of the defendant-respondent's right eye, occurred.

The state of Michigan has a statute similar to our act (Pub. Acts Ex. Sess., 1912, No. 10) which provides as follows:

10 "Part 2, Section 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employe a weekly compensation equal to one-half his average weekly wages, but not more than $10.00 nor less than $4.00 a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensa-
20 tion exceed $4,000."

"Section 10 . While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than $10 a week; and in no case shall
30 the period covered by such compensation be greater than three hundred weeks from the date of injury. *In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to wit:* * * * For the loss of an eye, fifty per centum of average weekly wages during one hundred weeks; the loss of both hands,
40 or both arms, or both feet, or both legs, or

both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of Section 9."

Under this Act the Supreme Court of Michigan, held in *Weaver* vs. *Maxwell Motor Company* (Michigan 1915), 152 N. W., 993, which is on all fours with the facts of this case, that the loss of the sight of the second eye was a partial disability which of itself did not cause total disability and that the plaintiff was only entitled to the compensation provided in Section 10 "for the loss of an eye," and said on page 994,

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"All of its provisions, however, should be given effect, if possible. The compensation fixed in Section 9 must be based upon the fact that the total incapacity for work resulted from the injury. Section 10 deals with the partial incapacity for work resulting from the injury, and fixes the compensation, and then proceeds:

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'For the loss of an eye fifty per centum,' etc. 'The loss * * * or both eyes * * * shall constitute total and permanent disability,' "

"In the instant case the loss of the first eye was a partial disability for which, if our Workmen's Compensation Law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the result of the partial

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disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity; and it is so ordered."

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This case was followed in *Winn* vs. *Adjustable Table Company* (Michigan, 1916), 159 N. W., 372, and *Collins* vs. *A. A. Albrecht Co.* (Mich., 1920), 180 N. W., 480.

In re Branconnier (Massachusetts, 1918), 111 N. E., 792, in which the facts were also similar, held that the petitioner was entitled to compensation as for a total incapacity for work.

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The Massachusetts Statute (St., 1911, c| 751) provides as follows:

"Sec. 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employe a weekly compensation equal to one half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than three thousand dollars."

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"Sec. 10. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employe a weekly compensation equal to one half of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be

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greater that three hundred weeks from the date of the injury."

It is apparent that this Act awards compensation for "incapacity for work" and does not prescribe a fixed compensation based upon the nature and extent of the injury suffered except in so far as an additional amount is awarded for certain specified injuries, and as Chief Justice Rugg said, in the above case, on page 793:

> "The Act affords a fixed compensation for a limited time 'while the incapacity for the work resulting from the injury is total.' It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the legislature intended any such division."

Weaver vs. *Maxwell Motor Company,* supra, was apparently called to the attention of the Massachusetts Court, which readily distinguished between the Michigan statute, which is similar to the New Jersey one, and the Massachusetts Act, saying on page 793,

> "The statute under consideration in *Weaver* vs *Maxwell Motor Car Company,* 152 N. W., 993, appears to have been so different as perhaps not to make that decision inconsistent with our view."

as did Wheeler, J., in Saddlemire vs. American Bridge Co. (Conn., 1920), 110 Atl., 63, on page 68:

> "Cases in other jurisdictions, which reach a different conclusion, are so affected by their

local statutes that we do not deem it important to differentiate them from this decision" (referring to the Brancounier case, supra).

The cases in other states which follow the Massachusetts law do so either because their own statutes are similar, such as *In re J. & P. Coats*, (Rhode Island, 1918), 103 Atl., 833, or fail to note any distinction whatever between the Massachusetts Act and their own. Such cases are obviously of no value as an aid to this court in construing the New Jersey Act.

As appears from reading the Massachusetts and similar Acts they have provided a schedule of compensation to be paid *in addition to* that awarded for "incapacity for work" in the case of certain specified injuries. Section 11 of the Massachusetts Act, Stat., 1911, c. 75 (as amended by acts 1913, c. 696, Sec. 1 provides as follows):

"In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensation.

(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of normal vision in both eyes with glasses, one-half of the average weekly wages, of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the reduction to one-tenth of normal vision in either eye with glasses, one-half the average weekly wages of the injured

person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks."

This section and the corresponding ones in similar laws are the only parts of those Acts which correspond with the New Jersey Compensation Act. It is significant that in construing its statute the Rhode Island Court *In re J. & P. Coats,* supra, holds that,

> "The purpose of Section 12 is plainly to provide compensation for specified injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified injury in this case is 'the entire and irrevocable loss of the sight of' one eye, and not of both."

The reason for the construction of the statute for which prosecutor-appellant contends is quite obvious. If an employer were to be held responsible for total and permanent disability in case of an injury which resulted in the loss of a member by an employe who had already lost another of the members referred to in paragraph 11 (C), it would be impossible for any such workman to get a position. Certainly the Compensation Act was never intended to create such a situation.

The prosecutor-appellant does not seek to avoid the payment of compensation for the injury resulting from this accident. It has admitted liability for its occurrence and continued to pay compensation on the basis of a partial disability consisting of "the loss of an eye" during the proceedings and until the full 100 weeks had been paid. It submits, however, that the only result of this accident was the loss of the petitioner's right eye and that it is not responsible for any further incapa-

city which the defendant-respondent, Richard Obser, has suffered by reason of having lost the sight of his left eye at some former time in addition to the injury resulting from this accident.

Respectfully submitted,

10 LINDABURY, DEPUE & FAULKS,
Attorneys for Prosecutor.

J. W. Bishop, Jr.,
J. E. M. Tams,
of Counsel.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE COMBINATION RUBBER MANUFACTURING COMPANY, a corporation, *Prosecutor-Appellant,* *vs.* THE COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF ESSEX and JOHN H. SCOTT, Clerk of the Court of Common Pleas, and RICHARD OBSER, *Defendants-Respondents.*	*On Certiorari.* *Appeal from Supreme Court.*

BRIEF FOR RICHARD OBSER, Defendant-Respondent.

Statement of Facts.

The facts are not disputed. Richard Obser, the petitioner below, entered the employ of The Combination Rubber Manufacturing Company, the respondent below, having previously thereto lost the sight of his left eye. While in the course of his employment, he sustained an injury to his right eye, which caused the loss of that eye, thus rendering him totally blind. The petitioner asked for compensation for total and permanent disability under paragraph 11, Section II, of the Workmen's Compensation Act, which provides as follows:

> "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability to be compensated according to the provisions of clause (b)."

The Court of Common Pleas gave judgment for four hundred weeks for total and permanent disability in accordance with clause (b), the Supreme Court sustained this judgment, and the appellant has taken the case to this court on appeal.

It is submitted that the judgment should be sustained for the following reasons:

I.

The Workmen's Compensation Act should be liberally construed.

In the words of a recent decision, *Mayor, &c.,* v. *Borst,* 90 N. J. L. 454, at page 456,

> "This law, it will be noted by a reference to its terms, is a remedial law of primary import, and should be liberally construed. It should be broadly construed."

The Supreme Court in sustaining the judgment stressed this very point (see page 49, State of Case).

This case is one of novel impression in New Jersey, and since it has arisen the Legislature has amended the act as hereinafter stated.

Section II, clause (b), of the law provides that for disability total in character and permanent in quality, there should be paid fifty per centum of the wages, not, however, beyond four hundred weeks, and further states in clause (c) that for disability partial in character but permanent in quality the compensation shall be * * * * for the loss of an eye, fifty per centum of the wages during one hundred weeks. It is further provided under clause (c) that the loss of * * * * both eyes * * * * shall constitute total and permanent disability to be compensated according to the provisions of clause (b).

It is urged on behalf of the respondent that he is entitled to fifty per cent. of his daily wages for four hundred weeks on the ground that because of his accident he has suffered a total and permanent disability. Clause (b) says nothing about one accident or two accidents or a series of accidents. Neither does clause (c) say that the loss of both eyes in one accident shall constitute total and permanent disability. So that there may be no question that a man having lost the sight of both eyes or other two members is totally and permanently disabled within the meaning of the law, the statute says so in so many words. A fair reading of the statute is this: Upon the happening of the loss of both eyes, or other two members, a man is conclusively presumed to be totally and permanently disabled and entitled to certain definite compensation. It will be seen in certain states that this presumption is not conclusive, but is a matter of proof.

By chapter 93 of the laws of 1919, the Legislature has amended paragraph 11 to read as follows:

> "(V) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof *as a result of*

any one accident shall constitute total and permanent disability, to be compensated according to the provisions of clause (b)."

The addition of the italicised words to the statute serves to show that the statute without this amendment should be construed to make the employer liable for total permanent disability in our case, and it is significant that it was added to the law after the present case had been instituted. Certainly it cannot be construed to interpret the statute as it previously existed.

On this point the recently decided case of *Jennings* v. *Mason City Sewer Pipe Co.*, 174 N. W. 785 (Supreme Court of Iowa), is of interest, the statute in that state being the same as in New Jersey before the amendment.

In part the opinion says:

> "It follows of necessity that the loss of the only eye constitutes a total permanent disability. * * * *
>
> It appears that since the time of this injury the statute has been amended at this point. The appellant urges upon us that the statute as above set forth should be construed by us in accordance with the later amendment, on the theory that the amendment discloses the legislative construction of the original statute. The position is not tenable.
>
> We must construe the statute as it was and the amendment as it is. A Legislature construes enactments of previous Legislatures only for its own purposes. An amendment enacted does not indicate a construction of the original statute, further than that, as construed, it was deemed to need amendment."

II.

The matter is not controlled by the mere physical member removed, but by the disability incurred.

The Supreme Court of Illinois in the case of *Wabash Railway Co.* v. *Industrial Commission, et. al.*, 121 N. E. 569, decided a similar case. The petitioner had previously suffered the loss of his left arm by amputation near the shoulder. Later he injured his left knee in the service of the railroad. Tuberculosis of the bone set in and his left leg was amputated.

The Court says, as page 570:

> "The principal contention made by plaintiff-in-error is that the Circuit Court erred in holding that it was liable to pay compensation for a total and permanent disability.

The basis of this contention is that the loss of one leg does not constitute total permanent disability. Defendant-in-error Williams contends, on the other hand, that the loss of his left leg, combined with the previous loss of his left arm, constitutes total permanent disability, and that the judgment of the Circuit Court is correct. This precise question has not arisen before in this state. It has arisen in other jurisdictions under compensation acts similar to our act. In Massachusetts and New York, it has been held that under such circumstances the disability occasioned is total and permanent." * * * *

"Paragraph (e) of section 8 of the Workmen's Compensation Act provides that the loss of both hands, or both arms, both feet, both legs, both eyes, or any two of them, shall constitute total and permanent disability for which compensation shall be paid according to par. (f) * * * *

"We are disposed to follow the reasoning of the Massachusetts Court construing a statute quite similar to ours, and hold that this act applies where the loss of one of the members mentioned occurred previous to the employment, and the loss of the other occurred as the result of an injury arising out of and in the course of the employment. This, in our opinion, is the fair intent and meaning of the act. When Williams was employed by plaintiff-in-error, he had lost his left arm, and his capacity for work was to that extent impaired. He was employed to do work which could be performed by a man having but one arm, and he was paid upon that basis. By the loss of his leg such capacity as he had for work was entirely destroyed, and under the provisions of the act he was entitled to compensation for total permanent disability. Such a construction of the act works no hardship upon plaintiff-in-error. Williams was employed and paid as a man of limited capacity, and the compensation which plaintiff-in-error is required to pay is based upon the wages it was paying him as a man of limited capacity."

"The judgment of the Circuit Court is affirmed."

"Judgment affirmed."

The Supreme Court of Louisiana in *Brooks* v. *Peerless Oil Co., Inc.,* 83 So. 663, holds:

"The rationale of these Employer's Liability Acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one * * * *. In speaking of the workman being only partially disabled by the loss of one eye, one arm or one foot, the Employer's Liability Act has reference evidently to the normal man having both eyes, arms or feet."

In a case decided by the Supreme Court of Minnesota, 174 N. W. 826, *State ex rel Broderick Co.* v. *District Court, &c.,* the syllabus is as follows:

> "The intent and purpose of the Workmen's Compensation Act was to secure to an injured employee compensation to the extent of the disability actually sustained and the provisions as to payments for specific injuries must yield thereto; when taken together they create a greater disability."

The New Jersey Court of Errors and Appeals in *Simpson* v. *New Jersey Stone and Tile Co.,* 107 Atl. 36, has decided that total and permanent disability does not depend on the loss of a particular member, but on the disability incurred. In this case the syllabus says:

> "Where an employee's arm is so seriously fractured that it creates a total disability which will be permanent, unless the arm be amputated, award under the Workmen's Compensation Act is not limited to that for the loss of an arm, since a total and permanent disability may exist without loss or injury to any specific member."

The syllabus of *Hoberts* v. *Columbia Shirt Co.,* 173 N. Y. Supp. 606, reads as follows:

> "Where an employee who was near-sighted and had only 50% vision lost the use of an eye, it was not error to allow compensation for the loss of an eye as against claim that he had lost only 50% of vision."

There is another section—(c) of Section 11 of our law as follows:

> "In all other cases in this class, or where * * * * any physical function is permanently impaired, the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

The Supreme Court on this point said (see p. 49, State of Case):

> "The petitioner had eyesight when he entered on his employment; that eyesight was a physical function; it was destroyed utterly. True, the word 'impair' taken literally, does not cover total destruction of a function, but here again the spirit should not be killed by the letter. The compensation prescribed by the clause is the same proportion of that provided for loss of both eyes (involving total blindness), as the disability produced by the injury in question (total blindness) bears to that produced by the loss of both eyes, *i. e.,* the same. Such a view was enunciated by the Supreme Court of Massachusetts under the statute of that State in *re* (Branconnier), 223 Mass. 273."

III.

Under the Workmen's Compensation Act, the amount of the award is to be based upon the proportion of disability to normal ability regardless of previous partial impairment of normal ability.

In a Colorado case decided by the Supreme Court, and to be found in 172 Pac. 422, an employee having lost ten-elevenths of normal vision in one eye by reason of trachoma, lost the balance of vision in that eye in an accident. The Court says:

> "It clearly appears from the record that the commission was of the opinion that the amount of compensation is to be determined by ascertaining how much an injury contributes to a disability. That is, it is assumed that if a claimant was partially disabled prior to the injury which forms the basis of his claim, and because of the injury he be found totally disabled, he is not to receive the compensation fixed for disability, because it was not all due to the injury. To illustrate: If claimant before the injury had only one-half of normal vision and lost one-half of that, he would be entitled to one-quarter of the compensation allowed for total blindness. It is hardly necessary to say that such is not a correct construction of the law."

The following Massachusetts cases further illustrate this point:

Morrison v. *Fidelity & Casualty Co.*, 2 Mass. Wk. Comp. Cases, 594.

(Decision of Comm. of Arb. affirmed by Indus. Acc. Bd.)

In this case a pile driver lost the vision of his left eye by accident. The vision of the right eye had been destroyed previously by a cataract, and he was totally incapacitated for work because of the injury. He was awarded compensation on account of total disability.

In *re* Branconnier, in *re* Travelers Ins. Co., 223 Mass. 273; 111 N. E. 792.

(Compensation awarded under Act. Award affirmed by Superior Court, and again affirmed by Supreme Judicial Court, Mass.)

Facts of the case.

The employee, a man who, in 1910, had lost one eye, met with an injury in 1915, whereby he lost the sight of his remaining eye.

Quotations from opinion.

> "The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties, but, nevertheless, it was the employee's capacity. It enabled him to earn the wages which he received. He became an employee under the Act, and thereby entitled to all the benefits conferred upon those coming within that description. The Act affords a fixed compensation for a limited time 'while the incapacity for the work resulting from the injury is total.' It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to the pre-existing condition, and it gives no intention that the Legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man, but that capacity, which was all he had, had been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury."

The whole physical condition must be taken into consideration by the Court. In *Vishney* v. *Empire Steel & Iron Co.*, 87 N. J. L. 481, the Court held that eighty per cent. of the usefulness of both eyes having gone, petitioner should recover eighty per cent. of four hundred weeks and not eighty per cent. of one hundred weeks for each eye separately, making the basis the proportion of disability to total disability.

In a recent case decided by the Court of Errors and Appeals, *Orlando* v. *Ferguson*, 90 N. J. L. 553, the Court says:

> "It is not strictly a mathematical problem. It is not to be solved by adding up the fractional parts, but upon the basis of the percentage of total and permanent disability reasonably found to be produced by the several injuries considered collectively and with due regard to their cumulative effect."

The case of *Schwab* v. *Emporium Forestry Co. & Travelers Insurance Co.*, 167 App. Div. 614; 153 N. Y. S. 234, affirmed by Court of Appeals, unanimous vote, 216 N. Y. 712; 111 N. E. 1099, was decided May 5, 1915, and was affirmed Nov. 30, 1915. The second accident happened when the employee was working for a different employer and not in the same line of employment as at the time of the first accident.

This is the case of the loss of the second hand. The New York statute provides for "the loss of a hand" as permanent and partial disability—just like New Jersey, yet in this case the award was made for total permanent disability.

The opinion in full follows:

> "The claimant was injured on July 6, 1914, by having his right had severed at the wrist. His left hand was amputated in the year 1892. The question certified is whether the claimant is entitled to compensation for permanent total disability under subdivision 1 of section 15, or for compensation as for the loss of one hand under subdivision 3 of said section.
>
> If a man has two hands, he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand. The method of payment of compensation for the loss of one hand is to allow the salary which the injured party was earning for 244 weeks. If the injured party had two hands and was earning $20 a week, if he lost one hand he would recover $4,880. Another workman having lost one hand before entering the employment would be receiving, say, $10 a week for less efficient service. If that workman lost the second hand in the service if the claim of the insurance carrier is right, he would recover for 244 weeks at $10 a week, or $2,440. So that for the loss of the second hand, which had its double value on account of the previous loss of the first hand, under this system he would be entitled to receive only half as much as for the loss of the first hand. This anomalous result would indicate that the Legislature could not so have intended. By subdivision 1 of section 15, the loss of both hands shall presumably constitute total disability. As compensation for that total disability he is to receive 66 2/3% of the average weekly wages that he is then earning. As the man with one hand is presumably earning less wages than a man with two hands, to allow for the loss of the second hand as a permanent disability, a percentage of the weekly wage that he was then earning would be in complete harmony with compensation to one who had lost both hands by the accident, who receives his 66 2/3 per cent. upon the greater wages that he was earning at the time of the accident.
>
> Moreover, this reasoning accords with the rule which seems to be laid down in subdivision 6 of section 15, which provides that the fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, 'but in determining compensation for the later injury or both, his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury.' Cases are cited upon the

Attorney General's brief which indirectly lend support to his contention that the claimant has the right to recover as for a permanent disability. But the decision may well rest upon the logic of the situation in view of the fact that the amount of compensation depends upon the weekly wage, and the weekly wage is influenced by his crippled condition at the time of the accident.

In answer to the question certified, we decide that claimant is entitled to recover as for total disability.

Question certified answered in the affirmative. All concur (Kellogg, *J.*, in result in memorandum), except Woodward, *J.*, dissenting."

The case of *Kriegbaum* v. *Buffalo Wire Works Co., Inc.*, New York Supplement, Vol. 169, page 307, &c., and in which the Appellate Division, Third Department, rendered a unanimous decision, 182 A. D. 448, covers our case exactly. It is decided on the basis of the law as it stood in New York in 1914, the date of the accident, and in every way is a case on all fours with the present one.

The following excerpts from the opinion will give the gist of the decision:

"In July, 1914, the claimant, an employee of the Buffalo Wire Works, while engaged in a hazardous employment, sustained an accidental injury, resulting in the total loss of the sight of his right eye. * * * * On September 8, 1914, the commission made an award of compensation for the period of 128 weeks for the loss of the eye. * * * * About December 1, 1916, application was made to the commission on behalf of the claimant to reopen and rehear the claim. Upon the hearing * * * * it appeared that in 1901 the claimant had suffered an accidental injury to the left eye which had resulted in the permanent total loss of the vision of that eye except as to 8/200 minus. This rendered the sight of that eye useless for any vocational purpose. The fact of the left eye having been injured was not taken into account by the commission, and, in fact, was not known to it at the time of making the award for the loss of the right eye. * * * *

The commission understanding the case to be one of permanent partial disability only, made the award of September, 1914. That the claim was in fact one entitling the claimant to an award for permanent total disability cannot be questioned, nor can it be doubted that such award would have been made had the commission been fully informed as to the facts. Upon the rehearing * * * * the commission for the first time became advised as to the facts, and thereupon made an award continuing the payment granted by the prior award from the time of the last payment

until such time as the State Industrial Commission should be shown that the claimant had some useful vision of his left eye. * * * *

The loss of the sight of the right eye having occurred in July, 1914, the award was not affected by the amendment of section 15, subdivision 6, by Chapter 615, Laws of 1915, but the claim was governed by the law in force at the time of the decision of this Court in Schwab *v.* Emporium Forestry Co., 167 App. Div. 614; 153 N. Y. Supp. 234; affirmed 216 N. Y. 712; 111 N. E. 1099, in which it was held that an employee who had suffered the loss of a hand by a previous injury, who suffered the loss of a remaining hand by a subsequent injury, was entitled to an award for permanent total disability instead of an award simply for permanent partial disability on account of the loss of the remaining hand. * * * *

The award of the commission should be affirmed. All concur."

In Rhode Island, in *re* J. & P Coats, 103 Atl. 833, with a statute similar to that of New Jersey, the Court followed Massachusetts and New York.

So also in Connecticut in *Fair* v. *Hartford Rubber Works,* 111 Atl. 193.

The only state in which a decision adverse to our contention has been handed down is Michigan *(Weaver* v. *Maxwell Motor Co.,* 152 N. W. 993), but in that case the Court stated, "it must be confessed that the provisions of the Michigan statute are so ambiguous as not to be free from doubt." But in addition to this halting decision, a later Michigan case (160 N. W. 391) seems to be entirely inconsistent with the first decision. (See opinion of Common Pleas Court, pp. 30-32 inc., state of case.)

The Legislature fixed 50% of daily wages for one hundred weeks for the loss of an eye. If the contention of the appellant that the loss of the second eye should be similarly compensated is sound, we have the Legislature fixing a maximum of $4,000 as the compensation for the loss of both eyes in one accident, and the maximum of $2,000 for the loss of both eyes in two different accidents. In addition, if the Legislature fixes $1,000 for one eye, and $4,000 for two eyes, it fixes the value of the second eye at three times that of the first, and yet if appellant is right in his contention, the value of the second eye is no more than the first eye, and may even be less if the workman be receiving less wages at the time of the second accident. The point that must be stressed in these cases is that the Legislature is giving a part of

one hundred weeks' wages for the first member removed, and allowing a part of four hundred weeks' wages for the workman on losing the second member, considering the probable decrease of earning power incident to the first accident; so that actually in practice it rarely works out that the employee receives part of five hundred weeks wages for two separate accidents at the maximum rate of compensation, but more often receives less for the two separate accidents than he would if both members were lost in the one accident.

The contention of the defendant-respondent is based on a broad interpretation of the Workmen's Compensation Act as decided by the courts of New Jersey, is backed by the decisions in the highest courts of the states of Iowa, Illinois, Louisiana, Colorado, Connecticut, Rhode Island, Massachusetts and New York, and is opposed by the courts of but one state—Michigan, where two decisions neutralize each other.

It is therefore respectfully submitted that the judgment should be affirmed.

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