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New Jersey Supreme Court

Notice of Appeal.

NEW JERSEY DEPARTMENT OF LABOR 10

WORKMEN'S COMPENSATION BUREAU

MICHAEL WILLNER,

Petitioner,

vs.

SAMUEL KATZ,

Respondent.

20

To Michael Willner, Petitioner and Katchen & Meisterman, Attorneys of Petitioner:

TAKE NOTICE, that the respondents hereby appeal to the Court of Common Pleas of the County of Essex from all of the judgment rendered herein by Harry J. Goas. Referee of the Workmen's Compensation Bureau, which judgment is dated November 13th, 1925. 30

Dated November 27, 1925.

Yours respectfully,
FRANK G. TURNER,
Attorney of Respondent.

40

Writ of Certiorari.

New Jersey, ss:

The State of New Jersey to the Clerk of the Court of Common Pleas, in and for the County of Essex, in the State of New Jersey and the
 10 Judge of said Court; and the Secretary of the Workmen's Compensation Bureau of New Jersey; and Harry J. Goas, Deputy Commissioner of Labor of the Workmen's Compensation Bureau of the State of New Jersey, GREETINGS:

We being willing, for certain reasons, to be certified of and concerning certain proceedings taken by Harry J. Goas, Deputy Commissioner of the Workmen's Compensation Bureau of the
 20 State of New Jersey; the Workmen's Compensation Bureau of New Jersey; and the Essex County Court of Common Pleas in and for the County of Hudson in the State of New Jersey, for the determining and awarding of compensation, counsel fees and other allowances to Michael Willner for injuries alleged to have been sustained by him while in the course and scope of his employment as an employee of Samuel Katz,
 30 and the determination and Order made by said Harry J. Goas and the determination and Order affirming judgment and dismissing appeal made by the Judge of Essex Common Pleas which said respective determinations and Orders have been filed with the Clerk of the Court of Common Pleas in and for the County of Essex and State of New Jersey; do command you that said proceedings, together with all matters touching and concern-
 40 ing the same as fully as before you, they remain or are in your custody or control, you do certify

Return

and send, together with this Writ, to our Justices of our Supreme Court of Judicature at Trenton, on the first Tuesday of May, One Thousand Nine Hundred and Twenty-six, that therein may be done what of right and according to law ought to be done. 10

Witness, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court at Trenton, aforesaid, this day of April, One Thousand Nine Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

Frank G. Turner,
Attorney.

20

Return.

The return of the Court of Common Pleas of the County of Essex to the Writ of Certiorari of our Supreme Court of Judicature of the State of New Jersey.

30

40

Employee's Claim Petition for compensation

7. What was the business of your employer?
Butcher and poultry business.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No. 10

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

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

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

12. If so, on what date? November 26, 1924. 20
MIKE WILLNER.

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

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Clerk and helper. Was carrying chickens at time of accident.

15. When did the accident happen? November 26, 1924, at approximately. 30
(State month, day, year and hour)

16. Where did the accident happen? In poultry market, 104 VanBuren St., Newark, N. J.

17. What was the nature of the accident, and how did it happen? As petitioner was walking from rear of store to the front, he observed his employer being held up by robbers who pointed a pistol at him, petitioner, warning him not to inter- 40

Employee's Claim Petition for compensation

fere and ordered petitioner to hold up his hands; before petitioner could do so the robbers shot him, bullet piercing his body.

10 18. On what date were you compelled to stop work because of the injury? November 26, 1924.

19. On what date were you well enough to work again? Still unable to work.

20. If still disabled, on what date do you think you will be able to work? Cannot ascertain.

21. Give nature of any injury from which you will recover. Bullet is still in body having pierced the kidney and recovery is doubtful.

20 22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. Internal organs have been mutilated, rendering petitioner incapable of any physical repair.

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

24. If so, what was your average weekly wage?

30 25. If wages were fixed by the hour, state rate per hour? Paid by the week.

26. Give number of hours in an ordinary working day. 12.

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

28. State the amount of weekly wages. \$32.00.

40 29. How much money have you received from your employer as compensation (not medical aid) since your accident? None.

Employee's Claim Petition for compensation

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

31. If so, how much?

32. Was medical aid required? Yes.

33. Did you receive medical, surgical or hospital services? Yes. 10

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

35. Were they furnished? No.

36. If so, between what dates?

37. If not, what sum did you spend for them during the first four weeks after the accident? 20
About \$325.00.

38. Give name and address of physician and hospital. Dr. McCabe, St. James Hospital, Newark, New Jersey.

39. What other facts are there which you believe important? Petitioner was working at the time of the holdup and suffered his injury during the course and scope of his employment. 30

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

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make 40

Employee's Claim Petition for compensation

compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved
 10 April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will every pray, etc.

20 MK. WILLNER,
 (Petitioner)
 439 So. 10th St.
 (Address)

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

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

MK. WILLNER,
 (Petitioner)

40 Subscribed and sworn to before me, this
 30th day of January 1925,
 at Newark, N. J.,
 Nathan Lifshus,
 Notary Public.
 (Seal)

Employee's Claim Petition for compensation

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

TO THE RESPONDENT

10

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

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts. 20

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

Stamped on face:

30

Received Feb. 7, 1925
Claim Dept.

40

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

	MICHAEL WILLNER,				
		Petitioner,			
10	vs.				}
		Respondent.			}
		SAMUEL KATZ,			Claim Petition No. Feb. 14, 1925.

Attorney for Respondent Frank G. Turner, Jersey City, N. J.

(Address)

- 20 In answer to Claim Petition filed in this cause:
1. What is the petitioner's name? Michael Willner.
 2. Where does he reside? 104 Van Buren St.
(Street Address)
Newark, N. J.
(City or Town)
 6. Was the petitioner in your employ at the
30 time of the accident? Yes.
 7. State your business. Butcher.
 8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
 9. Did you give such notice to him? No.
 10. When did you first have knowledge of this
40 accident? Nov. 26, 1924.

Respondent's Answer to Employee's Claim Petition

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

14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Laborer and helper. 10

15. When did the accident happen? Nov. 26, 1924.

(State month, day, year and hour)

16. Where did the accident happen? 104 Van Bureau St. Newark.

17. What was the nature of the accident, and how did it happen? Petitioner was shot by a 20 stranger.

18. On what date was the petitioner compelled to stop work because of the injury? Nov. 26, 1924.

21. Give your understanding of the nature of any injury from which he should recover? Shot wound.

27. Give number of days in an ordinary working week. Six. 30

28. State the amount of weekly wage. \$32.

29. How much money have you paid the injured as compensation (not including medical aid) since the accident? None.

30. Have you promised to pay compensation?
No.

39. What other facts are there which you believe important? If you deny that compensation is 40

Determination and Order

payable in this case, explain fully your reasons for this conclusion. Department of Labor is without jurisdiction. Shooting was not an accident. Shooting did not arise out of employment of petitioner.

10

SAMUEL KATZ,
(Respondent)
104 Van Buren St.,
(Address)
Newark, N. J.

Determination and Order.

20

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

MICHAEL WILLNER,	}
Petitioner,	

vs.

30

SAMUEL KATZ,	}
Respondent.	

This matter having been brought before me on a formal hearing at the Workmen's Compensation Bureau, 9 Franklin Street, Newark, New Jersey, on the 31st day of March, 1925, and on the adjourned days of July 22, 1925, July 24, 1925, and August 13, 1925, respectively, in the presence of

40

Determination and Order

William Harris, Esq., by Ira J. Katchen, Esq. on the 31st day of March, 1925, and in the presence of Samuel G. Meisterman, Esq., on the subsequent dates, as attorney for the petitioner, and Frank G. Turner, Esq., attorney for the respondent, and witnesses having been produced by both parties, and it appearing that on the 26th day of November, 1924, while petitioner was in the employ of the respondent at the place of business of the respondent, 104 Van Buren Street, Newark, New Jersey, and while he had in his possession moneys belonging to the respondent and was engaged in his usual duties, a "hold-up man" entered the premises of the respondent and ordered all persons in the place to hold up their hands, and then fired a shot, hitting the petitioner and causing a bullet to penetrate his abdomen, and resulting in injuries necessitating an operation. 10 20

And it further appearing that at the time of the above occurrence the petitioner was employed by the respondent at a wage of \$18 per week in addition to his board.

And it further appearing that since the occurrence, the petitioner has not been able to engage in his usual pursuits, and that the petitioner is at this time unable to do any kind of work. 30

And it further appearing that the expenses of the petitioner consisted of the following:

Hospital	\$429.95	
Medical services of Dr. Thomas S. McCabe for operation and treatment	492.00	40
Attendance of nurses	295.00	

Determination and Order

And it further appearing that the petitioner was not employed under Section 1 of the Compensation Act of New Jersey.

10 I do, on this 28th day of October, 1925, find and determine that the petitioner on the 26th day of November, 1924, was employed by the respondent and suffered an injury in an accident arising out of and in the course of his employment and do order that the respondent pay the petitioner compensation for temporary disability at the rate of \$17 per week for the period beginning November 26, 1924, to the date of this order, said sum of \$17 per week to be paid to the petitioner on the 20 basis of \$12 per week in cash and \$5 per week as credit for board furnished to the petitioner by the respondent, the total compensation for temporary disability as above being forty-eight weeks at \$17 per week, consisting of \$12 per week in cash and \$5.00 per week in credit for board, and making a total sum in cash of \$576.

30 And I further order that the respondent pay the petitioner the sum of \$1216.95 for hospital, medical and nurse expenditures.

And I further order that the respondent pay the total of said sums, to wit, the sum of \$576 for temporary disability accrued and the sum of \$1216.95 for hospital, medical and nurse expenditures, to wit, the sum of \$1792.95 in a lump sum.

40 And I further order that the respondent continue to pay the petitioner from October 28, 1925, and thereafter, the sum of \$17 per week as compensation for temporary disability consisting of

Determination and Order

\$12 per week in cash and \$5 per week in credit for board, if the respondent will continue to furnish petitioner with board as above, otherwise a total of \$17 per week in cash, as and for compensation for temporary disability, until it shall appear that the temporary disability has ceased and an award for permanent disability may be made. 10

And I further order that the sum of \$250.00 be paid to the attorneys for the petitioner as a counsel fee, said sum to be paid by the respondent.

Dated October 28, 1925.

HARRY J. GOAS,
Deputy Commissioner of Labor. 20

I hereby consent to the entry of the above as to form.

Attorney for Respondent.

Determination and Order.ESSEX COUNTY COURT OF COMMON
PLEAS

10	MICHAEL WILLNER, Petitioner,	}
	vs.	
	SAMUEL KATZ, Respondent.	}

This matter being before the Court on an appeal from a judgment of Harry J. Goas, Deputy
 20 Commissioner of Labor of the New Jersey Department of Labor, Workmen's Compensation
 Bureau, dated November 13, 1925, wherein the petitioner was awarded compensation for temporary
 disability at the rate of \$17.00 per week for the period beginning November 26, 1924 to October
 28, 1925, said sum of \$17.00 per week to be paid to the petitioner on the basis of \$12.00 per
 week in cash \$5.00 per week as credit for board
 30 furnished to the petitioner by the respondent, the total compensation for temporary disability as
 above being forty-eight (48) weeks at \$17.00 per week, consisting of \$12.00 per week in cash and
 \$5.00 per week in credit for board, and making a total sum in cash of \$576 for temporary disability
 compensation; and that the respondent continue
 to pay the petitioner from October 29, 1925 and thereafter the sum of \$17.00 per week as com-
 40 pensation for temporary disability consisting of \$12.00 per week in cash and \$5.00 per week in

Determination and Order

credit for board, the respondent to continue to furnish petitioner with board as above otherwise a total of \$17.00 per week in cash as and for compensation for temporary disability has ceased and until an award for permanent disability may be made; and the sum of \$1216.95 for hospital, medical and nurse expenditures. 10

And it appearing that the hearing of said appeal was fixed for the 7th day of January, 1926, at which time counsel for the respective parties, to wit, Meisterman & Katchen, attorneys for the petitioner and Frank G. Turner Esq., attorney for the respondent, agreed to submit the controversy in issue on briefs, and briefs having been subsequently filed by counsel for said parties as well as a transcript of the record and testimony as well as all other proceedings in said cause and the court having read and considered the transcript of the record and testimony and the briefs of the respective parties. 20

And; it appearing from a reading and a consideration of said transcript of record and briefs, that on the 26th day of November 1924, while the petitioner was in the employ of the respondent at the place of business of the respondent 104 Van Buren Street, Newark, New Jersey, and while he had in his possession moneys belonging to the respondent and while engaged in his usual duties, a hold-up man entered the premises of the respondent and ordered all persons in the place to hold up their hands and then fired a shot hitting the petitioner and causing the bullet to penetrate his abdomen which resulted in injuries necessitating an operation. 30 40

Determination and Order

It is on this day of February, 1926, found and determined that the petitioner was on the 26th day of November 1924, employed by the respondent and that the petitioner suffered an injury in an accident arising out of and in the course of his employment.

And it is further ORDERED that the respondent do comply with the terms of the order of the said Harry J. Goas, Deputy Commissioner of Labor of the New Jersey Department of Labor, Workmen's Compensation Bureau dated November 13, 1925 and that the respondent pay to the petitioner compensation for temporary disability at the rate of \$17.00 per week for the period beginning November 26, 1924, to October 28, 1925, said sum of \$17.00 per week to be paid to the petitioner on the basis of \$12.00 per week in cash and \$5.00 per week as credit for board furnished to the petitioner by the respondent the total compensation for temporary disability as above being forty-eight (48) weeks at \$17.00 per week consisting of \$12.00 per week in cash and \$5.00 per week in credit for board.

And it is further ORDERED that on and from October 28, 1925, the respondent continue to pay the petitioner said sum of \$17.00 per week as compensation for temporary disability consisting of \$12.00 per week in cash and \$5.00 per week in credit for board (if the respondent continue to furnish petitioner with board as above) otherwise a total of \$17.00 per week in cash as and for compensation for temporary disability till it shall appear that the temporary disability has ceased

Determination and Order

and an award for permanent disability has been made.

And it is further ORDERED that the respondent pay the petitioner the sum of \$1216.95 for hospital, medical and nurse expenditures. 10

And it is further ORDERED THAT THE SUM OF \$1792.95 being the amount of temporary disability and an award for hospital, medical and nurse expenditures up to the date of the entry of the order of the Workmen's Compensation Bureau, together with sums for temporary disability as have accrued since October 28, 1925, be paid to the petitioner in a lump sum on the signing of this order. 20

It is further ORDERED that the sum of \$150 awarded by the said Harry J. Goas, Deputy Commissioner of Labor of the New Jersey Department of Labor, Workmen's Compensation Bureau to the attorneys for the petitioner as a counsel fee be paid to the attorneys for the petitioner by the respondent.

And it is further ORDERED that the petitioner or respondent may have the right to apply to the said Harry J. Goas, Deputy Commissioner of Labor, New Jersey Department of Labor, Workmen's Compensation Bureau, for an order determining that the temporary compensation cease and the amount of the award for permanent disability and additional medical expenditures and counsel fee be determined. 30

It is further ORDERED that the respondent do 40
comply with the terms of the order of the New

Reasons

Jersey Department of Labor, Workmen's Compensation Bureau dated November 13, 1925, in all other respects, said order being hereby affirmed in all particulars.

10 And it is further ORDERED that the sum of \$150 be paid to the attorneys for the petitioner as a counsel fee in this Court said sum to be paid by the respondent.

NEWTON H. PORTER,
Judge.

Reasons.

20

NEW JERSEY SUPREME COURT

	MICHAEL WILLNER,	Plaintiff,	} On Cer- tiorari.
		vs.	
30	SAMUEL KATZ,	Respondent.	

To Messrs Meisterman & Katchen, Attorney of Respondent:

TAKE NOTICE, that the following are the Reasons on which the Prosecutor herein will rest to set aside the proceedings herein under review:

40

Reasons

1. The Workmen's Compensation Bureau of the New Jersey Department of Labor was without jurisdiction to hear and determine this cause.
2. The Court of Common Pleas of the County of Essex was without jurisdiction to hear and determine this cause. 10
3. The petitioner did not participate in an accident which arose out of and in the cause of his employment.
4. The shooting of the petitioner was not an accident.
5. The shooting of the petitioner did not arise out of his employment. 20
6. The awarding of Twelve Hundred and Sixteen Dollars and ninety-five cents for hospital, medical and nursing expenditures to the petitioner was contrary to Law.
7. The awarding of Seventeen Hundred and Ninety-two Dollars and Ninety-five cents to the petitioner in a lump sum by the Workmen's Compensation Bureau was contrary to Law. 30
8. The finding of the Workmen's Compensation Bureau in favor of the petitioner was contrary to Law.
9. The finding of the Essex County Court of Common Pleas in favor of the petitioner was contrary to Law.

FRANK G. TURNER,
Attorney of Prosecutor.

Hearing of March 31, 1925.

WORKMEN'S COMPENSATION BUREAU

Newark, New Jersey

10	MICHAEL WILLNER, <div style="text-align: right; padding-right: 20px;">Petitioner,</div> <div style="text-align: center; padding: 5px 0;">vs.</div> SAMUEL KATZ, <div style="text-align: right; padding-right: 20px;">Respondent.</div>
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Transcript of stenographer's notes of evidence taken in the above entitled matter before Hon.

20 HARRY J. GOAS, Deputy Compensation Commissioner, at 9 Franklin Street, Newark, New Jersey, on the 31st, day of March, 1925, at eleven o'clock a. m.

Appearances:

William Harris, Esq., (By Ira J. Katchen, Esq.) for Petitioner.

30 Frank G. Turner, Esq., for Respondent.

DOCTOR LOUIS BLEIER, sworn on behalf of Petitioner:

Direct-examination by Mr. Katchen:

Q. What is your name, Doctor? A. Louis Bleier.

Q. You are a practicing physician in the State of New Jersey? A. I am not admitted to practice as yet, just finishing up my internship.

40

Dr. Louis Bleier—Direct

Q. You are a graduate of what college? A. General Medical College, Chicago, Illinois.

Q. When were you graduated? A. In 1924.

Q. How long have you been an interne? A. Eight months.

Q. At what hospital? A. St. James Hospital. 10

Q. At that hospital under whose supervision do you work? A. The force of visiting doctors.

Q. Do you do any assisting in the surgical ward? A. Yes.

Q. Do you know the petitioner, Michael Willner? A. Very well.

Q. Do you remember when he was admitted to the hospital? A. Yes.

Q. When was he admitted? A. On November 20 26th, 1924.

Q. At what time of day? A. In the evening.

Q. Do your records show? A. No, my record does not show the hour.

Q. Which hospital was that? A. St. James Hospital.

Q. Did you examine Michael Willner when he was admitted? A. I examined him about twenty minutes later.

Q. And about what time was that? A. I just can't state. It was late in the evening, anyhow. 30

Q. What was his condition? A. The man was in shock, bleeding profusely from a wound in the abdomen; high up in the abdomen.

Q. Did you examine the wound? A. Well, we knew it was a gunshot wound by its general aspect.

Q. And did you attempt to remove the bullet that night? A. Yes. We brought him to the op- 40

Dr. Louis Bleier—Direct

erating room and probed for the bullet and without success had to the fact it was imbedded so deeply in the liver.

Q. How long was he in the hospital? A. He was in the hospital from November 26th to February 3d, 1925. Pardon. That is March 3, 1925.

Q. While he was in the hospital what treatment did you prescribe for him? A. He was under surgical supervision and he had a general breakdown which caused empyema and degeneration of the liver tissues. The diaphragm was perforated, causing pus to ooze up into the thoracic cavity, causing empyema. The man coughed up blood and pus for many weeks.

Q. Under whose direct care was he? A. Doctor McCabe.

Q. And you were Doctor McCabe's assistant? A. Yes.

Q. Did you attend any operation? A. I assisted at both operations.

Q. When were they? A. The first operation was November 27, 1924.

Q. What was that operation for? A. Probing and drainage of the wound. Probing for the bullet and drainage of the wound.

Q. Is that abdominal? A. Through what we call the epigastrium; up to the right of the middle line.

Q. And incision was made in the abdomen? A. Yes.

Q. Which shows a permanent scar? A. Yes, it shows a permanent scar.

Q. Of about how many inches? A. I should judge about four inches.

Dr. Louis Bleier—Direct

Q. What was the result of that operation? A. Well, the probing was unsuccessful and the man continued to drain bile and so on, pus, from the wound area.

Q. When was the next operation? A. The next operation was February 6th, 1925. 10

Q. What was the nature of that operation? A. That was a posterior approach to get the bullet from behind.

Q. And did you get it later? A. I have the X-rays showing the place.

Q. How many X-ray pictures were taken? A. Several were taken but they were so dense or the pus was so thick in there that the bullet was not visible. Now, here are two. Here is one showing the bullet right there (indicating). Here is the other one (indicating same to the Court). Now, we have the bullet, that is, the police have it. 20

Q. Who has the bullet? A. The police, I believe, have the bullet.

Q. From the time you made your first observation and X-ray and operation to the second time, had the bullet descended at all in the body? A. Yes, the liver tissues degenerated causing the bullet to go along the line of least resistance of its own weight, traveling posteriorly and downwards. 30

Q. How many inches did it travel? A. It is hard to say exactly. I would not be in a position to state that. Possibly four or five inches, I daresay.

Q. And the result of that is what, so far as the effects upon those tissues is concerned through which it passed? A. There was degeneration of 40

Dr. Louis Bleier—Direct

the liver tissues, which, of course, takes away considerable of the function of the liver and fibrous changes which occur in the diaphragm, draining that out. The elasticity of the diaphragm itself is altered.

10 Q. Doctor, the posterior operation, has that left a scar? A. Yes, on a line of about the eleventh or twelfth rib in the back, in the upper lumbar region. The scar is about four inches long.

Q. Both of those scars will be permanent, the one on the stomach and the one on the back? A. Yes.

20 Q. Doctor, when was the last time you examined the petitioner? A. I have seen the petitioner pretty nearly every three or four days since he left the hospital.

Q. Did you see him a few days ago? A. Yes.

Q. What is his condition at the present time? A. Well, he is not nearly as good as he normally was. He is far, I daresay, under his normal condition.

Q. Can he still do any heavy work?

30 Mr. Turner: I do not think the doctor ought to be able to say that. I don't think he is qualified to say that.

Mr. Katchen: Question withdrawn.

Q. Doctor, would you advise him to do any work as his physician? A. Well, from the general aspect of the case showing that the liver and lung tissue had degenerated, I would want to keep him out in the air as much as possible doing light work, if any.

40 Q. Has he lost any weight? A. Oh, consider-

Morris Willner—Direct

able. He is now picking up. He was absolutely down to nothing. He was just skin and bones when he left the hospital.

Q. So far as his internal condition is concerned, doctor, what effect has these operations and this wound caused? A. Well, I wouldn't say that the wound itself has any effect excepting the scar and the adhesions that have formed. The change in the diaphragm and degeneration of the liver tissue, they are the outstanding features which, of course, cause an organic change throughout. 10

Q. Will that ever be absolutely cured?

Mr. Turner: I object to that question. That is too remote. I do not see how any doctor can tell that. 20

Q. Is that, doctor, in the nature of a permanent impairment? A. Yes.

Mr. Turner: No cross-examination.

MORRIS WILLNER, sworn on behalf of Petitioner:

30

Direct-examination by Mr. Katchen:

Q. Mr. Willner, where do you live? A. 439 South Tenth Street, Newark.

Q. Are you a brother of Michael Willner, the petitioner? A. Yes, sir.

Q. How old is your brother? A. Twenty-four.

Q. Has your brother been living with you? A. No, he was living at 104 Van Buren Street, where he was employed with Mr. Katz. 40

Morris Willner—Direct

Q. How much was he making, do you know?

A. He was making approximately eighteen dollars a week and board, all around board, whatever he needed, washing and everything complete. He lived there, ate there and slept there and got
10 whatever was necessary in the line of living.

Q. Do you know when he was injured? A. Yes, sir.

Q. When did you find out? A. Well, you see, it is this way: an hour after the accident Mr. Katz called me up on the telephone.

Mr. Turner: I object to his calling up after the accident. We don't know as yet what it is going to be.
20

The Court: I see no harm in that. This is a matter of law, anyhow.

A. (Continuing.) Mr. Katz called me up and said, "Hurry up, come down; your brother got shot in a hold-up," and I said, "Where is he now?" and he said, "We took him over to St. James Hospital." I said, "What can I do if I come down there?" And he said, "Come on, we
30 have to make some kind of arrangements; he is in very bad shape." So I went down to St. James Hospital and I wasn't admitted to see him.

Q. What day was that? A. That was about eleven o'clock at night on November 26, 1925.

Q. Where did you see him? A. The next day about nine o'clock I rushed down again, and I demanded to see him as a brother, and they admitted me, and I found him very bad; bad shape.

Q. Did you pay any bills for him for medical
40 service? A. Yes, all the bills.

Morris Willner—Direct

Q. To whom? A. St. James Hospital, Doctor McCabe and the private nurse I had.

Q. How many nurses did you have for him?

A. The first week I had two nurses for him and after the first week, I discharged one of the nurses and for seven weeks after I kept one nurse. The doctor ordered me to do so. 10

Q. How much did you pay this nurse?

Mr. Turner: A private nurse? Does the Court think that is a proper charge in a compensation case?

The Court: He may testify.

Mr. Turner: We will let it go in subject to our general objection. 20

Q. How much did you pay the nurse? A. During the seven weeks I was paying one nurse forty-two dollars a week. One nurse got for one week forty-three dollars and fifty cents.

By the Court:

Q. For seven weeks you had two nurses? A. One nurse.

Q. And you paid her forty-two dollars a week?

A. Yes, for seven weeks. 30

Q. The first week you had an extra nurse? A. Yes, and I paid her forty-three dollars and fifty cents, and I had to pay for their board twelve dollars a week. I have the bills to prove it. I have all the bills with me.

Q. How much did you pay the hospital every week? A. The hospital was twenty-eight dollars for a private room.

Q. And how many weeks did you keep him there? A. I kept him there something like seven 40

Morris Willner—Direct

weeks in the private room and after seven weeks, I thought his condition was improving a little and I was running out of finances and I decided to put him in a ward which only cost me fourteen dollars a week.

10 Q. How long was he in the ward at that price?

A. I really can't say, but I have all the bills from that day and you can trace it.

Q. Are these the two bills you refer to? A. This bill I paid for the hospital in full.

Q. How much was that? A. \$429.95 was for the hospital expense, but not for the nurses.

Q. The bill was \$429.95 for the hospital expense not counting the nurse? A. Yes, not counting the
20 nurse and the doctors.

Q. How much was the doctor's bill? A. The doctor's bill I haven't settled yet. One bill I paid in part.

Q. Is that for the operation? A. Yes, \$492.00 for the first operation and that's the treatment from the beginning he got in there until February 2d. From November 27th until February 2d, all combined, with the operation, I paid \$492.00, and February 2d, 1925, Doctor McCabe operated
30 on him again and I haven't settled the bill yet.

Q. Did you receive a bill for that? A. No, they are still giving him treatment. I thought I will finish up when he is done with him.

Q. What is this bill? (handing witness paper.)
A. That is part of the hospital bill. This is an itemized bill.

Q. What does your brother do now? A. He is
40 stopping with Mr. Katz, his boss. He is not doing anything. Of course, he goes out with the

Morris Willner—Cross

machine now and then, but he has a boy helper. He drives the machine and the boy carries in the orders.

Q. Is he being paid for the work? A. No. He is giving him his board there and so on. They were nice enough to take him in. He is not getting any money for it. 10

CROSS-EXAMINATION by Mr. Turner:

Q. Of course, you say he is not being paid for this work. That is what your brother tells you?

A. I was speaking with Mr. Katz. He is not earning any money so he can't get paid.

Q. Now, this bill from St. James Hospital for \$429.95, you paid that yourself, did you? A. I did. 20

Q. You paid that on March 3d, 1925? A. Yes.

Q. And this bill from Dr. McCabe for \$492.00 covering treatment from November 27th, 1924 to February 2d, 1925, you paid that yourself, did you? A. Yes.

Q. And you paid that on February 5, 1925, right? A. Yes, sir. That bill is not necessary because that is only part, the other bill is an itemized bill. 30

Q. This one here is included in the other one (indicating)? A. Yes. Some bills are not included, the nurses' expenses.

Q. These two are all you paid? A. Yes, the hospital and the doctors. Some bills I paid for outside, for an outside nurse, because they were private nurses. This hospital does not furnish any nurses.

Q. Your brother is coming here this morning? A. Yes. 40

Morris Willner—Re-direct

RE-DIRECT-EXAMINATION by Mr. Katchen:

Q. The amount of the hospital bill altogether is \$429.95 which includes the room, the X-rays and the service at the hospital? A. Of the hospital,
10 yes.

Q. The doctor's bill up to February 2, 1925, for which you paid, it includes the first part of his \$492.00? A. Yes.

Q. Since February 2d to date there is an additional bill, the amount of which you do not know? A. That is it.

Q. In addition to this is the expense of the nurse, one nurse at forty-two dollars a week for
20 seven weeks, making \$294.00? A. Yes, sir.

Q. And one nurse for one week of forty-three dollars. That is an extra nurse you had for the first week, making a total of \$337.00, and eighteen dollars a week board at the hospital? A. No, not eighteen. One week twenty-four dollars for two nurses and after that it was only twelve dollars for the other nurse.

Q. For the other six weeks? A. That is it.

Q. So that is an additional ninety-six dollars
30 for the board of the nurse in addition to the \$337.00 for their salaries? A. Yes.

By the Court:

Q. There is the ward charge of a room of twelve dollars? A. That is included in this bill of \$429.00.

Samuel Katz—Direct

SAMUEL KATZ, respondent, sworn on behalf of the Petitioner :

Direct-examination by Mr. Katchen:

Q. What is your full name? A. Samuel Katz.

Q. Where do you live? A. I live at 98 Van Buren Street, and my business is at 104 Van Buren Street. 10

Q. What is your business? A. Meat and poultry market. Live poultry and killed poultry and meats.

Q. Does the store front on the street? A. Well, the store is up to the front of the street.

Q. And where is the market, in the rear of the store? A. The alleyway leads to the rear of the store. 20

Q. And the alley entrance is on the side of the store? A. There is a doorway from the store leading from the alley and the alley leads right to the street also.

Q. About how many feet long is your market? A. About thirty-five to forty feet long.

Q. How long is the store about? A. Eighteen feet long.

Q. The store and market are absolutely detached from each other? A. You can see the rooms between each other. 30

Q. You can be in the market without seeing the store? A. Positively, when you are in the market you can't see the store.

Q. Do you know Michael Willner, the petitioner? A. Yes.

Q. Is this the man here (indicating)? A. Yes. 40

Q. How long has he worked for you? A.

Samuel Katz—Direct

About three and a half years, going on the fourth year.

Q. In November, 1924, the end of November 1924, was he working for you? A. Yes.

10 Q. What was he doing for you? A. General work; everything. Everything I used him for to help. Driving a machine, cutting meat, returning the money after collections, helping in the chicken market, plucking chickens, and general work. Everything I do in the business he was supposed to help me and did help me all the time.

Q. He also lived with you? A. Yes, boarded with me.

20 Q. What salary did you pay him? A. Twenty dollars a week cash besides his board.

Q. And the board included what? A. I don't know.

Q. Lodging? A. Yes.

Q. A bedroom? A. Yes.

Q. Clothes, too? A. No, no clothes.

Q. That he had to buy out of the money you gave him? A. Yes.

30 Q. How long did he work for you a day? A. His hours were sometimes—I opened six o'clock usually and sometimes a little before and busy days when we were real busy it is open until ten o'clock at night and other days it is only open to eight.

Q. On November 26, 1924, that was the day before Thanksgiving? A. Yes.

Q. Were you in the store the night of that day? A. In the market, yes.

Q. Was Michael Willner there? A. Yes.

40 Q. Who else was there? A. I was there,

Samuel Katz—Direct

Michael Willner was there and a customer. We three were on one side like, and on the other side was my wife and another girl by the name of Fannie Goldstein and another boy by the name of Aaron Schilhouse. Six of us.

Q. Who of those six worked in the store? A. 10
Mr. Willner.

Q. Does that girl work in the store? A. No, she is the landlord's daughter.

Q. Who was that boy? A. That boy was helping the landlord. He is not a regular employee.

Q. What was your wife doing? A. My wife, she helps me. She was at that time sitting down there on one of the boxes. 20

Q. What were you doing? A. I was standing sorting chickens and Mr. Willner was taking them out of the iron coops and he was taking these chickens out from there and handing them to me and I was sorting them. We were almost through business that day and I was getting ready to quit. All of a sudden I heard, "Hands up." When I heard "Hands up," it was already the second command, "Hands up", 30 and as soon as I turned around my wife screamed. Mr. Willmer is a little hard of hearing, but when she screamed he kind of thought—

Mr. Turner: I object to what he thought.

Q. Just tell us what you saw happen. A. When she screamed all of a sudden Mr. Willmer got up. He was on the bottom of this coop, and when he turned up he was very near to one of these men that had a gun pointing. 40

Samuel Katz—Direct

Q. How many men were there with guns? A. Three.

Q. Were they pointing guns at the time? A. Right in front of us.

10 Q. Each hold-up man was covering each one of the three? A. To tell you the truth as long as I faced them, I didn't see what was in back of me. They were in line and had guns in front of them.

Q. What did they say? A. As soon as Michael turned around, one fire was shot off and my wife was still screaming right along. When they heard her scream without ending, one of the men said, "Let's go", and they pulled off.

20 Q. What was Michael doing just at the time when they said, "Hands up"? A. He was in the bottom of these iron flats, you know, carrying chickens out to me. When he got up he came out with three or four chickens and a few dropped on the floor.

30 Q. Before the hold-up men shot at him, did they tell him to put his hands up? A. They didn't talk any more. They said, "Hands up" when I turned around and when he turned around they didn't say nothing, and because my wife was screaming that is what brought him to turn around. Not from the command brought him to turn around.

Mr. Turner: I object and ask that that be stricken out.

The Court: It may be stricken out.

40 Q. At that time did Michael have any money belonging to the store or you?

Samuel Katz—Direct

Mr. Turner: I object to that. I think that is incompetent and immaterial.

The Court: Yes, you might show it in some way. Let him answer the question.

Mr. Turner: I pray an exception.

A. He usually gives it—

10

Mr. Turner: I object.

Q. Not usually, but what did he do that night?

A. That night he had money with him, sure.

Q. How much, do you know? A. Well, I didn't know when they took him away, but when he came back from the hospital they turned in ten dollars in change.

Q. Who turned it in? A. Michael Willner brought it home with him when he came out of the hospital. I went over to get the money and they said he was too weak to talk about business, and I waited until he came out.

20

Q. What was that money from? A. From collecting orders.

Q. Did you know any of those three hold-up men? A. No.

Q. Had you ever seen them in the store before? A. No, sir.

30

Q. Did they shoot any more than one time? A. No.

Q. They did not attack you? They did not shoot at you or your wife? A. No, nothing else was done.

Q. When they pointed the gun at you, how close were they to you? A. Two and a half feet from me or three, around that.

Q. How far was the gun from you when it was

40

Samuel Katz—Direct

pointing at you? A. That's how far (indicating.)

10 Q. How near were they then to your wife? A. I couldn't say exactly how near they were because—I didn't have much of a chance to look around. The whole thing took very shortly and I had no time to consider what was going on. Before they shot I thought it was only in fun and I couldn't make out what happened. The whole thing happened in a few minutes.

Q. Did you have any money you had taken in that day? A. I had some money; I didn't have much. I am pretty careful with money nowadays. I didn't have much with me.

20 Q. Where was the money? A. In my pocket.

Q. About how much? A. About one hundred dollars.

Q. Where was the rest of the money you took in during the day? A. During the day I gave it to some men. I paid some bills and made a deposit and kept some in the house.

Q. Did any of the other people in the market do anything to interfere with the hold-up men? A. Did they know anything that was going on?

30 Mr. Turner: I object.

Q. Did they do anything? A. Oh, when my wife was screaming?

Q. What was this girl, Fannie, and the boy doing? A. I didn't have no chance to look behind, as I told you before. I didn't see what the others were doing; I was quite busy with myself.

Q. Did these hold-up men have any masks on their faces? A. No.

40 Q. Were they young fellows or how did they appear to you? A. They appeared to be middle-

Samuel Katz—Cross

aged, twenty-five or thirty. I can't say exactly the age. They were kind of neatly dressed.

Q. Since the time of the accident, since November 26, 1924, have you paid Michael Willner any of his salary? A. No.

Q. Is he working for you now? A. Yes, he is beginning. I figure he will start as soon as Doctor McCabe says he is able to.

Q. Are you paying him anything yet? A. No, I am giving him board for that. He stops with me like.

Q. This is Doctor McCabe in Court (indicating)? A. Yes.

CROSS-EXAMINATION by Mr. Turner: 20

Q. Now, is Michael Willner related to you? A. No, sir.

Q. How long have you known him? A. Since he has been working for me. I never knew him before.

Q. Where did he come from, the same town you came from in Russia? A. I didn't come from Russia. Its Roumania now. He comes from Poland. Austria it used to be.

Q. You say now he drives the truck. When did he begin to drive the truck? A. It is about eight days he started to drive the machine.

Q. Eight days ago? A. Yes.

Q. How many hours a day does he drive the truck now? A. Oh, he gets up about half-past seven. I haven't got any steady driving like. He goes around for an hour or two and comes back and goes down to see the doctor.

Q. What time does he stop driving the truck 40

Samuel Katz—Cross

at night? A. Sometimes at five o'clock or four o'clock. It all depends. It is unusual times, you know.

Q. Did he work last Friday night driving? A. This last Friday?

10 Q. Yes. A. I am not open Friday night.

Q. Thursday night were you open? A. Yes.

Q. How late were you open Thursday night?

A. Thursday night I am usually open till ten o'clock.

Q. Was Michael Willner in your place until ten o'clock Thursday night? A. Yes, he was around.

20 Q. What was the last trip he made Thursday night with the truck? A. About seven or eight o'clock. I couldn't say the exact time. That is only Thursday night I am open. Sometimes I am open Saturday, too, but not such late trips on Saturday.

30 Q. When did you begin to pay him twenty dollars cash? A. He started with me very small salary. When he come to me he was just coming from the other side and hardly knew anything, and I started him off with board only and gradually I gave him once in a while a raise until I raised him up. I can't say exactly the month, week, or date because I am not sure, you know.

Q. Now, at the time of this happening, when he went to this hospital, he was getting eighteen dollars cash, wasn't he? A. At the time it happened?

4 Q. Yes. A. Probably.

40 Q. And when was it that you raised him up from eighteen to twenty dollars? A. I couldn't

Samuel Katz—Cross

say. Maybe I didn't give him yet twenty dollars. I ain't sure.

Q. At the time of the happening he got eighteen dollars? A. Yes.

Q. As a matter of fact, you are giving him twenty dollars now, aren't you? After this case is over you intend to give him twenty dollars? A. Yes, I intend to. 10

Q. Twenty dollars and his board? A. Yes.

Mr. Katchen: I object as to what he intends to do. It is merely speculation.

The Court: I think his wages are eighteen dollars. It will not do any harm.

Q. Now, this happening this night of November 26th, 1924, was that in the market or was it in the store? A. In the market. 20

Q. Now, that is back where the chickens are? A. Yes, sir.

Q. You have chickens stored there in crates around the market? A. They come in crates and we put them in the iron coops.

Q. You have your chickens in coops of iron in this market, don't you? A. Yes.

Q. And that is really what it is, it is a storage place for chickens? The store is out in front? 30

A. Yes. That is not only storage, people come in there to buy. It is regular market, a place with lots of coops and a counter and I have scales and customers come in to buy.

Q. That is where your customers come in to buy live chickens? A. Yes.

Q. Do you kill your chickens in this market? A. Yes, there is a certain little room further, 40 deeper in the market in the same room.

Samuel Katz—Cross

Q. What time was it, do you remember, when these three men came in? A. Yes, I remember. It was closely to ten o'clock. Five to ten or ten o'clock, that's about the time it was.

10 Q. Now, what kind of work did Michael Willner do all that day? A. He got up in the morning, takes out the meat in the ice box and gets it ready for me when I come in the store. I find the meat ready to make out orders. He goes in the garage and gets the machine out and delivers these orders. By the time he comes back I got some other orders ready. That day I had other orders ready. He kept on coming and going with these orders. That was right along all day, and some-
20 times in the day he stops off. After lunch he cleaned up a little of the store and has more orders. Before this happened he came back from the route about twenty after nine, then I told him to go in the market and sort these chickens and we will get through for the day.

Q. You had been sorting chickens in the market for about an hour, had you, or half an hour? A. I couldn't say how long. It was after he got through with that trip. When it happened it
30 was nearly ten o'clock.

Q. The sorting of the chickens was the last work that was to be done that night? A. Yes.

Q. As soon as the chickens were sorted you were going to close? A. We were going in the house and count the money he collected, C. O. D. and all the cash.

Q. What time did you expect to get to bed that night? A. I don't count on when I go to bed.
40 When I get through.

Samuel Katz—Re-direct

Q. You expected to finish about eleven o'clock?

A. Yes. We only had about six more chickens in that flat. Maybe in ten minutes we would have been out of the market, out altogether.

Q. Chickens in the flat, does that mean chickens in the wooden case? A. No, the iron case with five flats. He was in the bottom flat at the time getting these chickens out. 10

Q. Michael Willner at that time was sorting those chickens that were in those coops or flats?

A. Yes. I usually sort them. I understand it a little more. I wouldn't leave it to him to sort.

Q. At the time when this thing happened he then had chickens in his hands, didn't he? A. Yes. 20

Q. And when this man shot him he dropped the chickens, of course? A. I think he dropped them before he shot him. When he turned around he raised his hands up.

Q. Just before he put his hands up he had these chickens in his hands? A. Yes.

Q. And then he didn't leave the place where he was standing, he put his hands up over his head? A. Right there. I was right only a half a foot away from him. 30

RE-DIRECT EXAMINATION by Mr. Kat-
chen:

Q. Did you see these hold-up men run out of the store? A. No, not out of the store, out of this market.

Q. Which way did they go, through the store or the alleyway? A. I just followed and they went right straight out of the alley. 40

Doctor Thomas S. McCabe—Direct

Q. How did they run away? A. The engine was running outside and they got in the machine and went away.

Q. Somebody was at the wheel waiting for them? A. I saw the machine in the back. They
10 told us—

Mr. Turner: I object to what they told.

Q. You saw them go off in the automobile? A. Yes, that is what I saw.

DOCTOR THOMAS S. McCABE, sworn on be-
20 half of Petitioner.

Direct-Examination by Mr. Katchen:

Q. Doctor you are connected with St. James Hospital, Newark? A. I am.

Q. In what capacity?

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

Q. Have you attended Michael Willner? A.
30 I have.

Q. You operated on him? A. I did.

Q. How many times? A. Twice.

Q. What was the nature of the operation? A. His first was an operation for a gunshot wound in the liver, and the second was a resection of the ribs.

Q. The results of both of these operations leave scars? A. Yes, both will leave scars.

40 Q. Were you successful in removing the bullet, doctor? A. I did, yes.

Doctor Thomas S. McCabe—Direct

Q. How long was he in the hospital, approximately? A. Until some time in February, I think, or March.

Q. March 3rd he was there the book records show to me. At the date of his discharge at the hospital, what was his condition? A. Why, he was gradually improving every day, and I thought the air would do him good. 10

Q. Have you seen him since then? A. I saw him every other day.

Q. When was the last time you saw him? A. Yesterday.

Q. Can you tell the Court what his condition is? A. Where the resection of his rib is is still draining but it will only be a short time before it is all closed up. 20

Q. Is his condition of such a nature he can work now? A. Well, just light work.

Q. Will he be able to work at any kind of work in a short time? A. What kind of work do you mean?

Q. The ordinary man's work; the kind of work he did before? A. I think so.

Q. In about how long? A. Probably a month or so. 30

Q. As a result of the bullet wound in his kidney, I think it was— A. No, in his liver.

Q. —and the operation that was performed upon him, is there any permanent disability of any internal organ? A. It will contract the liver to a certain extent as far as the functions are concerned, but how much I couldn't tell.

Q. Would you call it a permanent disability of even a slight percentage? A. You would if you can tell how much liver tissue has been lost. 40

Doctor Thomas S. McCabe—Direct

Q. But there has been a loss of some liver tissue? A. Oh, yes. How much I could not tell. He has been drained now for three months.

Q. Enough to interfere with his general condition? A. Yes.

10 Q. And will that be a permanent disability? A. Yes, sir.

Q. Is there anything besides his liver disability out of the way? A. Probably the amount or capacity of the air of the lung on the side may be limited to a certain amount.

Q. Do you know? A. I can't tell that.

Q. From your examination of him does it disclose such a contraction of the lung or such disability you speak of? A. No, the lung is
20 functioning pretty good just now.

Q. Would you say his disability is a ten percent one, doctor?

Mr. Turner: I object to that.

The Court: That is very, very leading. Let the doctor make his own estimate.

Q. Doctor, can you make an approximate estimate of what the total disability is? A. No,
30 there is no such way you could approximate it. As I said before, I couldn't say how much liver tissue was lost.

Q. But you did remove some in the operation and that is how you know there was a loss? A. A loss of tissue through drainage. Constant drainage of the liver tissue, not gall bladder but the liver tissue.

Q. Is it still an open wound? A. It is an external wound.
40

Q. That is gradually healing? A. Yes, sir.

Doctor Thomas S. McCabe—Direct

Q. Is there any drainage pipe there? A. Not now.

Q. When was that removed? A. Oh, some time ago.

Q. Your bill, doctor, that was paid as testified to by Mr. Willner's brother of \$492.00, up to February 2, 1925, is that right? A. Yes. 10

Q. Since then there is an additional bill due you? A. Yes, sir.

Q. Do you know how much that is? A. No, I do not.

Q. The bill includes an operation? A. Yes, sir.

Q. How much will you charge for that operation? A. It will figure all up in the dressings, everything. I haven't figured that at all. 20

Q. Can you give us an approximate figure? Three hundred dollars? A. Probably around that, two hundred and fifty to three hundred dollars.

Q. Is it still necessary for him to come to you for further examination, doctor? A. Yes, sir.

Q. From his present condition, how much longer do you say he ought to come to you? A. Well, you cannot tell exactly how long. It may take two weeks, it may take three weeks, it may take a month. 30

Q. Will you say at the end of a month in your opinion he will be absolutely cured? A. He will not be absolutely cured but will be able to do his regular duties.

Q. Has there been a loss of weight from the time you first saw him? A. Oh, yes, emaciation was quite some. I think he lost something like forty pounds, but he is gradually getting that back. 40

Mr. Turner: No cross-examination.

Michael Willner—Direct

MICHAEL WILLNER, Petitioner, sworn.

Direct-Examination by Mr. Katchen:

Q. Where do you live? A. 98 Van Buren Street with Samuel Katz.

10 Q. On November 26, 1924, for whom were you working? A. I worked for Samuel Katz.

Q. Where? A. In the market.

Q. On Van Buren Street? A. Yes.

Q. What were you doing there? A. I do butcher and almost everything I do. Chop meat, go to the market and regular orders, everything.

Q. Now, how much did you get a week for doing that? A. Before I got shot I got twenty
20 dollars a week.

Q. How many weeks did you get that before you were shot? A. For two weeks. Before I got eighteen dollars and after he give me a raise of two dollars.

Q. In addition to the eighteen dollars, what else did you get? A. Board, sleeping and everything.

Q. What time did you start your work in the day? A. This time I start work at five o'clock. It was a busy day, before Thanksgiving.

30 Q. You mean the day you were shot? A. Yes, that day I got up earlier.

Q. What day was that? A. It was the day before Thanksgiving.

Q. Wednesday, November 26th, 1924? A. Yes.

Q. Tell us what happened when you were shot.
A. I was a few orders delivering. I go to Irvington and come back, and after he tell me I hand
40 him chickens from the coops, and he put me in another coop; he wanted good stuff. I was in

Michael Willner—Direct

the coop and I didn't know nothing, and three fellows come in and I heard Mrs. Katz scream and I was in the coop and I got up and he hollered, "Hands up." and I got up and I have chickens in my hand and I dropped these chickens and I hold my hands up and this fellow comes down with the gun—a little gun it was—and after the Mrs. screamed, two fellows was by the Mrs. and one was by me, and the counter was this side and I was this side (indicating), and as the Mrs. screamed one fellow fired a shot and he run away. One fellow was white and a little bit higher and two fellows was dark. 10

Q. Do you mean a colored fellow? A. No, one was white, like a blonde, and the dark one was higher and two smaller. He just fired and on this side he shot me and run away. 20

Q. Where did they take you, do you know? A. Who?

Q. After you were shot? A. They took me to St. James Hospital.

Q. How long were you there? A. I was fourteen weeks in the hospital. Now, I go every two days for dressing to Doctor McCabe.

Q. How do you feel now? A. I have a pain in the back. It hurts me. I am weak. 30

Q. Are you still working for Katz? A. No, just helping.

Q. How many hours a day now are you working for him? A. I am weak, and I can't work much. I get up at six o'clock.

Q. How many hours do you work, five, six or seven hours? A. About six hours.

Q. Does he pay you any wages? A. He don't pay me, not yet. He gives me eat. 40

Michael Willner—Cross

CROSS-EXAMINATION by Mr. Turner:

Q. You work for him now six hours a day? You start in to work at six o'clock in the morning? What time do you stop working in the afternoon? A. One o'clock; twelve o'clock.

10 Q. You stop some days at one o'clock and some days at five o'clock? A. No, five o'clock I don't work.

Q. What is the latest you are there in the afternoon? A. In the afternoon I generally deliver orders.

Q. When you deliver orders for him in the afternoon, what do you take, an automobile? A. Yes, an automobile.

20 Q. And who drives the automobile? A. I drive it.

Q. You drive the automobile? Do you deliver orders in Newark? A. Yes.

Q. And you go out in the car and take orders out? Does that mean live chickens? A. All packages.

Q. Are the orders live chickens? A. No, I don't deliver live chickens.

30 Q. Just meat and chickens that have been killed? A. Yes.

Q. Now, how late do you deliver orders in the afternoon now? A. From one o'clock to five o'clock.

Q. Do you go out alone in this automobile? A. No, it is a touring car.

Q. I say, do you go out in the automobile and drive it yourself? Do you carry meat in the house? A. Yes.

40 Q. Now, did you work for him yesterday? A. Yes, I worked yesterday.

Michael Willner—Cross

Q. You delivered orders yesterday? A. Yes.

Q. What time did you stop work yesterday afternoon? A. Yesterday afternoon half-past six. I start work at half past six in the morning.

Q. You started working yesterday morning at six-thirty? A. Yes. 10

Q. What time did you stop work yesterday afternoon? A. Five o'clock.

Q. You stopped yesterday afternoon at five o'clock? A. Sure.

Q. Did you sort any chickens yesterday? A. I didn't sort any chickens; I didn't do this work.

Q. What day is it you sort chickens, Thursday? A. I no sort chickens. 20

Q. Mr. Katz does that himself, ordinarily? A. Yes.

Q. Mr. Katz, he is the one who sorts the chickens ordinarily? A. Before I sort chickens; before when I feel all right.

Q. Do you wait on customers in the store or in the market? A. No.

Q. You just drive a car delivering orders? A. That is all, and go to customers.

Q. You sell meat to customers? A. Yes. 30

Q. Do you sell chickens now? A. I go with these orders. I go out with the touring car. That is all I do.

Q. Now, how many days have you been working for Katz like this? When did you start to work for him like this? A. I start working like this just a week.

Q. And your pay day has not come yet? A. Oh, no, no. I can't work because I have a bad back. It hurts me. 40

Michael Willner—Re-direct

Q. Yes, we know you have a bad back. A. Sure.

RE-DIRECT EXAMINATION by Mr. Kat-
chen:

10 Q. Do you collect money too for the boss? A. Yes.

Mr. Turner: I object to that as leading. Counsel comes back now on re-direct examination and leads the witness.

The Court: There is testimony here that he does make some collections.

Q. On the night you were hurt did you have any money of the boss'? A. Before I got shot?

20 Q. Yes. A. I got ten dollars when they took me to the hospital.

Q. Since the day you were shot did you get any weekly money? A. No.

Q. Did he pay anything for the doctor? A. No, everything I pay. It is my money.

Q. Did you give your brother the money to pay for you? A. Yes.

Q. It was your money that your brother paid?

30 A. Yes.

Q. You gave him your bank book? A. Sure.

Q. How much money did you pay altogether? A. Altogether? I haven't got all bills.

Q. How much was this altogether? A. My brother paid everything for me. He pay everything. The expenses I don't know how much.

Q. Was it with your money or his money? A. My money, I think.

40 Q. Have you any money in the bank? A. Sure.

Michael Willner—Re-cross

Q. Did you pay back your brother what he paid for you? A. My brother, he took my money in the bank and he paid the doctor.

RE-CROSS EXAMINATION by Mr. Turner:

Q. Where is the bank book? A. My brother 10
got it.

Q. What bank have you money in? A. Tenth Street and Springfield Avenue.

Q. How much money did you have in the bank before November 1924? A. I don't remember how much money I got.

Q. Don't you know how much money you had in the bank? A. I forget.

Q. You didn't have any money in the bank at 20
all, did you? A. Sure.

Q. How much? A. It's on the book; I can't tell you how much.

Mr. Katchen: What difference does it make who paid it? The fact is the employer did not pay it.

The Court: I think we ought to have the proof about it.

Q. How much money did you have in the bank 30
before November 1924?

Mr. Katchen: I object; I don't think it makes any difference.

The Court: He can answer the question if he can. He can tell approximately.

A. I got more than fifteen hundred dollars.

Q. And it was down in your bank book? A.
Yes.

Q. In the bank at Tenth and Springfield Ave- 40
nue? A. Yes.

Samuel Katz—Direct

Q. Do you know the name of that bank? A. The Springfield Avenue Trust Company.

Q. Was any of that money drawn out? A. I didn't take nothing. My brother say he took it.

Q. You didn't draw any money out of that
10 bank? A. No.

Q. You didn't sign any checks or drafts on that bank? A. No.

Q. So far as you know, that money is still there? A. Sure.

Q. You didn't pay these bills at all, your brother paid them? A. Yes, my brother paid them but I must give back the money.

Q. Why did you just say you paid with your
20 money then?

Mr. Katchen: I object.

The Court: The brother paid it and he expects to pay him back.

SAMUEL KATZ, re-called:

Direct-Examination by Mr. Katchen:

30 Q. Did you pay any bills for the doctor or hospital expenses? A. No, sir.

Q. Did you know that Michael Willner was taken to the hospital? A. Yes.

Q. When did you know it? A. Right away. Al Goldstein came over with the machine and I went over and requested him to take him to the nearest hospital it was best to take him and he brought him to St. James.

40 Mr. Turner: No cross-examination.

Nettie Katz—Direct

NETTIE KATZ, sworn on behalf of Petitioner.

Direct-Examination by Mr. Katchen:

Q. Mrs. Katz, you are the wife of Samuel Katz? A. Yes, sir.

Q. Where do you live? A. 98 Van Buren Street. We have our business at 104 Van Buren. 10

Q. And you work in the market, too? A. Yes.

Q. Does Michael Willner work for your husband? A. Yes.

Q. Does he live with you at the house? A. Yes.

Q. Does he pay anything for his board and lodging? A. No, sir; I even sent things to the hospital while he was laid up also. 20

Q. You have charge of the household expenses? A. Yes.

Q. Do you know how much Michael's food and expenses cost a week? A. I can't directly say, because I don't get a salary. If I have money I buy him eats just as well as we.

Q. Do you know how much extra he costs your family?

The Court: That would not make any agreement. Find out if there was an agreement between the parties. 30

Mr. Turner: His testimony is he got twenty dollars a week, board and lodging.

The Court: You are trying to establish reasonable value of his board.

Q. Do you know as to any agreement between your husband and Michael Willner for his salary?

A. No, I do not. I don't mix in that. 40

Q. (By the Court.) Was there any agreement between you and Michael or Michael and your

Nettie Katz—Direct

husband, if you know, as to what was the worth of his board and room? A. I never kept boarders and I never considered it. Really, we treat him like our own.

10 Q. (By the Court.) What you agreed it was to be? A. I can't say that.

Q. Mrs. Katz, on the night of November 26, 1924, were you in the store? A. I was in the market.

Q. Were you there when the hold-up men came in? A. Yes, sir.

Q. Was Michael there? A. Yes, he was taking out chickens and three fellows came in, and I was sitting on a box and Fannie was in back of me, and a fellow was in back of me washing his shoes
20 off and Michael was handing chickens out of the coops, and three fellows came in with their hands in their pockets, dressed well, and we smiled and I was going to wait on them. I seen Mr. Katz was busy and I was going to say, "What do you wish?" and they took out their guns and said, "Hands up." I raised my arms and I screamed, and I was still screaming and I could not stop until my doctor came and then he gave me some
30 kind of medicine and I stopped screaming. The three fellows were standing and the fellow said to me, "Shut up," but I couldn't stop screaming.

Q. What happened to Michael? A. Michael Willner, when he heard me scream and turned around, why I was still screaming and he held his hands up and dropped the chickens. Two fellows were standing there (indicating) and I was standing here (indicating), and the third one was
40 by Michael Willner, and when I was hollering

Nettie Katz—Cross

two fellows said, "Fire," and they fired the gun, and he said, "Let's go," and they ran out.

CROSS-EXAMINATION by Mr. Turner:

Q. When Michael Willner was shot he had both of his hands over his head? A. Yes. They said, "Hands up," and he dropped the chickens and they shot him. 10

Q. When he was shot his hands were up over his head? A. Not when he was shot. The fellows ran out. When the fellows ran out he couldn't hold his hands up over his head.

Q. When they put the bullet in him, his hands were over his head? A. He went up against the coop. 20

Q. That was after he was shot. A. He went over; he didn't fall; he was standing by the coop.

Q. At the time he was shot, when the gun went off, his hands were up over his head? A. I didn't see him. I heard the fellow say, "Fire," and I heard the shot. I didn't even believe he got shot because I thought the bullet went into the coop. My husband said, "What is the matter?" and he said, "They shot me," and when I heard he was shot I was screaming more. 30

Mr. Katchen: Petitioner rests.

Mr. Turner: We will move to dismiss the petition on the ground that the Court is without jurisdiction, and on the ground that the claim is not compensable; on the further ground, that this was not an accident arising out of and in the course of his employment. We will submit a brief setting forth some of the decisions sustaining our claim. 40

Hearing July 22, 1925.

WORKMEN'S COMPENSATION BUREAU

Department of Labor of New Jersey

NEWARK ESSEX COUNTY DISTRICT

10

MICHAEL WILLNER,

vs.

SAMUEL KATZ,

No. 3613.

20 Transcript of stenographer's notes of evidence taken in the above entitled matter on the twenty-second day of July, A. D., 1925, at one o'clock p. m., at 9 Franklin Street, Newark, New Jersey, before the Honorable Harry J. Goas, Deputy Compensation Commissioner.

Appearances:

Samuel G. Meisterman for petitioner.

Frank G. Turner, Esq., for respondent.

30

DR. MAURICE AVIDAN, a witness on behalf of the petitioner, sworn.

Direct-Examination by Mr. Meisterman:

Q. Have you examined the petitioner, Mr. Willner? A. I have.

40 Q. What do you find? A. He has got a scar over the region of the liver. Oh, I should say a scar about two and a half to three inches long, and then he had a discharging sinus in the back in

Dr. Maurice Avidan—Direct

the region of the kidney and this sinus is circumscribed by an inflamed area and you could say it is a discharging sinus, and from the history of the case he has had a penetrating wound, which apparently became infected. This penetrating wound, I think, was a bullet wound, penetrating the viscera, the abdominal organs, liver and various viscera, vital structures, and as I say it apparently became infected and at the present time it is a discharging sinus. 10

Q. With such a condition existing would you advise that the petitioner engage in any employment? A. Now, as a laborer I wouldn't advise him to work. Of course a man would naturally take a little walk, but as far as actual work I would say no; emphatically no. 20

Q. If since March 31st, the condition complained of has become worse, and if during that time he had been doing some light work, would you say that that light work had any relation to the increased disability?

Mr. Turner: I object to that on the ground it is incompetent; no foundation laid for it. There is not any proof he became worse. 30

Mr. Meisterman: That will be proved later on.

Mr. Turner: I do not think you should anticipate that, because here is a man here in his shirt sleeves in court, looks as though he had been working all day. He has got automobile grease on his shirt sleeves.

Mr. Meisterman: I will withdraw the question. That is all. 40

Dr. Maurice Avidan—Cross

CROSS-EXAMINATION by Mr. Turner:

Q. You said that so far as actual work as a laborer is concerned you would not advise him to do it? A. No, sir.

10 Q. Do you see any objection to his riding in an automobile? A. Riding in a car?

Q. Yes. A. Oh, I suppose he could take a pleasure ride for half an hour a day or so. An hour a day would not hurt him.

Q. Do you see any objection to his sitting at the wheel of that car? A. You mean driving the car?

Q. Yes. Sitting at the wheel and driving it? A. Yes; I do. I really—

20 Q. What objection do you see? A. These people—I have treated a lot of sinuses—these people, have to build them up.

Q. No. What objection do you see to him sitting at the wheel? A. You take a car and run it, and the vibration is bound to spread the infection. That is, it might spread it. As a private patient coming to my office in that condition I would advise him to rest as much as possible and take it easy until that condition heals.

30 Q. When you say “take it easy,” do you mean he should lie on his back? A. No; a little walk would not hurt him.

Q. A little walk would not hurt him? A. A little riding around in the car would not hurt him.

Q. His work, he says, is to drive an automobile and he stops his automobile and gets out and delivers packages of meat and groceries. Do you see any reason why he should not do it? A. How
40 long a day? How many hours a day?

Dr. Maurice Avidan—Cross

Q. He does that in the afternoon from about one o'clock until five. A. One until five? Well, it would all depend on the type of individual. If this man gets a tired feeling, I would say no. Anything that tends to tire an individual lowers his resistance. 10

Q. Now, doctor, if he did this work, I mean to say, if he drove an automobile and delivered packages in the afternoon, say a pound of meat here and a couple of pounds of meat there, and some chops and so forth, do you see any reason why he should not do that? A. How many hours in the afternoon?

Q. In the afternoon from one to five. A. Four hours? 20

Q. So long as he didn't feel any ill effects you would not interfere with him, would you? A. You are not giving the man the benefit of the doubt. No, I would say no.

Q. As long as he did not feel any ill effects you would not interfere. A. I would not advise him.

Q. Would not stop him. A. Absolutely. I would stop him from all work.

Q. You said if he got tired you would stop him. Suppose he did not get tired? A. I said that, but I mean to say this you are not giving him the full benefit—I may be wrong about that. There is nobody in the world can say that. We don't know. But all we know when you treat a chronic condition of a serious thing of this kind, a quick recovery is gotten—the quickest recovery is gotten by giving the man the benefit of the doubt, by improving his resistance, and you do that by giving him rest. And then you help nature along to 40

Dr. Maurice Avidan—Cross

10 heal the condition. A man may work and may not have any ill feeling, but you are prolonging the cure. That has been my experience with every sinus case I have, including the leg sinus. If you stop work and rest the man you heal it up quick. If you have him work it lowers his resistance. This man may be in the same condition, I don't know how long. But at the same time we are not doing right.

Q. You say you would stop him working now?

A. I would stop this man working altogether.

Q. What would you have him do? A. I would have him take a walk every day.

20 Q. You would have him take a walk every day, you would have him take exercise? A. No; positively not. That is just the thing you don't want in a case like this.

Q. You would have him walk? A. A little walk would not hurt him.

Q. And you say riding in an automobile would not hurt him. A. Well, a pleasure ride, probably for an hour a day would not hurt him, on a smooth pavement.

30 Q. What else? A. Give him good nourishment. I would have this man gain twenty pounds, if I could.

Q. What? A. I would have this man gain twenty pounds, if I could, fatten him up. Put him on the farm.

Q. Put him on the farm? You do not mean that they get fat on the farm. A. Yes; they do. A lot of them do.

40 The Court: Without work.

Witness: Yes; without work. Put him

Dr. Maurice Avidan—Cross

on a farm. A lot of good food. I have had some tough sinus cases.

Q. You spoke of infection. Why do you say there is infection here? A. Because the wound is not closing.

Q. Is that your idea about it, because the wound is not closing? A. Oh, yes; that means infection. Any discharging wound that is not healed— 10

Q. You do not know anything about this case at all. A. Except what Dr. Zerlip told me and the history I got from the man.

Q. When did you examine him? A. A short while ago with Dr. Zerlip.

Q. Today? A. Yes. 20

Q. And when before? A. Oh, I guess I saw him about two weeks ago.

Q. And any other time? A. I think I saw him a third time. I don't remember, probably a week ago or so. The sinus is surrounded by an inflammatory area. I don't think there is any question. As I say, a lot of these people work because they have to work.

Q. Thousands of these people work with that condition. A. They do work, but I mean if a man came to my office and asked my personal opinion. 30

Q. If he was a rich man. A. And he said, "What is the quickest way to get well?" I would tell him, "Just take it easy. Just eat up and fatten up." And that man will get well, if he ever does get well. You have to handle these cases like T.B. cases. On the same style. This man apparently had quite a serious infection. I don't say he can't work under a handicap. I 40

Dr. Maurice Avidan—Re-direct

don't say that. But I say in order to get a rapid cure my advise from a medical standpoint is not to work.

Q. The first time you examined him doctor, when was that? A. About three weeks ago.

10 Q. About three weeks ago. You did not examine him in March? A. Beg your pardon?

Q. You did not examine him in March? A. I examined him with Dr. Parsonette. No, I don't think I did. I don't think I saw this man then.

Q. Three weeks ago you first saw this man? A. Yes.

Mr. Turner: That is all.

20 RE-DIRECT EXAMINATION by Mr. Meisterman:

Q. Mr. Turner asked you whether it would hurt him to work from about twelve o'clock until five o'clock and suppose instead of that he worked from six-thirty until the end of the day. Would that make it worse still? A. Oh, that would be against the man.

30 Mr. Turner: What kind of work do you mean?

Witness: Anything; any work at all, that occupies him all day makes the man move around; any work is naturally—keeps the man moving around. Automobile driver, I imagine it is automobile driver.

40 Q. Yes. A. That is no work for him. Ridiculous. The man needs rest. Any poison, the only way to localize is to give him rest.

Dr. Maurice Avidan—Cross

Mr. Turner: When are you able to say this would terminate?

Witness: I don't know.

Mr. Turner: You cannot form any opinion, can you?

Witness: All I can say is the quickest cure and the best cure is to put the man at rest and give nature the best chance. 10

By Mr. Turner:

Q. You cannot form any opinion. A. No; I really don't know. I don't know.

Q. So that he might rest all his life, mightn't he? A. I really don't know. I don't know whether he will get well. I really don't know. I haven't the least idea, because— 20

Q. Suppose that he had worked from March until now and had observed no ill effects and hadn't exercised himself unusually, and had shown no ill effects of that, would you still advise rest?

A. Well, he would not be the judge to know about—the very fact that that thing is still discharging shows the work did not do him any good. That man does not know what effect work has been on him. That thing is still open; still an open wound; still discharging. Work apparently wasn't any benefit to the man. 30

Q. Would you say it was any detriment? A. Surely; it didn't do him any good if it didn't heal.

Q. Do you know whether it has improved? A. All we know—I don't know about this case individually—all we know is what diagnosis teaches us as the best cure in any chronic condition is rest. And the best treatment for infection is rest. 40

Dr. Maurice Avidan—Re-direct

You take any infection of any kind, you got to put it at rest; otherwise, you spread it and you simply make the condition worse, from disseminating it.

10 Q. If it has not spread in all this working and he worked from March, 1925, to July, 1925, you would not say work hurt him. A. All I can say is the fact the man did not heal, it showed the work probably did do harm. Just how much I don't know.

Q. You cannot form any idea then. A. No; I don't know, but I know this: The man has been working and he has got a condition like that; deep infection.

20 Mr. Turner: That is all.

Witness: I surely would not advise him to continue working.

RE-DIRECT EXAMINATION by Mr. Meisterman:

Q. Would you consider that the condition of the work and the original wound caused the malignant situation?

30 Mr. Turner: Oh, I object to that, because the doctor does not know anything about the facts. He does not know anything about the facts of it.

Mr. Meisterman: He knows the history. It was a bullet wound.

40 Mr. Turner: No, he does not know the history. No one has told the doctor the history and the doctor has only seen him three times.

Dr. Maurice Avidan—Re-direct

Q. Were you told the history? A. I was told it was a bullet wound that penetrated the liver and penetrated the abdomen; and finally became infected and that he had a discharging sinus. That is the history I got.

The Court: All right: Then he may answer the question. 10

Witness: Well, I would say this: As I said before, the man was not given the benefit of nature's cure, by working. Just how much harm work did, I don't know. Probably did some harm.

Q. You are saying that in a general way and not with any particular knowledge of any change. 20
A. No; I wouldn't say any particular case. This is a general situation. In every chronic case we have to give the man rest. The more rest we give him the quicker he is going to get well.

Mr. Meisterman: That is all.

(The Court thereupon took a recess until this afternoon to 2:30 o'clock p.m. at which time the respective parties by their respective counsel reconvened.) 30

Michael Willner—Direct

MICHAEL WILLNER, re-called:

10 Mr. Turner: Now, if the Court please,
I will put my objection on the record. I
object to the petitioner being re-called on
the ground that he has already testified in
this case and has been examined directly
and cross-examined, and has testified as
to what he can tell about his condition and
has testified to the fact that he was then
working and his testimony was corroborated
by the respondent who was a witness
for the petitioner and the case was closed
as to that feature of the case. And I think
20 his testimony now is incompetent, irrele-
vant and improper.

The Court: In view of the fact that it
is now claimed that his condition is such
that he should not be working at all, I will
allow him to testify as to how he feels and
what work he has done only since the date
of the last hearing which was held on—

Mr. Meisterman: March 31st, 1925.

30 The Court: Is that the last hearing?
Mr. Meisterman: Yes, sir.

The Court: Since March 31st, 1925.

Mr. Meisterman: Then I pray an excep-
tion.

The Court: Note an exception.

By Mr. Meisterman:

40 Q. Mr. Willner, since the last hearing on March
31st, 1925, what has been the condition of your
health?

Michael Willner—Direct

Mr. Turner: I object on the ground it is a medical question which has to be answered by the doctors and not by the petitioner.

The Court: How have you felt.

Q. How have you felt since then? A. How I feel? 10

Q. Yes. A. Hurt me, I got cramps in the side, and hurt me in the drain; I was take out every two days, sometimes every day.

Q. Who was the doctor? A. Dr. McCabe.

Q. And what does the doctor do to you?

Mr. Turner: I object to that, because Dr. McCabe has testified in this case.

Q. Since that time. Since March 31st. 20

Mr. Turner: And the witness is not qualified to answer the question.

The Court: He may testify to what extent—is Dr. McCabe the only doctor that is treating him now?

Mr. Meisterman: Dr. McCabe.

The Court: How often Dr. McCabe calls to see him or he calls to see Dr. McCabe, and what he does for him. 30

Q. Do you go to Dr. McCabe? A. I was today. I going every day. Yesterday I was all weak.

The Court: To Dr. McCabe's office?

Witness: Sure.

Q. What does Dr. McCabe do to you? A. He dress me and he cleaned the pus or drainage pus.

Q. Yes. A. Was all ready drain.

The Court: Just a moment until we get that clearly. He does what? 40

Michael Willner—Direct

Witness: Clean the pus from me.

The Court: And changes the dressing?

Witness: Yes; Dr. McCabe dress me.

The Court: And drains the pus?

Witness: Sure.

10 The Court: Every day?

Witness: Every day.

Q. Do you go more to the doctor now or less than you did right after March 31st, 1925?

Mr. Turner: I object to that on the ground it is incompetent because he can easily tell how often he goes. There is no need of comparing.

20 The Court: Yes. That will speak for itself.

Q. With reference to work, what do you do now, and tell us briefly what you have been doing since March 31st, 1925. A. I doing now, nothing. My boss got a boy here work with me. I do nothing. I work on nothing just four or three hours I go with the machine. He have the boy deliver the orders.

30 Q. Did he have a boy before? A. Before, he got it before boy too. (Answer repeated by the stenographer.) Sure.

Q. Before when? Did the boy— A. I was shot.

Q. Did you used to go with the boy before you were shot? A. Yes; before I was shot. Before I shot, no boy; after.

Q. Before you were shot he did not have any boy. A. No boy; no.

40 Q. And then you did the work yourself?

Michael Willner—Direct

Mr. Turner: Counsel ought not to lead the witness, because your Honor can see this is a contradiction. Now he is asking him what he did before he was shot, and your Honor has limited his testimony— 10

Mr. Meisterman: Very well.

Mr. Turner: —to the time since March 31st.

Mr. Meisterman: I will withdraw that question.

Q. I mean to say when did the boss get a boy?

A. The boy—before I come out of the hospital. I was in the hospital. He gets a boy and he work with me all steady work. I was shot, he had the boy. 20

Q. And what does the boy do? A. He do everything I supposed to do.

Q. Everything that you used to do? A. Yes.

Q. What do you do? A. I don't do nothing. Just three or four hours I go out for myself for a ride and the boy with me, he deliver it, he carry the packages and I stay in the machine, and I ain't doing nothing. I can't do; I get tired. 30

Q. Do you feel when you do something you have a pain?

Mr. Turner: Oh, wait a minute! I object to that. That is very leading.

Mr. Meisterman: He indicated that.

Mr. Turner: There is only one answer to that.

The Court: Let him express it himself.

Mr. Meisterman: All right. 40

Michael Willner—Direct

Witness: I go up on the steps and I get tired. Make me heavy, no can make straight. And I can't move, no can walk, on steps, make tired. I must stay five minutes before I can walk. Make tired.

10

By the Court:

Q. You go out with the boy about three hours?

A. Sure.

Q. And every day? A. Every hour.

Q. In the morning or afternoon? A. In the afternoon. About ten o'clock or twelve, or one o'clock. The boy.

Q. With the boy? A. Yes. Four or three hours.

20

Q. Where do you sit in the automobile? A. In the front.

Q. Who drives? A. I drive. I drive it.

Q. When you are with the boy who delivers the packages? A. The boy. The boy carry all packages.

Q. Does the boy do any delivering? A. Sure; boy do everything.

30

Q. Does the boy do any delivering at any time that you are not with him? A. No; I am with wagon.

Q. Does the boy do any delivering? A. Yes; he do everything.

Q. At any time, at any time when you are not with him? A. Yes, sure he do, himself. I no go with him every time. He go up himself. I am not there with him.

40

Q. How long does it take every day to deliver the meat? A. The meat an hour and two hours

Michael Willner—Direct

and three hours. That is all. And take him back.

Q. So the boy does not go out on any of those days? A. Yes.

Q. In addition to the time you go out with him?
A. That's all. 10

Q. What do you do when you come back from those deliveries? A. When I come back he give me breakfast.

Q. One moment. He gives you breakfast? A. Sure.

Q. Do you go off to dinner? A. Yes.

Q. What time of the day? A. Twelve o'clock, dinner, eat. Half-past.

Q. When do you go out mostly with this boy
to deliver, in the afternoon or morning? A. In
the afternoon. 20

Q. After delivering for him about three hours?
A. That's all.

Q. Then you come back and he gives you dinner? A. That's all.

Q. What time does that make your dinner? A. Twelve o'clock.

Q. Then you go out in the morning? A. Twelve, half-past twelve, whenever he makes
ready, I eat. 30

Q. Do you go out with the boy? A. Sure.

Q. To deliver in the mornings too? A. Sure, in the morning don't deliver, just afternoon, three or four hours deliver.

Q. If you just go out in the afternoon to deliver for a period of about three hours. A. That's all.

Q. How do you come back in time to have din- 40

Michael Willner—Direct

ner about twelve o'clock? A. Well, I go out nine o'clock.

Q. You go out in the morning? A. Sure.

Q. Do you always go out in the morning? A. Nine o'clock.

10 Q. Do you always go out in the morning to deliver? A. Yes, sir; I go out three or four hours, that's all I do.

Q. Do you always go out in the morning to deliver? A. Yes; in the morning.

Q. Do you sometimes start out in the afternoon to deliver? A. No; afternoon, no.

Q. Start in the morning about nine o'clock to deliver? A. Sure.

20 Q. With the boy? A. With the boy.

Q. And the deliveries last sometimes— A. Deliveries, three or four hours delivery.

Q. And then you come home? A. I coming home and I take rest.

Q. And then you have dinner? A. And then I have dinner and I take rest. I don't do nothing. Boy do all the work for me.

30 Q. What do you do then after you come back from your delivery and have your dinner? What do you do then? A. I don't do nothing. Nothing. I don't do nothing.

Q. What time in the afternoon is it you usually finish your delivery? A. Delivery? Sometimes finish half-past eleven, twelve o'clock, that's all.

40 Q. What do you do usually in the afternoon? A. The afternoon? Doing nothing. I eat my dinner. I make tired. I very tired. Here is hurt me and the shirt is wet from the drain and

Michael Willner—Direct

I am tired and I can't do nothing. I can't move myself.

Q. What do you do in the afternoon to pass the time around? A. After I get up I walk around. That's all I do. I don't do nothing. I got the boy. The boy work. 10

Q. You have supper then with your employer? A. He give me supper after.

Q. He gives you all the meals? A. Yes; all the meals.

Q. Do you do anything before supper time in the afternoon? A. I don't do nothing. I don't do nothing.

Q. Do you do anything in the store? A. Nothing at all. 20

Q. Do not do anything in the store? A. Nothing.

Q. At any time? A. No.

Q. Do you cut up any meat at any time? A. I no cut nothing, boy cut.

Q. Do you handle the chicken? A. I don't handle no chicken at all. I no can do nothing. I have to lift. It hurts me. I can't do nothing.

Q. Does the boy drive the car? A. Boy no can drive. Boss drive. 30

Q. Does the boss go out with the car sometimes? A. Yes; he does.

Q. Does the boss go out with the car sometimes with the boy? A. Yes; with the boy.

Q. Are there any days you do not go out with the boy at all? A. The boss drive.

Q. No. Are there any days you do not go out at all with the boy? A. I go out every day, out with the boy three or four hours. That's all I go 40

Michael Willner—Direct

out with the boy. After some time the boss go down.

Q. Are there some days the boss goes out on the same days you go out too? A. No; I no go. Boss go away. I no go no place. I go sleep and
 10 I sleep. That's all. I am afraid go. That's all. I no can go myself. I would like go myself away and I can't do.

Q. Do you go out every day with the boy? A. On the boy mornings three or four hours.

Q. Are there some days you do not go out with the boy to deliver? A. No; sometimes I don't go.

Q. Sometimes you don't go? A. No.

20 Q. When are the times the boss goes out? A. Boss goes.

Q. When does he go out? A. Here today the boss he will do. Yesterday he works.

Q. Did the boss deliver yesterday? A. Boss, sure; he takes the chicken. I no do nothing.

Q. Did you go out to deliver yesterday? Yesterday? A. Yesterday I was in the morning.

30 Q. Was the boss out to deliver? A. The boss go out for stuff after. I no go no place.

Q. Did the boss go out to deliver meat to the customers yesterday? A. No, he go out for stuff; bring it in.

Q. Does the boss go out to deliver meat to the customers on any day? A. No; he no deliver. Sometimes he deliver. I no can go. He deliver, himself. In afternoon. He deliver himself.

Q. In the afternoon? A. Yes.

40 Q. To the customers? A. Sure. I no can go. I am tired. I was all weak with myself, the shirt wet.

Michael Willner—Direct

Q. Why don't you do any work in the store in the morning? A. I no can work. I no get out—

Q. Who does the other work you used to do in the morning in the store? A. The boy; boy.

Q. How old is the boy? A. Boy is seventeen years. 10

Q. How old are you? A. How old? Twenty-five.

Q. How long has he had this boy? A. This boy he had I was shot. Right away he gets this boy.

Q. Do you feel you are getting better? A. I feel I get some kind cramps here, and then in the back. I get tired. Walk a half block, must stop; I can't walk. Get tired. Get dizzy in the head. 20

Q. Are you getting better or are you not getting better? A. A little bit, aber not much. Get right away dizzy in the head.

By Mr. Meisterman:

Q. Are you getting paid for all of your work?

A. I no get paid. Nobody pay me nothing.

Mr. Turner: If the Court please, I object to that and ask that it be stricken out because it has been testified both by him 30 and by his employer he was getting paid.

Q. Since that time.

The Court: No.

Q. Now, what does the boss do for you for going out every day with the boy? A. What is that?

Q. What does the boss do for you? A. For 40 me?

Michael Willner—Direct

Q. Yes. A. He do—he deliver—

Q. No, before the accident. A. Oh, before the accident.

Q. You were getting paid, weren't you? A. Before the boy—before the accident the boss paid me.

Q. And now what do you get? How much did you get before the accident? A. Before the accident I got twenty dollars with board.

Q. What do you get now if anything? A. Nothing; I no get nothing.

Q. Who pays the board? A. The boss pay the boy.

Q. The board? Do you pay board to the boss?
20 A. Boss?

Q. Yes. A. Twelve dollars board.

Q. You pay him? A. Sure; twelve dollars a week.

Q. Where do you get the twelve dollars a week?
A. I no got him, but he wait. I no got no money.

Q. So you are not paying for board? A. No; I no pay him nothing for board.

Q. And you do not get paid for money. A.
30 No.

Q. In money. A. Nothing at all. Nobody pay me nothing.

Q. Do you consider the work you do is worth twelve dollars a week?

Mr. Turner: I object to that.

The Court: That is a matter of conclusion.

Q. About how many hours a day did you work
40 before the accident?

Michael Willner—Cross

Mr. Turner: Now, if the Court please, there is the same old question. This thing is thrown wide open. He is not given an opportunity to contradict everything he has testified to.

Q. Just to determine the value of his work, if any, in money. 10

Mr. Turner: I object to that. This case was closed once so far as this petitioner was concerned.

Mr. Meisterman: Very well.

The Court: The testimony is there. He said he worked a full day before the accident. 20

Mr. Meisterman: It is just a question of his working a little bit and a further question of whether he can continue working that little bit.

Mr. Turner: And he said he is getting a little bit better.

(Further argument of counsel off the record.)

The Court: Is that all?

Mr. Meisterman: That is all. 30

CROSS-EXAMINATION by Mr. Turner:

Q. Yesterday morning—yesterday was Tuesday, wasn't it? Wasn't it? A. Yes; yesterday was Tuesday.

Q. How many hours did you go out with the automobile to deliver orders yesterday morning?

A. The boy—I no go out before—I go out three or four hours every day. That's all. 40

Michael Willner—Cross

Q. Do not tell me every day. Yesterday morning how many hours did you go out? A. Yesterday morning?

Q. Yes. A. Four hours.

Q. Four hours. That was Tuesday, July 21st.
10 Four hours. What time did you come in? What time was it by the clock when you came in? A. I came in? I came in—yesterday I came in twelve o'clock.

Q. Twelve o'clock. And did you go out alone yesterday morning? A. I no go out no time alone.

Q. No. Were you out alone yesterday morning? A. No.

20 Q. None of the time? A. No.

Q. You drove the car yourself? A. I got two—

Q. Just answer my question. Do not tell me something else. You drove the car yesterday morning yourself. A. I drive but with the boy with me.

Q. I did not ask you about the boy. You drove the car yesterday morning yourself? A. Yes; I drive myself.

30 Q. You got in twelve o'clock and you had your dinner, didn't you? A. Sure.

Q. Did you eat your dinner with Mr. Katz? A. Sure.

Q. Did you eat a good big dinner? A. Sure.

Q. What did you have for dinner? A. What I have?

Q. What did you have for dinner? A. I no know. I don't remember what I have.

40 Q. Roast beef? A. I forget what I had.

Q. Tell us what you had for dinner yesterday.

Michael Willner—Cross

A. I got a good dinner, that's all. What I know what I got?

The Court: You had a good dinner?

Witness: Yes, sure.

Q. You had meat and potatoes? A. Sure; 10
everything.

Q. And coffee? A. Coffee.

Q. Have some soup? A. Soup.

Q. Did you have any clams? A. Why, no clams.

Q. Did not have any clams. Did you have some
ice cream? A. Cabbage.

Q. Cabbage. Did you have some ice cream and
pie? A. Ice cream and pie? I don't know what
is ice cream with pie. 20

Q. Did you have pie? A. No.

Q. Did you have ice cream? A. I eat good
dinner, that's all.

The Court: He had a good dinner.

Q. Did you smoke after dinner? A. I no
smoke.

Q. You never smoke, do you? A. Never no
smoke.

Q. After you had your dinner what time was 30
it? A. I eat twelve o'clock dinner.

Q. Were you through dinner by one o'clock?

A. Well, I eat in hour, half an hour, dinner. I
ate the dinner, and that's all.

Q. At one o'clock where did you go, at one
o'clock? A. No place.

Q. You went somewhere. Where did you go?
A. I go sleep.

Q. You go sleep? A. Sure. 40

Michael Willner—Cross

Q. Where? A. Upstairs.

Q. Upstairs to bed? A. Sure.

Q. What time did you get up? A. What time I get up? I know I get up—I sleep two hours.

Q. Slept two hours? A. Sure.

10 Q. Until three o'clock. And now at three o'clock you got up, didn't you? A. Yes.

Q. Where did you go three o'clock? A. No place.

Q. Oh, you went somewhere. Where did you go? A. I walked around. That is all I did. I am tired.

Q. We know you are tired and everything else, but you walked around. A. That's all I do.

20 Q. Where did you walk to at three o'clock? A. After night, give me again breakfast.

Q. No. You are not answering the question at all. At three o'clock you started to walk? A. Yes.

Q. Where did you walk to? A. I walk around; I sat a little bit on the stairs.

Q. Where? A. On Van Buren Street, where I live. I sat on the steps.

30 Q. You sat on the steps? A. Sure.

Q. The steps of the store? A. On the house.

Q. The store is right by the house, isn't it? A. By the house, and I was sick. That is all I do.

Q. And you sat there from three o'clock until what time? A. What time? I sitting, walk around a little bit.

Q. Where did you walk to? A. In the block.

Q. In the block? A. Sure.

40 Q. Where else did you go? A. No place.

Q. Is your store there in the block? A. There is no store on the block.

Michael Willner—Cross

Q. Where is the store? A. What do you mean block.

Q. How near is the store to the place where you slept? A. The store from the house is two houses away—

Q. Two houses away, isn't it? So when you started out to walk did you walk over to the store? 10

A. I passed it.

Q. You passed the store? A. Sure.

Q. Did you look in? A. I look in? Why I look in?

Q. Did you go in? A. No; I no work—

Q. Who was in the store when you went passed yesterday afternoon? A. The boy.

Q. The boy. Where was the boss? A. The boss too. 20

Q. The boss was there too? A. Yes, the Missus. The Missus is by the store outside on the chair.

Q. They were all three there by the store, weren't they? A. Sure; they were.

Q. That was around three o'clock wasn't it? A. Yes.

Q. Where did you go after that? A. After that I no go no place. After that I—six o'clock, you know, get supper—It was coming night you know, I was tired. I went back to sleep again. 30

Q. We understand about your being tired, but we did not ask you about that? A. I know.

Q. Six o'clock you came back for supper, didn't you? A. Yes.

Q. Where were you from three o'clock to six? A. I didn't do nothing.

Q. I did not ask you that. Where were you? 40

Michael Willner—Cross

A. I walk around, just around the block; that's all.

Q. Were you walking from three o'clock until six? A. Yes.

Q. All that time? A. All that time.

10 Q. Where did you walk to besides around the block for three hours? A. I walk around Ferry Street.

Q. Ferry Street? A. Ferry Street.

Q. Ferry Street? A. Yes.

Q. Where else did you walk? A. I didn't walk no place. I walked around.

Q. How many miles did you walk yesterday afternoon from three o'clock until six? A. Miles?

20 How much can be? Three blocks.

Q. Did you keep walking back and forth for three hours? A. That's all. I go sleep again after I walk around, and go in the park.

Q. Go slow. You had your supper at six o'clock. A. Sure.

Q. What did you do after supper at six o'clock? A. After six o'clock I take walk a little.

30 Q. Took a walk again after six o'clock? A. Sure.

Q. How many hours did you walk after supper? A. After supper take a walk a half an hour.

Q. A half an hour? A. Be better sleep.

Q. What time did you get home after supper? A. After supper come it was half past seven.

Q. Half-past seven? A. Yes.

40 Q. So you walked from about half past six until half-past seven? A. I was in park.

Michael Willner—Cross

Q. In the park. You walked in the park for about an hour, did you? A. Yes.

Q. And then you came home again at half past seven? A. Yes.

Q. What did you do then? A. Then I go sleep. 10

Q. You went to sleep then at half past seven? A. Yes.

Q. What time did you get up this morning? A. I get up this morning half past seven.

Q. Half past seven? A. Yes.

Q. So you mean to say that you slept last night from half past seven last night until half past seven this morning? A. Yes.

Q. Did you sleep all the time. A. I slept all 20 the time.

Q. So yesterday you had about fourteen hours sleep, didn't you? A. Sure, I no can tell; I no work.

Q. Hold down your job and walked for three or four hours? A. Sure.

Q. And is that what you did every day? A. That every day I do nothing. I can't work. I walk outside, eat my supper, and dinner, and take a little bit walking, and then go sleep again. 30 Tired. See my shirt.

Q. Yes. We know. We know about that. Tell us this: don't you go into the store at all?

A. No, no.

Q. You never go into the store? A. Is none of my business there.

Q. Where do you get the stuff you take out to deliver? A. This boy. Boy take him out.

Q. Where do you get it? A. The boy get him 40

Michael Willner—Cross

out in the machine. I take the machine in the garage, you know.

Q. Where is the garage? Near the store? A. Three houses away from the house, that's all. That's all.

10 Q. It is back of the store? A. Van Buren Street. No back of the store. Across the street.

Q. The garage is across the street from the store? A. Three or four numbers.

Q. And you go down and get the car? A. Yes.

Q. Is this a Ford car? A. Ford.

Q. Has it got a self starter? A. Sure; I no can crank it. No work with the hand.

Q. Do you take it out of the garage yourself?

20 A. I take it out.

Q. Then you run it out in front of the store?

A. I run in the store, and then the boy take out orders and go with me.

Q. And you testify you stay in the car? A. I stay in the car. That's all.

Q. And you never get out of the car and go into the store? A. No; I no go into the store.

30 Q. When was the last time you were in the store? A. Last time I was in the store— I go in the store sometimes, but I no do nothing. I pass the store.

Q. I did not ask you about doing anything there. We asked you the last time you were in the store. A. In the store?

Q. Yes. A. I go in there when I was—

Q. You were in the store yesterday, weren't you? A. Well, I was in the store.

40 Q. Of course you were in the store yesterday. How long were you in the store? A. I no was long. I go in the store—

Michael Willner—Cross

Q. How long were you in the store? A. I get up half-past seven. I go in the store. I get up and got ready the orders.

Q. No. The only question I am asking you is how long you were in the store yesterday? A. I no stay long. 10

Q. An hour? A. Maybe an hour; maybe a quarter of an hour.

Q. A quarter of an hour? A. That's how long I stay.

Q. You were in the store every day? A. Sometimes I go to the store.

Q. When customers come in the store and you are in there and the boss is out you wait on them? A. The boss is every time there. 20

Q. If the boss is out. A. The Missus is there.

Q. If they are both out you wait on the customers? A. No; is the boy wait on customers.

Q. Don't you wait on customers at all? A. No; I don't do nothing.

Q. When did you last wait on customers? A. Customers come in there is boy call the Missus and Missus come in and give the customer what she need.

Q. When is the last time you waited on a customer? A. Yes. 30

Q. When? A. Last time? What do you mean? I don't do nothing.

Q. We know you do not do anything now, since the last hearing. But before that you waited on customers, didn't you? A. I no wait customers. Not my business to wait on customers.

Q. Did you ever wait on customers in your life? A. Before. 40

Michael Willner—Cross

Q. When was the last time? A. No last time. I no do nothing at all.

Q. When was the last time you waited on customers? A. I was shot.

Q. That was the last time? A. Yes.

10 Q. You never did since you were shot? A. I was shot on the—

Q. Calm yourself. So up to March 31st you say you had not waited on any customers? A. I no—not my business on customers. I go in the store and if the boy got ready the orders he brings out orders. I go away. That's all.

Q. You testified last hearing you did wait on customers. A. No.

20 Q. You say now you did not wait on customers up to the time of the last hearing, didn't you? A. Wait?

Q. You want to change your testimony now, don't you? A. I no wait nothing. What I wait? I no do nothing there. Customer come in and the boy no in and the boss come in and he do it. I know nothing about it. I know no boy's customers. I haven't no business with the customers, nothing. I no got business. Customers
30 come in and the boy is there, he call to come the Missus, and the boss she give and he go away.

Q. And if you are there and no one is there you send the customer away, don't you? A. I no send them away.

Q. You do not take their money or give them any food? A. Nothing.

40 Q. You just send them away. A. I no send them away. I no do nothing.

Michael Willner—Cross

Mr. Meisterman: I object to putting too many of these sentences into his mouth. He is obliging, he will answer almost anything.

Mr. Turner: He has to be obliging. He has no choice. 10

Mr. Meisterman: Very true. But I think it would be better to ask him questions instead of giving answers.

The Court: Make it short. In other words, such questions as call for a categorical reply.

Q. Did you ever wait on customers at all in this store? A. No.

Q. Never in your life? A. Before I was shot I tended customers, but not "jetzt." 20

Q. You never waited on customers since you were shot? A. That's all.

Mr. Turner: That is all.

Mr. Meisterman: I suppose what will happen now is Mr. Turner will put on his medical testimony and I am in a rather embarrassing situation in not having Dr. Parsonette. I expected to have him this afternoon. 30

Mr. Turner: Is your case closed?

Mr. Meisterman: That is just what I would like to ask the court to rule upon, whether we will be permitted, if necessary, to put on Dr. Parsonette.

The Court: When did Dr. Parsonette notify you he was on this case?

Mr. Meisterman: He was here today and 40

Michael Willner—Cross

he had to go to this operation which was scheduled for two-thirty. He was here all morning off and on.

The Court: You do not want to put in your medical?

10 Mr. Turner: Not until after Dr. Parsonette testifies.

(Discussion of counsel off the record.)

The Court: Just Dr. Parsonette for the petitioner?

Mr. Meisterman: That is all.

20 Mr. Turner: I think the record ought to show it is adjourned on the application of the petitioner. The respondent is ready.

Mr. Meisterman: I think when we are going to adjourn it we might as well have Dr. Kessler who is not here today. He has been continually examining the petitioner at the Compensation Bureau and there is a complete report in the files. If he is available on the 29th we ought to have the right to call him.

30 The Court: Suppose you put it on for the 29th. The first case on. I do not know of any other case that is continued.

Mr. Meisterman: I understand Dr. McCabe is treating him every day. Suppose we get him here too.

Mr. Turner: He has testified.

40 Mr. Meisterman: But he is still treating him.

Stenographer's Certificate

Mr. Turner: Going to have three doctors here?

Mr. Meisterman: Yes. Dr. McCabe, Kessler and Dr. Parsonette.

The Court: I take it it will be confined only to the question of the necessity of having all this medical treatment all the time and his inability to work. 10

Mr. Turner: We do not question the necessity of the medical treatment.

The Court: And the inability to work?

Mr. Meisterman: Yes.

The Court: In view of the treatment he is having and his present condition. 20

(The case was thereupon adjourned until July 29th, 1925, at ten o'clock a. m.)

To be heard at the same place.

Stenographer's Certificate.

I hereby certify that the foregoing is a true and correct transcript of the stenographic notes of the proceedings held in the matter hereinbefore set forth on the 22d day of July, A. D. 1925, at 1:00 p. m., and at the place hereinbefore set forth. 30

EDWIN J. O'BRIEN,
Court Stenographer.

Hearing July 29th, 1925.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Newark, Essex County, District

10

MICHAEL WILLNER,

Petitioner,

vs.

SAMUEL KATZ,

Respondent.

#3613

20

TRANSCRIPT OF TESTIMONY taken in the above entitled matter, before HARRY J. GOAS, Deputy Compensation Commissioner, at the Department of Labor Building, Newark, N. J., on the twenty-ninth day of July, 1925.

Appearances:

30 Samuel G. Meisterman, Esq., (Meisterman & Katchen) for the Petitioner.

Frank G. Turner, Esq., for the Respondent.

DR. AARON PARSONETTE, sworn as a witness on behalf of the petitioner, testifies as follows:

Direct-examination by Mr. Meisterman:

40 Q. Doctor, did you examine the petitioner, Mr. Willner? A. I did.

Dr. Aaron Parsonette—Direct

Q. What did you find?

The Court: And when?

Q. When did you examine him? A. The date I don't remember. I met him with Dr. Avidan and another— 10

Q. About how many weeks ago? A. Two or three weeks ago, and I have examined him again today.

Q. And what did you find? A. I found the remains of an incision in the abdomen and a running infective wound on his back—the right lumbar region, it would be. I found also evidence of a weakened wall anteriorly, as the wall of the incision is weakened, and there is an active drainage from the wound in his lumbar region. A tube at present is inserted and lots of pus coming through it. 20

Q. In such a condition, Doctor, what might he do with reference to being employed—working?

A. At present I don't think the man is in a position to work at all.

Q. Would a work of an active or semi-active nature tend to help him or otherwise? 30

Mr. Turner: Well, I suppose it is leading.

Objection withdrawn.

A. Well, I don't believe that this man should be actively employed at all at present. Wherever there is pus coming from a wound there is always a serious danger of contamination, and by working the danger is present to a greater degree.

Q. And what effect is work likely to have on his 40

Dr. Aaron Parsonette—Cross

recovery? A. It would materially delay it in so far as to tend to produce a post-operative hernia or rupture in addition to impairing the function of his kidney.

10 Q. Can you tell from his present condition when he will be well again? A. I can not.

Q. The petitioner testified that he was being treated periodically now, is that necessary? A. Absolutely.

CROSS-EXAMINATION by Mr. Turner:

Q. Doctor, you believe that there is danger of infection—more danger if he works than if he doesn't? A. Yes.

20 Q. And when you say infection, do you mean that some dirt or foreign substance may get into the wound? A. The wound is already infected so far as it drains pus. The greater danger is another, mixed infection, where another organism would contaminate the wound.

Q. And do you know how long he had been working? A. I don't. I go purely by what I have seen as to his present condition.

30 Q. Do you see any reason why he should not drive an automobile now? A. Oh, yes.

Q. You think he should not? A. No.

Q. What do you think he should do now? A. I would keep this particular patient in bed until his wound closed. That is purely a matter of my opinion.

40 Q. And if he would not stay in bed, what would you do with him? A. Well, the age of persecution is over, so I suppose I would have to let him go.

Dr. Aaron Parsonette—Cross

Q. Do you see any reason why he should not walk around and enjoy the fresh air and sunshine, the birds and flowers? A. I think from my experience that a draining kidney does best by keeping the patient in bed.

Q. The only treatment then that you recommend for him really is a treatment to keep him at rest? A. Keep him in a position that would assist drainage. That would be lying down, according to the position of his wound. That is my opinion. 10

Q. And do you know when this shooting took place, Doctor? A. I have a faint recollection I read the case through pretty well. It takes some time, and kidneys are very slow in healing, and judging from the position the course of the bullet took there is a great deal of trauma produced in the kidney, and it would take a great deal of time to heal it at the expense of a great deal of kidney tissue. 20

Q. Well, why do you think, Doctor, that there would be danger of infection if he should drive an automobile? A. Well, his position, his chance of being hurt while driving. He has an active, open wound with very weak walls and he has an open sore that welcomes infection. He has a very thin wall covering his kidney. Any sudden jar, any strain, may enlarge that wound and may seriously impair the healing kidney. 30

Q. Then, what you are saying, Doctor, are the things that might happen to him if he is up and about and doing the work which an ordinary man does? A. Yes, and secondly, a man's condition if he has this, is greatly impaired, and work is not 40

Dr. Aaron Parsonette—Cross

conducive to restoration to health. Rest is the main thing.

Q. You do know, Doctor, of many men who have running wounds and running sores who are working all the time? A. They are exceptions in
10 the rule.

Q. And these men, on your general rule, would you say they should be in bed, too? A. By all means. We try to keep all our patients in bed that have running wounds unless they are chronic fistulas of certain types. We have certain types of fistula conditions where men go about their business indefinitely for twenty—twenty-five
20 years until they reach the knife of the surgeon, but these fistulas are in a position where they are not apt to injure very vital organs. Here we are dealing with a kidney, which is a very complicated organ and difficult to heal, and essential to absolute health.

Mr. Meisterman: The situation, as I take it, is that Mr. Willner should be temporary at the present time, inasmuch as liability has been proved in our favor, and the question of permanent must await a
30 changed condition. Now, if an appeal is to be taken—I assume it will be taken from the determination, I suggest—

Mr. Turner: Now, if the Court please, here is the thing: There are two rules of guidance in life. First, the things that we ought to do, and then, secondly, the things which we do do, which, perhaps, we ought
40 not to do, but, nevertheless, we do do them.

This man, of his own desire, time and

Argument

purpose, has chosen to go to work, and the record shows that he is working. Now, with all due respect to doctors—I have great respect for doctors and have had occasion to use doctors, but sometimes they are wrong as to what is really best for the individual. In other words, does the petitioner himself know what is better for him than any doctor could possibly know? Of course, there will be medical testimony in this case as to the effect of the injury, and so forth, but the petitioner here has chosen to go to work on a certain date—he did go to work, and from that date he has been working. Now, then, it seems to me that he cannot claim disability from the time when he started to work. He is working. No doubt about that. Your Honor will remember that this is a case where the respondent and the petitioner are very friendly and they live in the same house, and the respondent says when called by the petitioner that he is going to pay him twenty dollars a week—the week hadn't yet terminated when he was called here as a witness—he was going to pay him twenty dollars a week and board. Now, I submit that that was the termination of the temporary disability, and the permanent, of course, is something that cannot yet be determined. Ther will be a permanent, of course, but we cannot determine that yet.

(Discussion.)

Adjourned.

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Hearing August 13th, 1925.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Newark, Essex County, District

10

MICHAEL WILLNER,

Petitioner,

vs.

SAMUEL KATZ,

Respondent.

#3612

20

TRANSCRIPT OF TESTIMONY taken in the above entitled matter, before HARRY J. GOAS, Deputy Compensation Commissioner, at the Department of Labor Building, Newark, N. J., on the thirteenth day of August, 1925.

Appearances:

30 Samuel G. Meisterman, Esq., (Meisterman & Katchen) for the Petitioner.

Frank G. Turner, Esq., for the Respondent.

DR. THOMAS S. McCABE, already sworn, recalled and further testifies as follows:

Direct-examination by Mr. Meisterman:

40 Mr. Meisterman: I don't suppose it is necessary for me to repeat the purpose of the Doctor's testimony?

Dr. Thomas S. McCabe—Cross

Mr. Turner: No, you won't have to do that.

Q. Doctor, have you been treating Mr. Willner since March 31st, 1925? A. Yes.

Q. How regularly? A. Almost daily.

10

Q. And are you treating him now? A. Yes.

Q. What is his condition at the present time? A. He still has a drainage of pus from the lung.

Q. Now is that condition with reference to the condition around March 31st, 1925? A. Well, it is decreasing.

Q. Is he in his present condition able to work? A. No, because it irritates the condition.

20

CROSS-EXAMINATION by Mr. Turner:

Q. Would you say, Doctor, he could do light work now? A. No. At first he did do work, but it accumulated the pus I found much more quickly, and I think the best thing for him to do is to keep as quiet as he possibly can, except, of course, to get the fresh air, which means a lot to him.

Q. Do you know, as a matter of fact, he drives an automobile? A. No, I don't think that he does.

30

Q. Up to a week or two ago he did drive one? A. Up to two or three weeks ago I think he did off and on.

Q. But you think now he doesn't? A. No, he doesn't now. I know that part of it.

Q. How soon is your opinion is it, Doctor, before he can do light work? A. That is a question I could not possibly answer. No definite time.

Q. Have you any opinion about that at all? 40

Stenographer's Certificate

A. No. I might explain that, if I can. You see, when the liver tissue broke down it formed this abscess, opening the doorway into the lung, which broke down the lung tissue. The opening of the liver itself I could put my hand from the anterior
10 surface of the liver right through to the posterior with my fist, so you can imagine what a lot of tissue was destroyed.

Q. When did this lung condition develop, Doctor? A. Before we located the bullet.

Q. You say that this discharge of pus is decreasing? That means, then, that his condition is improving? A. Well, slightly. How long before that lung condition will clear up, I could not tell.
20

Mr. Meisterman: I don't think it is necessary to put down the Doctor's bill for services at that time?

Mr. Turner: No, I don't think so.

Stenographer's Certificate.

30 I hereby certify that the foregoing is a true and correct transcript of the testimony as taken down by me on July 29th and August 13th, 1925, at the place hereinbefore mentioned.

PETER O'BYRNE.

Notice of Appeal.

NEW JERSEY SUPREME COURT

 SAMUEL KATZ,

Appellant,

vs.

MICHAEL WILLNER,

Respondent.

10

*To Michael Willner, Respondent and Meisterman
and Katchen, his attorneys:*

TAKE NOTICE, that the Appellant hereby ap- 20
peals to the New Jersey Court of Errors and
Appeals from all of the judgment entered herein
on October 13th, 1926.

Yours respectfully,

FRANK G. TURNER,
Attorney of Appellant.

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40

Grounds of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS

10 MICHAEL WILLNER,
Petitioner-Respondent,

vs.

SAMUEL KATZ,
Respondent-Appellant.

20 *To Messrs. Meisterman & Katchen, Attorneys of
Petitioner-Respondent:*

TAKE NOTICE, that the following are the grounds of appeal from the judgment entered by the New Jersey Supreme Court herein:

1. The New Jersey Supreme Court erroneously affirmed the judgment of the Essex County Court of Common Pleas.
- 30 2. The New Jersey Supreme Court erroneously held that the Workmens' Compensation Bureau of the New Jersey Department of Labor had jurisdiction to hear and determine this cause.
3. The New Jersey Supreme Court erroneously held that the Court of Common Pleas of the County of Essex had jurisdiction to hear and determine this cause.
- 40 4. The New Jersey Supreme Court erroneously held that the petition participated in an accident

Grounds of Appeal

which arose out of and in the course of his employment.

5. The New Jersey Supreme Court erroneously held that the shooting of the petitioner was an accident.

10

6. The New Jersey Supreme Court erroneously held that the shooting of the petitioner arose out of his employment.

7. The New Jersey Supreme Court erroneously held that the awarding of Twelve Hundred Sixteen Dollars and Ninety-five Cents for hospital, medical and nursing expenditures of the petitioner, was lawful.

20

8. The New Jersey Supreme Court erroneously held that the awarding of Seventeen Hundred, Ninety-two Dollars and Ninety-five Cents to the petitioner in a lump sum by the Workmen's Compensation Bureau was lawful.

9. The New Jersey Supreme Court erroneously held that the finding of the Workmen's Compensation Bureau in favor of the petitioner was in accordance with law.

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10. The New Jersey Supreme Court erroneously held that the finding of the Essex County Court of Comon Pleas in favor of the petitioner was in accordance with law.

FRANK G. TURNER,
Attorney and of Counsel
with Respondent-Appellant.

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Rule for Judgment of Affirmance.

NEW JERSEY SUPREME COURT

10	SAMUEL KATZ, <div style="text-align: right; padding-right: 20px;">Prosecutor,</div>	}	In Cer- tiorari
	vs.		
20	MICHAEL WILLNER, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		

This court having inspected the determination and order of the Essex County Court of Common Pleas and the proceedings touching and concerning the same, returned with the certiorari in the cause, the reasons for error assigned, and considered the briefs of counsel thereon, and maturely considered the same, do order that the judgment of the said Essex County Court of Common Pleas be in all things affirmed and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

30 Entered October 13th, 1926.

MEISTERMAN & KATCHEN,
Attorneys for Respondent.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT

No. 290. May Term, 1926

MICHAEL WILLNER,

Petitioner,

vs.

SAMUEL KATZ,

Respondent.

10

Submitted May 14, 1926; decided October 5,
1926.

20

Certiorari to award in a workmen's compensa-
tion case.

BEFORE:

Justices PARKER, BLACK and CAMPBELL.

For the Petitioner, FRANK G. TURNER.

For the Respondent, MEISTERMAN & KATCHEN.

PER CURIAM. The only question presented is
whether there was an accident arising out of and
in the course of the employment. Petitioner was
working for and with his employer sorting live
chickens, when suddenly a gang of hold-up men
appeared, and called "hands up." The peti-
tioner apparently did not elevate his hands
quickly enough to suit them, some one shot, and
the petitioner was hit in the abdomen, his life be-
ing saved by a prompt operation.

30

40

Opinion of Supreme Court

The important question to consider is whether a "hold up" of an employe and his employer, working together is a situation which should be reasonably anticipated as connected with the employment. In these times when such events are
 10 of more than daily occurrence, we think there can be but one answer. As a matter of common knowledge, every employe with money of his employer in his custody or working in the neighborhood of the cash, may as well expect that something might happen. The bank messenger, the pay roll custodian, the collector, the cashier, and all workling around them, are subject to the risk.

20 It is true that when the attack is aimed at the employe as a personal matter, or does not appear to be connected in any way with the employment, it is not considered as furnishing basis for a claim under the statute. *Walther v. American Paper Co.*, 89 N. J. L. 732; *Schmoll v. Brewing Co.*, *Id.* 150. But in *Foley v. Rubber Co.*, 91 N. J. L., 323 where the risk was a war Risk, and in *Emerick v. Slavonian Union*, 93 N. J. L. 282,
 30 where the injured bartender was trying to collect for his employer, and *Nevich v. D. L. & W. R. R.*, 90 *Id.* 228, the injury was connected with the employment. We think that was the case here; if the petitioner had been carrying a pay roll, or had been cashier in a restaurant, the case would have been typical, but as we view it, no more plain that that before us.

The judgment of the Common Pleas affirming
 40 the award is in turn affirmed.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">SAMUEL KATZ, Prosecutor,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">MICHAEL WILLNER, Defendant.</p>	}	<p style="text-align: center;">Appeal On Certiorari. Workmen's Compensation.</p>
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BRIEF OF APPELLANT.

This is a workmen's compensation case. Defendant was shot and an award was made to him against prosecutor-appellant.

The prosecutor-appellant claims that the Common Pleas Court had no jurisdiction of the subject-matter of this proceeding, and that the Workmen's Compensation Bureau was without jurisdiction.

The judgment of the Supreme Court was erroneous.

The Facts.

The facts as testified to by the petitioner are:

"I live at 982 Van Buren Street with Samuel Katz and on November 26th, 1924, I was working for him in the market on Van Buren Street. I am a butcher—go to market and fix orders. On this day I started work at five o'clock in the morning, I came back to the market on that day and was handing chickens to Mr. Katz from the coop. Three fellows had come in the store when I was in the coop and as I got upon, one of them hollered 'hands up.' I had chickens in my hands and I dropped those chickens and put up my hands. One of the fellows shot me and then ran away" (Case, p. 49).

"When Michael Willner was shot he had both hands up over his head. There is no

doubt that this shot did not arise out of the employment of Michael Willner. There is no proof that Willner was shot while he was attempting to protect the property of his employer. There is, indeed, no proof that these men were intent on robbery. There is nothing in the proof that the men contemplated robbery. They said nothing to so indicate and they made no demand for money and no demand for chickens or other property."

He was not protecting his employer. He had heard someone holler "hands up" and in order to save himself from possible injury he was putting up his hands. The manner of his doing this act may have been misinterpreted or the men may have been his personal enemies, and took this opportunity to shoot him.

There is no proof that the men were enemies of the prosecutor and no proof that they intended to rob the prosecutor. They came into the chicken market with guns and shot Mr. Willner as soon as they saw him. They did not rob anyone and did not shoot at any of the others who were present. Merely because petitioner does not tell why the man shot at him does not enable the Court to ignore the necessity for such proof. Petitioner was not a cashier nor was he at a cash register or behind a counter taking in money. He was a chicken handler or butcher's helper whose occupation as such was attended with no business risks. He was not a watchman or guard and carried no revolver.

The petitioner had in his pocket some money of his employer. No one knew that he had this money except his employer and himself. He is not in the class of a bartender who is selling liquor and taking in money. Our courts have held that the shooting or killing of an employee does not establish that the motive is one of robbery.

The Law.

In *Schmoll v. Weisbrod*, 89 N. J. L., 150; 97 At., 723, it is held:

“Whether death is the result of accident arising out of decedent’s employment is a mixed question of law and fact.

“Some evidence is required to support a finding that deceased met his death as the result of accident arising out of his employment.

“Where a brewery agent and collector was murdered while on his employer’s business in a district of bad repute, his representative could not recover compensation in the absence of a showing that the object of the murder was robbery, or that the employer knew of the dangerous character of the locality and the hazards of sending the employe to such place.”

In *Walther v. American Paper Co.*, 89 N. J. L., 732; 99 At., 263, it is held:

“A night watchman in a mill who, while making his rounds, was struck over the head and killed by an employe of the same company who had entered the mill and hid himself without any intent to rob the office of the mill or to do any other mischief or crime except to rob the deceased, whom he knew had been paid off that day, was not killed from an accident arising out of his employment.”

In *Hulley v. Moosbrugger*, 95 At., 1008; 88 N. J. L., 161, it is held:

“An employer is not liable, under the Workmen’s Compensation Act (P. L. 1911, p. 134), to make compensation for injury to an employe which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the

course of, it cannot be said to arise out of, the employment."

"No compensation was allowed where the workman was employed as a cook in a hotel, and a drunken customer came out of the bar-room into the kitchen, and made a rush at the cook, who was injured in trying to avoid him" (*Murphy v. Berwick* [1909], 43 Ir. Law Times, 126).

"So, an employe who goes to the rescue of his employer, who is being attacked by a gang of rowdies, stabbed to death, is not injured by an accident arising out of and in the course of his employment" (*Collins v. Collins* [1907], 2 I. R. [Ir.], 104).

"The risk of being assaulted by a drunken man is not in any way especially connected with or incident to employment as a carter" (*Mitchinson v. Day Bros.* [1913], 1 K. B. [Eng.], 603; 82 L. J. K. B. N. S., 421; 108 L. T. N. S., 193; 29 Times L. R., 267; 57 Sol. Jo., 300; 6 B. W. W. C. C., 190).

"In two cases it has been held that no compensation is recoverable where one workman is injured by a stone thrown in anger by another workman" (*Armitage v. Lancashire & Y. R. Co.* [1902], 2 K. B. [Eng.], 178; 71 L. J. K. B. N. S., 778; 66 J. P., 613; 86 L. T. N. S., 883; 18 Times L. R., 648; *Claytum v. Hardwick Colliery Co.* [1914], 7 B. W. C. C. [Eng.], 643).

"And an injury received by a workman while he himself was deliberately assaulting a fellow workman is not caused by accident arising out of and in the course of the employment" (*Shaw v. Wigan Coal & I. Co.* [1909], 3 B. W. C. C. [Eng.], 81).

"And an injury caused by an intentionally felonious assault by an employer upon the workman does not arise out of the employment" (*Blake v. Head* [1912], W. C. Rep. [Eng.], 198; 106 L. T. N. S., 882; 28 Times L. R., 321, 5 B. W. C. C., 303).

"A Willful assault upon an employee for personal reasons, whether by a fellow workman or a third person, is not compensable in view of Workmen's Compensation Act, Sec. 36 (2), subd. j" (*Ex parte Coleman*, 100 So., 114).

"Where a third party became involved in a controversy with officers of employer, and in his anger started shooting and opened safe door and killed a draftsman who had taken refuge therein, the death of the draftsman was not the result of an accident 'arising out of his employment' within the meaning of the Workmen's Compensation Act" (*W. A. Jones Foundry & Machine Co. v. Industrial Commission*, 143 N. E., 420).

"Where a chauffeur, directed by his employer to investigate noises in the lower part of the house, was killed by the cook from motives of private revenge or some other reason not 'arising out of employment,' and circumstances showed that the cook had no intention of killing his employer or molesting property, the injury was not compensable as 'arising out of employment'" (*Royal Indemnity Co. v. Industrial Accident Commission*, 221 P., 371).

"Where an employee guarding employer's property suffered an injury resulting from a holdup during working hours, the criminals not being after anything except the contents of his pockets, the injury did not arise out of his employment within the Workmen's Compensation Act" (*Bryden v. Industrial Accident Commission*, 215 P., 1035).

In the case of *McCarter v. LaRock*, 148 N. E., 523, it is held:

"Injury to workman on building, from explosion on adjoining premises, is not accidental injury 'arising out of employment,' within Workmen's Compensation Act, as there must be a causal connection between condition of work and injury."

In *Matter of Kowalek v. N. Y. Consol. Ry. Co.*, 229 N. Y., 489, 494; 128 N. E., 888, 889, where an employee was killed when leaving his day's employment, we refused to uphold an award, saying:

"An injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, an attribute of or peculiar to the specific duties of the employment. The fact that the contract of employment exists and necessitates the acts of performance may or will occasion for the employee risks not reasonably incidental to the character of the work or employment. For the injuries caused by or flowing from those risks, the statute does not direct or permit compensation."

And, as especially applicable to the theory advanced in this case:

"This conclusion is not affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed."

In *Matter of De Salvo v. Jenkins*, 239 N. Y., 531, 147 N. E., 182, the claimant, while at his post of duty as a night watchman, was injured by a shot from an air gun accidentally discharged on the premises. We held that the injuries arose from an accident which was in no manner connected with or incidental to claimant's employment and necessarily we held that the claimant was not entitled to an award simply because his employment took him to the place where he was and placed him in the course of the shot accidentally discharged. In conclusion, therefore, however strong may be the economic and sociological arguments in favor of a compensation statute which practically insures the employee against everything except his own misconduct, we think that this Court is thoroughly and justifiably committed to an in-

terpretation of our present statute, which requires as the basis for an award a causal connection, apparent to a reasonable mind upon consideration of all the circumstances, between the conditions under which the work is required to be performed and the resulting injury; injury from an accident which need not have been foreseen or expected, but which after the event must appear to have had its origin in a risk incidental to the employment and to have flowed from that source as a rational consequence, and that there must be more than a mere location of the employee in the pathway of an accident entirely disconnected from his employment.

In *Gray's* case, 121 Atl., 556, it is held:

"Where the statute provides compensation for accidental injuries arising both out of and in the course of employment, the injury must satisfy both elements.

"Where claimant, in attempting to discipline a coemployee, twitted him, and being provoked by personal jeers and scoffs from the latter struck him, and in so doing broke his thumb, held that, though the employment may have afforded the opportunity, it was not the contributing proximate cause of the injury under the statutory phrase 'arising out of the employment.'

"The phraseology, 'arising out of employment,' at first blush so simple as to be almost self-defining, has been the occasioner of rather numerous decisions. 'The accident must have * * * been due,' says Mr. Justice Deasy in wonted clarity of diction, 'to a risk to which the (employee) was exposed * * * because employed by the defendant.' *Mailman's Case*, 118 Me., 172, 106 Atl., 606. 'The great weight of authority,' writes Mr. Justice Philbrook, after discriminating research, 'sustains the view that these words "arising out of" mean that there must be some causal relation between the conditions under which the

employee worked, and the injury which he received.' *Westman's Case*, 118 Me., 133, 106 Atl., 532. An injury, upon reference to Massachusetts, arises out of the employment when, after the event, it must appear to have had its origin in a risk connected with the employment, and to have swept along from that source as a rational consequence. *McNicol's Case*, 215 Mass., 497, 102 N. E., 697, L. R. A., 1916A, 306. Injuries arising from employment are such as are made likely by the character of the business or by the method under which it is carried on. *Jacquemin v. Turner, etc., Mfg. Co.*, 92 Conn., 382, 103 Atl., 115, L. R. A., 1918E, 496. An injury is deemed to arise out of employment when there is apparent, on consideration of all the circumstances, the relation of cause and effect between the conditions under which the work is required to be performed and the resulting injury (*Buvia v. Oscar Daniels Co.*, 203 Mich., 73, 168 N. W., 1009, 7 A. L. R., 1301); when it is a direct and natural result of a risk reasonably incident to the employment (*Thomas v. Proctor, etc., Mfg. Co.*, 104 Kan., 432, 179 Pac., 372, 6 A. L. R., 1145); when it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business expose the employee (*Coronado Co. v. Pillsbury*, 172 Cal., 682, 158 Pac., 212, L. R. A., 1916F, 1164); and when the injury may be seen to have had origin in the nature of the employment (*Baum v. Industrial Com.*, 288 Ill., 516, 123 N. E., 625, 6 A. L. R., 1242)."

"Where a watchman lost the sight of one eye by the accidental discharge of an air gun in the hands of a young man, who, though formerly employed by the watchman's employer, had no business either with the employer or with the watchman, held, that the injury was not one 'arising out of employment,' with Workmen's Compensation Law, Sec. 3, subd. 7, defining 'injury,' as it was not a risk or special danger by reason of the em-

ployment" (*DeSalvo v. Jenkins*, 199 N. Y. S., 843; 205 App. Div., 198).

"Under Workmen's Compensation Act, Sec. 2, par. 8, subsec. (d), where employee had dispute with customer over repair of automobile wheel for the customer, and customer later returned and shot employee, the killing was result of third person's willful act and not compensable" (*Hightower v. U. S. Casualty Co.*, 117 S. E., 98).

"Where a workman in the performance of his duties passed over a platform when two fellow workmen engaged in a friendly wrestling match accidentally fell on him and broke his leg, such injury did not arise out of his employment within Workmen's Compensation, Insurance, and Safety Act of 1917; no claim being made that the wrestling was habitual, or that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment" (*Great Western Power Co. of California v. Industrial Acc. Commission*, 201 P., 931).

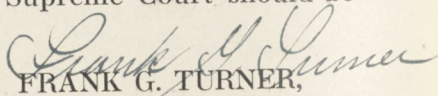
"Where boys between 15 and 16 years old using a machine operated by compressed air, attached the air hose after taking it from a locker, and while playing with hose according to a practice unknown to the employer one of them was killed by shooting air into his body per rectum as he turned to start his work, the injury, though occurring during the course of the employment, did not arise out of the employment within the Workingmen's Compensation Act so as to render the employer liable" (*Payne v. Industrial Commission*, 129 N. E., 122).

"Where an employee patrolling streets at night, guarding stores for employer furnishing burglar and watchman service, was struck by a bullet shot by a policeman pursuing a burglar in the distant part of the city, unrelated to the employee's work, the injury did not arise

out of the employment within the Workmen's Compensation Law" (*Heidmann v. American District Telegraph Co.*, 183 N. Y. S., 924; 193 App. Div., 402; order reversed 130 N. E., 302; 230 N. Y., 305).

Where laundry truck driver was returning to laundry after trip and was shot by one whom he had permitted to ride on the wagon, it was held that the injury was not sustained in the course of his employment (*Texas Employers v. Bailey*, 266 S. W., 102).

It is respectfully urged that the judgments of the Court of Common Pleas and Workmen's Compensation Bureau and Supreme Court should be set aside and vacated.


FRANK G. TURNER,
Attorney and of Counsel
with Prosecutor-Appellant.

New Jersey Court of Errors and Appeals

SAMUEL KATZ,
Prosecutor-Appellant,

vs.

MICHAEL WILLNER,
Defendant-Appellee.

*Appeal on
Certiorari.*

*Workmen's
Compensa-
tion.*

*Sat Below:
Justices
Parker,
Black and
Campbell.*

BRIEF FOR DEFENDANT-APPELLEE.

Statement.

This is an appeal from an order of the New Jersey Supreme Court on certiorari affirming an order of the Essex County Court of Common Pleas (State of Case, p. 16) upholding an order of the Workmen's Compensation Bureau in favor of the employee, the defendant-appellee herein.

By stipulation of counsel for the respective parties, the matter is submitted to this Court on briefs.

The appellant filed a number of grounds of appeal (pp. 102-103), but they mainly address themselves to the proposition that the Workmen's Compensation Bureau was without jurisdiction due to the fact that the injuries sustained by the petitioner below did not arise out of and in the course of his employment within the meaning of the New Jersey Compensation Act.

In order to determine this proposition, it will be important to set forth a full and complete statement of the facts involved.

Facts.

The facts, which are practically undisputed, are as follows:

On November 26, 1924, defendant was working for prosecutor in a poultry market at 104 Van Buren street, Newark, New Jersey. His work was that of general helper, delivering orders, working in and about the store and assisting in cutting meat, assorting and plucking chickens, and helping generally. His salary was \$18.00 to \$20.00 a week, besides board and lodging, which was also furnished by the prosecutor. At about 10:00 P. M. on November 26, 1924, defendant was in the poultry market assisting his employer, the prosecutor, when three robbers entered the store and held up the employer at the point of a pistol. Defendant was ordered to hold up his hands and not to interfere. At the time, defendant was sorting chickens and was stooping down at the bottom of the chicken coop handing chickens up to his employer, and as he turned up one of the robbers shot at him and then ran out of the store. The bullet pierced the body of defendant and lodged in his kidney. Defendant was immediately taken to the hospital, where he was kept until March 3, 1925; underwent two operations, and has not yet recovered. He received no compensation whatsoever from his employer, whereupon he brought this action for compensation.

It may be noted that the case rested entirely upon the evidence of the defendant; that the

prosecutor produced no testimony as to the happening of the accident.

In order to bring the outstanding facts in the case more graphically to the attention of the Court, a brief summary of the testimony of the witnesses to the accident will be given.

Samuel Katz, the prosecutor, testified as to the nature of the defendant's work as follows (p. 34, ll. 9-15):

“Q What was he doing for you? A General work; everything. Everything I used him for to help. Driving a machine, cutting meat, *returning the money after collections*, helping in the chicken market, plucking chickens, and general work. Everything I do in the business he was supposed to help me and did help me all the time.”

And as to the hours of the employment (p. 34, l. 28, to p. 35, l. 9):

“Q How long did he work for you a day?

A His hours were sometimes—I opened six o'clock usually and sometimes a little before and busy days when we are really busy it is open until ten o'clock at night, and other days it is only open to eight.

Q On November 26, 1924, that was the day before Thanksgiving? A Yes.

Q Were you in the store the night of that day? A In the market, yes.

Q Was Michael Willner there? A Yes.

Q Who else was there? A I was there, Michael Willner was there and a customer. We three were on one side like, and on another side was my wife and another girl by the name of Fannie Goldstein and another boy by the name of Aaron Schilhouse. Six of us.”

And as to the actual happening (p. 35, l. 21, to p. 36, l. 25):

“A I was standing sorting chickens and Mr. Willner was taking them out of the iron

coops and he was taking these chickens out from there and handing them to me and I was sorting them. We were almost through business that day and I was getting ready to quit. All of a sudden I heard, 'Hands up.' When I heard 'Hands up,' it was already the second command. 'Hands up,' and as soon as I turned around my wife screamed. Mr. Willner is a little hard of hearing, but when she screamed he kind of thought—

Mr. Turner: I object to what he thought.

Q Just tell us what you saw happen.

A When she screamed, all of a sudden Mr. Willner got up. He was on the bottom of this coop, and when he turned up he was very near to one of these men that had a gun pointing.

Q How many men were there with guns?

A Three.

Q Were they pointing guns at the time?

A Right in front of us.

Q Each hold-up man was covering each one of the three? A To tell you the truth, as long as I faced them, I didn't see what was in the back of me. They were in line and had guns in front of them.

Q What did they say? A As soon as Michael turned around, one fire was shot off and my wife was still screaming right along. When they heard her screaming without ending, one of the men said, 'Let's go,' and they pulled off.

Q What was Michael doing just at the time when they said, 'Hands up'? A He was in the bottom of these iron flats, you know, carrying chickens out to me. When he got up he came out with three or four chickens and a few dropped on the floor."

An important item to notice is that at the time of the hold-up the defendant had money of the

employer in his pocket (p. 36, l. 39, to p. 37, l. 27).

“Q At that time did Michael have any money belonging to the store or you?

Mr. Turner: I object to that. I think that is incompetent and immaterial.

The Court: Yes, you might show it in some way. Let him answer the question.

Mr. Turner: I pray an exception.

A He usually gives it—

Mr. Turner: I object.

Q Not usually, but what did he did that night? A *That night he had money with him, sure.*

Q How much, do you know? A Well, I didn't know when they took him away, but when he came back from the hospital they turned in ten dollars in change.

Q Who turned it in? A Michael Willner brought it home with him when he came out of the hospital. I went over to get the money and they said he was too weak to talk about business, and I waited until he came out.

Q What was that money from? A *From collecting orders.*”

The employer, too, had money on his person (p. 38, ll. 15-22):

“Q Did you have any money you had taken in that day? A I had some money; I didn't have much. I am pretty careful with money nowadays. I didn't have much with me.

Q Where was the money? A In my pocket.

Q About how much? A About one hundred dollars.”

Then follows the cross examination. As to the nature of the place where the defendant was shot, the following may be noted (p. 41, ll. 32-41):

“* * * That is not only storage, people come in there to buy. It is a regular mar-

ket, a place with lots of coops and a counter and I have scales and customers come in to buy.

Q That is where your customers come in to buy live chickens? A Yes.

Q Do you kill your chickens in this market? A Yes, there is a certain little room further, deeper in the market in the same room."

Mr. Katz further testified that the shooting occurred close to ten o'clock (p. 42); that the defendant had worked all day taking out orders and doing general utility work; that immediately before the happening the defendant had been told to go into the market and sort some chickens, it being contemplated that that would be the last work for him to do before going into the house and counting the money collected by him during the day (pp. 42-43).

To quote (p. 42, ll. 33-37):

"Q As soon as the chickens were sorted you were going to close? A We were going in the house and count the money he collected, C. O. D. and all the cash."

Then followed additional quizzing as to whether at the time of the shooting the defendant still had the chickens in his hands or whether he had dropped them before being shot (p. 43), all considerably unimportant.

The defendant, Michael Willner, testified as to the facts as follows (p. 48, l. 27, to p. 49, l. 22):

"Q What time did you start your work in the day? A This time I start work at five o'clock. It was a busy day, before Thanksgiving.

Q You mean the day you were shot? A Yes, that day I got up earlier.

Q What day was that? A It was the day before Thanksgiving.

Q Wednesday, November 26, 1924? A Yes.

Q Tell us what happened when you were shot. A I was a few orders delivering. I go to Irvington and come back, and after he tell me I hand him chickens from the coops, and he put me in another coop; he wanted good stuff. I was in the coop and I didn't know nothing, and three fellows come in and I heard Mrs. Katz scream, and I was in the coop and I got up, and he hollered, 'Hands up,' and I got up and I have chickens in my hand, and I dropped these chickens and I hold my hands up, and this fellow comes down with the gun—a little gun it was—and after the Mrs. screamed, two fellows was by the Mrs. and one was by me, and the counter was this side and I was this side (indicating), and as the Mrs. screamed one fellow fired a shot and he run away. One fellow was white and a little bit higher and two fellows was dark.

Q Do you mean a colored fellow? A No, one was white, like a blond, and the dark one was higher and two smaller. He just fired and on this side he shot me and run away."

And as to the moneys of his employer in his possession (p. 52, ll. 10-22):

"Q Do you collect money, too, for the boss? A Yes.

Mr. Turner: I object to that as leading. Counsel comes back now on re-direct examination and leads the witness.

The Court: There is testimony here that he does make some collections.

Q On the night you were hurt did you have any money of the boss'? A Before I got shot?

Q Yes. A I got ten dollars when they took me to the hospital."

Nettie Katz, the wife of the prosecutor, testified as follows as to the happening (p. 56, l. 14, to p. 57, l. 2):

"Q Were you there when the hold-up men came in? A Yes, sir.

Q Was Michael there? A Yes, he was taking out chickens and three fellows came in, and I was sitting on a box and Fannie was in back of me, and a fellow was in back of me washing his shoes off and Michael was handing chickens out of the coops, and three fellows came in with their hands in their pockets, dressed well, and we smiled and I was going to wait on them. I seen Mr. Katz was busy and I was going to say, 'What do you wish?' and they took out their guns and said, 'Hands up,' I raised my arms and I screamed, and I was still screaming and I could not stop until my doctor came and then he gave me some kind of medicine and I stopped screaming. The three fellows were standing and the fellow said to me, 'Shut up,' but I couldn't stop screaming.

Q What happened to Michael? A Michael Willner, when he heard me scream and turned around, why I was still screaming and he held his hands up and dropped the chickens. Two fellows were standing there (indicating) and I was standing here (indicating), and the third one was by Michael Willner, and when I was hollering two fellows said, 'Fire,' and they fired the gun, and he said, 'Let's go,' and they ran out."

Then follows minute cross examination as to whether the defendant's hands were up or down before or after the shootnig, and whether the defendant was standing upright or leaning against the coop (p. 57) and another minutiae of more or less importance from a standpoint of physics but hardly from a standpoint of liability under the Compensation Act.

ARGUMENT.**POINT I.**

The injury sustained by the defendant Michael Willner was caused by an accident arising out of and in the course of his employment within the meaning of the New Jersey Compensation Act.

Reasons 1, 2, 3, 4, 5, 6, 9 and 10 alleged by the prosecutor (pp. 102-103) will be covered under this point.

The instant case clearly comes under Section 2 of the Workmen's Compensation Act of 1911 and the amendments thereto and supplements thereof.

Paragraph 7 of Section 2 of the act provides that:

“When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provision of Section 2 of this act, 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 employee, etc.”

The whole question in this case is whether an injury resulting from a criminal assault by a third person upon an employee prevents the injury from being accidental within the meaning of the Workmen's Compensation Act.

The point involved may be most conveniently treated by considering

- (1) Decisions from foreign jurisdiction; and
- (2) Cases in New Jersey.

Decisions from Foreign Jurisdictions.

It has been stated in 15 A. L. R. Annotated 590 as follows:

“The rule governing, in case of injury to an employee by assault, has also been stated as follows: ‘If one employee assaults another employee solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant, and cannot be said to arise either directly out of the employment or as an incident to it. But when the employee is assaulting while he is defendant his employer, or his employer’s property, or his employer’s interests, or when the assault is incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the employment. He will then be serving his employer’s ends, and not his own.’” *Jacquemin v. Turner & S. Mfg. Co.* (Conn.), *supra*.

It has also been held in *Spang v. Broadway Brewing & Malting Co.*, 1918, 182 App. Div. 443, 169 N. Y. Supp., page 574.

“That an injury caused deliberately and wilfully by a third person might be an accidental injury within the meaning of the New York Act.”

Other jurisdictions seem to recognize that such injuries as the one in the instant case are compensable.

The Indiana courts in the case of *Polar Ice & Fuel Co. v. Mulray*, 1918, 67 Ind. Appeal 270, 119 N. E. 149, in which case a workman was employed to keep a record of ice taken from an ice plant to be sold by the drivers and to require each of them to account for the quantity taken out by him when he returned after delivering the load, and to collect for any shortage, was shot and killed by one of the drivers in a quarrel over the collection for such shortage, held that

the death might be said to have arisen out of and in the course of the employment. The Court said:

“The rule is well established that a claim for compensation will not be denied, simply because the accident occurred by reason of the unlawful and felonious act of some third person, if the employee actually sustained it by being specially and peculiarly exposed, by the character and nature of his employment, to the risk of the danger which befell him. In other words, when the injury results from the conditions surrounding an employee at the time of the accident, and under which he was required to perform his duties, then, generally speaking, it arises out of the employment.”

The English courts wherein the Workmen's Compensation Laws are applied similarly as our New Jersey courts apply such laws, have repeatedly held that an assault might be construed as having arisen out of the employment.

In the case of *Shaw v. MacFarlane*, 1914, 52 Scot. L. R. 236, 8 B. W. C. C. 382, decided that an iron-moulder's helper, who, while working in a stooping position in close proximity to boxes of molten metal, was struck by an intoxicated stranger, and fell and was burned by the metal, the helper was held to have suffered his injury by accident arising out of and in the course of his employment.

And in *Mariano v. Krasnoger Bros.* (1919), 190 App. Div. 65, 179 N. Y. Supp. 314, modified as to amount of award in (1920) 228 N. Y. 609, 127 N. E. 916, the employee's injury was held to have arisen out of and in the course of his employment, where it appeared that he was a carpenter working on a building, and that he went to the wash room during working hours, and, at the request of an employee of another

contractor, whom he found tied there, he untied him, and was then attacked by workmen in the employ of the other contractor, and that, before the altercation had been entirely subdued, he was struck and injured by the superintendent having general charge of work on the building.

A number of cases are gathered in the note 21 A. L. R. 758, some of which will be noted below. At page 760:

“In *Rosmuth v. American Radiator Co.* (1922), 201 App. Div. 207, 193 N. Y. Supp. 769, the accident was held to have arisen out of the employment, where a laborer engaged at night in drawing cinders from the employer’s plant to a dump was assaulted by unknown men at about 1 o’clock A. M. for the purpose of robbing him of his pay, which, according to the custom of the company in paying its employees, had been given him on that night. The court said: ‘I believe that the incident of the employment of Rosmuth which brought him to the spot where more successfully accomplished, and thus in a real sense invited, increased his exposure to a risk otherwise common to humanity. Since the employment directly contributed to the risk by added exposure to a common peril, the accident may be said to have arisen out of the employment.’”

“And the death of an automobile salesman was held to have arisen out of his employment, where he was killed by robbers who sought to obtain the automobile in which the salesman was riding for the purpose of making a sale. *Industrial Commission v. Pueblo Auto Co.* (1922), Colo.

A. L. R. , 207 Pac. 479.” “And in *Broadbent’s case* (1922), Mass. , 134 N. E. 632, findings that the employee at the time of his injury was acting within the scope of his employment, and that the risk of an assault was a risk of the employment, were held warranted, where there was evidence that the deceased

was employed as a counter man, to sell dormitory checks, candy and other articles, and to keep the inclosure clear, and that while he was trying to quell a disturbance he was struck on the side of the face and sustained a cerebral hemorrhage."

"And in Reithel's case (1915), 222 Mass. 163, L. R. A. 1916 A, 304, 109 N. E. 951, 11 N. C. C. A. 235, an injury to a superintendent of a mill, whose duty it was to order trespassers from the premises, by a shot fired by a trespasser whom he ordered to leave, was held to arise out of and in the course of his employment; it appearing that he had received special instructions from a superior to order the trespasser in question out, and to call the police to his assistance."

And additional cases on the same point are collected in 29 A. L. R. 126, only one or two of which will be noted below:

"In *Industrial Commission v. Irwin* (1923), 72 Colo. 573, 212 Pac. 829, it was held that the injury arose out of and in the course of the employment, where one employed as an automobile salesman, at the direction of his employer, took a demonstrating car home with him so that it might be accessible the next day, which was Sunday, to show to a customer, and, the weather being cold, attempted to put the car in the garage of a friend, which he had permission to do, and was shot by the friend, who believed him to be a burglar."

"And in *Empire Healty & Acci. Ins. Co. v. Purcell* (1921), Ind. App. , 132 N. E. 664, an injury to an insurance solicitor and collector was held to have arisen out of and in the course of his employment, where just after leaving a house where he had gone to collect premiums, he was assaulted, robbed and injured. The court said: 'In the instant case the duties of appellee required him to travel from place to place for the purpose of soliciting insurance and making collections. The localities to which

he was required to go in the course of the business constituted the place or places of his employment. It was by reason of his employment that he was at the place where he was injured. He was where his employment took him. The hazard of being injured as the result of an attempt to collect money due appellant, the hazard of being assaulted or robbed on account of his business, as well as the hazard of being injured by reason of accidentally falling while in the course of his employment, were all hazards incidental to his employment. This proposition is not changed by the fact that the public generally in that vicinity was exposed to the same hazards. Appellee's employment as a collector of money exposed him to increased hazards generally. The evidence warrants the inference that his injury resulted from conditions brought about by reason of his employment, and because he was in that locality at the time in question."

See also 29 A. L. R. 442:

"In *Young v. Brown City* (1932) Mich. , 193 N. W. 811, an injury to a fireman at a city electric light plant was held to have arisen out of and in the course of the employment, where he went to open up the plant early in the morning before it was light, and as he unlocked the door and was entering was struck on the head by an unidentified assailant and rendered unconscious, but a sum of money which was in his pocket was not taken, and the only property missing was a hammer from the plant. The court stated that the evidence negated an inference that the assault was due to personal animosity, and justified the inference drawn by the commission that the assailant was a trespasser in the building, and that he was surprised by the claimant, whom he assaulted in order to make his escape."

"And in *Martin v. Chase* (1922), 194 Iowa 407, 189 N. E. 958, it was held that an injury to a hotel clerk, who was assaulted

when he refused to assign a room to one who was addicted to the use of intoxicants, arose out of and in the course of the employment. The court said: 'It may be conceded, for the purposes of this case, that for injuries received in an affray having no connection with his employment there could be no recovery against the employer; but the rule is otherwise where the assault complained of grew out of, and in the course of, his service in such employment. It is not necessary to inquire into the merits of the quarrel between Dunwoody and plaintiff, or to assume or hold that as a moral proposition plaintiff was blameless in refusing Dunwoody a room; *it is enough that plaintiff was attending to his duties as clerk, and was assaulted because the manner of his performance of those duties gave offense to a man seeking to become a guests of the hotel.*'

"And in *Mason v. Schaffer* (1922), 203 App. Div. 332, 197 N. Y. Supp. 22, an injury to a collector who was required to keep all moneys collected the latter part of the day and the first half of the night was held to have arisen out of and in the course of the employment, where he was held up and shot in the doorway of his house when he was returning from his work and carrying his employer's money."

And on page 444:

"And in *O'Rourke v. O'Rourke* (1923), Pa. , 122 Atl. 172, the result of the trouble was held to be an unexpected happening in the course of the employment, and compensable under the Compensation Act, where the employee, a subforeman, while on his way to collect an indebtedness for his employer, was assaulted by two drunken men without provocation, and injured."

See also *Kansas City Fibre Box Co. v. Connell*, 5 Fed. Rep., 2nd Series, 398. In that case the Court held an injury to an employee at work

due to a scuffle with a fellow employee to be one arising out of employment, saying at page 401:

“In *Bryant, et al., v. Fissell*, 84 N. J. Law 72, 77, 86 A. 458, 461, the court said: ‘We conclude, therefore, that an accident arises “out of” the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. * * * A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.’”

And again at the bottom of the page:

“The extent to which the doctrine has been carried is illustrated by the interesting case of *Foley v. Home Rubber Co.*, 89 N. J. Law 474, 99 A. 624. *Foley* was in the employ of the Home Rubber Company as a special traveling salesman. It was necessary for him to visit the company’s London office, and he engaged passage on the steamship *Lusitania* and went down with it. It was held that this was an accident arising in the course of and out of this employment. See, also, *Walther v. American Paper Co.* (N. J. Sup.), 98 A. 264;” and citing a number of other decisions.

An interesting case in Maryland is *Todd v. Easton Furniture Mfg. Co.*, 128 Atl. 42, where the Court held that where a night watchman was found murdered after a quarrel, an inference might be drawn that the death arose out of and in the course of his employment on the ground that the deceased might have been attacked suddenly without warning, where duty to guard premises prevented his seeking safety in flight, the Court saying at page 43:

“The inference that increased danger of injury by ill-disposed persons was an incident of the special conditions of the night watchman’s service could be drawn from the facts proved by the evidence. Upon the

basis of such an inference the jury might have concluded, if the case had not been withdrawn from their consideration, that the injury inflicted upon the deceased employee arose out of the service in which he was engaged.

“There have been decisions sustaining claims under Workmen’s Compensation Laws in cases where: A night watchman was killed on his employer’s premises by unknown persons whose motive was to rob him of his money (*Vivier v. Lumbermen’s Indem. Exch.* (Tex. Com. App.), 250 S. W. 417); an employee while performing his duty of making a fire in an engine at night in an isolated locality was shot and killed by persons whose identity was not discovered (*Dyer v. Rapides Lumber Co.*, 154 La. 1091, 98 So. 677); a head waiter of a hotel was killed on the premises by a waiter whom he had discharged (*Cranney’s Case*, 232 Mass. 149, 122 N. E. 266, 15 A. L. R. 584); a road construction foreman was accidentally killed by a hunter (*Arnested v. Mc-Nicholas*, 223 Mich. 488, 194 N. W. 514); a fatal assault on a schoolmaster was made by unruly pupils (*Trim Joint District School Board v. Kelly* (H. L.), 1914, App. Cases 667); a bartender was shot by customers during a dispute as to the price of liquors which they had purchased (*Emerick v. Slavonian, etc., Union*, 93 N. J. Law 282, 108 A. 223); the foreman of a lodging camp was killed by a discharged employee with whom he had quarrelled (*Stertz v. Industrial Ins. Com.*, 91 Wash. 588, 158 P. 256, Ann. Cas. 1918 B, 354); a night watchman, employed to protect buildings of his employer’s patrons against burglary, while patrolling the street for that purpose, was accidentally shot by a police officer pursuing burglars who had not entered a building which the watchman was protecting (*Heidemann v. Amer. Dist. Telegraph Co.*, 230 N. Y. 305, 130 N. E. 302); a workman, who had orders to protect his employer’s prop-

erty from trespassers, was injured by a shot from an air gun playfully discharged in his direction by one of a group of boys whom he had driven away from the vicinity of the property because of similar acts (*Munro v. Williams*, 94 Conn. 377, 109 A. 129, 13 A. L. R. 508); an engineer was struck by a stone wilfully thrown by a boy from an overhead bridge (*Challis v. London & Southwestern Ry Co.* (1905), 2 K. B. 154)."

The paragraph last quoted summarized innumerable situations similar to the one in the instant case held to be compensable under the Workmen's Compensation Laws.

(2) New Jersey Decisions.

The decisions in the New Jersey courts that may be considered analogous to the situation under consideration will be considered below.

In *Emerick v. Slavonian, &c., Union*, 93 N. J. Law 282, the petitioner was employed as a bartender in defendant's saloon and was shot by a patron while in the act of selling liquor. His widow was awarded compensation by the Court of Common Pleas under Section 2 of the Workmen's Compensation Act and the case was taken to the Supreme Court on certiorari.

The only question before the Supreme Court was whether the accident arose out of the employment and the Court, in holding that it did, said at page 284:

"we think where, as here, decedent, while at work for his employer as a bartender selling intoxicating liquors in his employer's saloon, was shot and killed by a patron because of and during a dispute regarding the price of drinks which decedent sold to such patron, the trial judge was justified in

concluding that decedent's death arose out of his employment. It was, of course, decedent's duty to collect the price of drinks sold. An assault as the result of an attempt to make such collection was a risk reasonably incident to the performance of the work, and if not an ordinary risk directly connected with the employment, certainly it was an extraordinary risk indirectly connected with the employment owing to the special nature of the employment. The case is in principle much like *Foley v. Home Rubber Co.*, 89 N. J. L. 474; affirmed, 91 *Id.* 323."

So, in the instant case was it a part of the duty of the employee to guard the property of his employer and the shooting was a risk, ordinary or extraordinary, connected with the employment?

Another New Jersey case involving assault is *Nevich v. D., L. & W. R. R. Co.*, 90 N. J. L. 228, where the employer, while reclaiming tools from persons who, without authority, were attempting to remove them, was assaulted and injured. Under these facts the Court held the petitioner entitled to compensation.

The cases in New Jersey where recovery was not allowed are clearly distinguishable from the instant case.

In *Schmoll v. Weisbrod & Hess Brewing Co.*, 89 N. J. L. 150, where the agent, a collector of the Brewing Company, while on his employer's business in a district of bad repute, was shot by some unknown person, the Court held that, in the absence of any proof that the motive of the assailant was robbery or that the employer had notice or knowledge of the dangerous character of the locality, it could not be said that the shooting of the agent was an accident arising out of the employment.

That the instant case is distinguished from the above is clearly aparent when it is considered that it is common knowledge that hold-up men do not usually visit chicken markets for the purpose of avenging love disputes, and that when a hold-up man visits a store, be it a chain grocery or chain cigar store or whatnot, he visits it for the avowed purpose of robbing the till.

And in *Walther v. American Paper Co.*, 89 N. J. L. 732, where the decedent was a night watchman in a mill and, while engaged in such employment, was struck down with a club and killed by his assailant, who took from his vest pocket the sum of fifteen dollars, the Court of Errors and Appeals held that the death of the deceased was not the result of an accident arising out of his employment because in that case the assailant knew that the deceased had been paid his wages that day and went to the mill in the night-time on purpose to rob the deceased. He made no attempt at any robbery of the office of the mill or any destruction of the mill property or at any mischief or crime other than the robbery of Walther, the Court saying at page 732:

“The assailant was an employee of the trustee in bankruptcy at the plant of the American Paper Company, at Bogota, and had been paid off on the said 24th of December, 1914, earlier in the day. After being paid off, he had lost all of his money except fifty cents in a crap game. He knew that Walther had been paid off that day and would probably have the money in his pocket. The assailant’s purpose in going to the mill at night and hiding in it was to rob Walther, and he did not attempt any robbery from the office of the mill, or any destruction of the mill property or any mis-

chief or crime other than the robbery of Walther.”

The fact that he hid in the mill and made no attempt other than the robbing of Walther led to the irresistible conclusion that it was Walther he was after and not the employer.

How different from the instant case, where the hold-up men entered the chicken market for the undeniable purpose of robbing it and not for the purpose of singling out the defendant and robbing him. But inasmuch as the defendant was rightfully on the premises and engaged in the work of the prosecutor and in possession of money of his employer, it clearly follows that any injury the defendant sustains while so engaged arises out of and in the course of his employment.

Nor is the case of *Hulley v. Moosbrugger*, 88 N. J. L. 161, in favor of the prosecutor. There liability was denied for an injury to an employee resulting from horse-play or skylarking on the ground that, though an accident hapening under such circumstances may arise in the course of, it cannot be said to arise out of the employment. But that the opinion in the case is not contrary to defendant's contention may be gathered from the following excerpt from the higher court's opinion in reviewing the decision of the Supreme Court. To quote Chancellor Walker at page 163:

“The Supreme Court in its opinion properly held that the principle to be deduced from the adjudications in this state is, that where an accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment.”

That the accident in the instant case is the result of a risk reasonably incident to the employment follows from a mere cursory examina-

tion of the facts. An employee who is actually engaged at the time in the work of his master, who has in his possession money belonging to the master, and who is shot by a hold-up man who enters the premises with the command "Hands up" at a time of night when hold-ups with the avowed purpose of robbing the owner generarily occur; those are the facts in the instant case. If an injury sustained under such circumstances cannot be said to be the result of a risk reasonably incident to the employment, then it cannot be said that such risk is ever possible.

A case akin to this discussion is *Foley v. Home Rubber Co.*, 89 N. J. L. 474, affirmed 91 N. J. L. 323, where the Court held that an employee in going to a European country on his employer's business on a vessel sailing under the flag of a country then at war, to the knowledge of his employer, and losing his life on the voyage when the vessel was sunk by an enemy submarine, suffered death as the result of an accident arising out of and in the course of the decedent's employment, the Court saying at page 479:

"Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the *Lusitania* was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's employment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag, carrying contraband of war, subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of na-

tions, not only the loss of the vessel attacked, but the loss of lives of those upon her might result. The fact that the attack in this instance was not executed in a way that might have been anticipated, but in a manner said to be contrary to the law of nations, may operate to qualify the degree or nature of the danger and risk to such a peril, but does not eliminate the essential factor in the case that the voyage was one pregnant with risk which the employer must have contemplated as arising out of and in the course of the employment. Such appears to have been the reasoning in *Zabriskie v. Erie Railroad Co.*, 86 N. J. L. 266, holding that where the employee left the shop and crossed a danger zone of two railroad tracks of the main line of the Erie Railroad, laid at grade, upon a much traveled public highway, in order to reach a toilet and was killed, that the danger and risk of the journey must have been within the contemplation of the employer. It becomes at once apparent that the fact whether or not the automobile which killed the employee was operated in a lawful manner or was lawfully upon the highway, was not regarded as an essential factor in the case."

In this case the Court carefully distinguishes between the Walther and Schmoll cases, heretofore considered in this brief, saying at page 480:

"It must be borne in mind that the denial of a right of compensation in the Walther case was put upon the ground that the design of the assailant was to rob Walther and not Walther's master, and hence the attack made on Walther was not connected with Walther's employment, and that the denial of compensation in the Schmoll case was rested upon the fact that though the brewery collector was shot, but whether out of revenge for some personal wrong done to his assailant or by mistake or accident did not appear, and there was no fact or circumstance from which it could be reason-

ably inferred that the shooting had some connection with the collector's employment."

The instant case is clearly distinguishable from those cases in which compensation was denied in that it cannot be properly said that the robbers had any other design than the robbing of the employer's market. Any malice intended by them was only as a result of their main object, that was, the accomplishment of the robbery. So that if the defendant suffered any injury, it was only because of his effort or attempt to save his employer's property, or, even if he were shot without making any effort in behalf of his employer, the injury arose merely because of his presence in the place where he was employed at a time when a third person was attempting to rob his employer. And an injury arising out of such circumstances is clearly the result of a risk reasonably incident to the employment.

In *Newark Hair and Bi-Products Co. v. Feldman*, 89 N. J. L. 504, where the decedent was in her master's place of business in the course of her employment as a stenographer, within a time during which she was employed, when a fire occurred and caused her death, the Court held that the death was caused by an accident in the course of the employment, saying at page 506:

"We think that the important question is whether there was any danger to be reasonably anticipated by the employer to its employes while at work on the fourth floor from the situation and condition of the premises.

"For if the risk of danger is in any manner connected with the employment, an accident happening by reason of such risk is an accident arising out of the employment. The learned trial judge had before him evi-

dence that there was a single stairway leading from the fourth floor, which stairway became useless as a means of escape from smoke and fire; that though there was a fire escape it could not be used by reason of its proximity to an elevator shaft through which fire and smoke were issuing; that a window at the head of the stairway was fastened so that it could not be raised; that the employees in order to effect their escape were compelled to jump from the fourth floor to the roof of a one-story building to save their lives. We are therefore unable to perceive how the court could have reached any other conclusion than that the danger to employees in case of fire, whether on the premises of the employer or on one of the floors beneath, was a danger to be reasonably anticipated by the employer. It was a danger incident to the employment."

In this connection it is also of interest to note the words of Justice Kalisch at page 506:

"The difficulty under which the trained legal mind labors, in this class of cases, is to detach itself from considering the facts of each particular case free from the influence of well settled legal principles governing cases of negligence, and to simply keep in view that we are dealing in lieu thereof with a state policy of social insurance in which the doctrine of negligence has no abiding place."

See also *Dobbs v. New Amstedram Casualty Co.*, 3 N. J. A. R. 288, 127 Atl. Rep. 209.

Nor do any of the cases cited by the prosecutor in his behalf mitigate against the argument contended for by the defendant. They all go to the proposition that an injury sustained by a workman not having its origin in a risk connected with the employment is not compensable under the Workmen's Compensation Act, but these very cases are all to the effect that an injury made likely by the character of the em-

ployment or by the method under which it is carried on is compensable. *Gray's Case*, 121 Atl. 556.

POINT II.

The award made by the Compensation Bureau was not contrary to law.

Grounds of appeal 7 and 8 will be covered under this point.

Under ground of appeal 7, the appellant urges that "the New Jersey Supreme Court erroneously held that the awarding of \$1,216.95 for hospital, medical and nursing expenditures of the petitioner was lawful."

The act (Laws of 1922, p. 500), Section 14, provides as follows:

"The employer shall furnish to the injured workman such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the workman of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible; *provided, however*, that the employer shall not be liable to furnish or pay for physicians' or surgeons' services in excess of fifty dollars and in addition to furnish hospital service when necessary in excess of fifty dollars, unless the injured workman or the physician who treats him, or any other person on his behalf, shall file a petition with the Workmen's Compensation Bureau stating the need for such physician's or surgeon's services in excess of fifty dollars as aforesaid, and such hospital service or appliances in excess of fifty dollars as aforesaid, and the Workmen's Compensation Bureau after investigating the need of the same and giving the employer an opportunity to be heard, shall determine that such physician's and surgeon's treatment and

hospital services are or were necessary, and that the fees for the same are reasonable and shall make an order requiring the employer to pay for or furnish the same. If the employer shall refuse or neglect to comply with the foregoing provisions of this paragraph, the employee may secure such treatment and services as may be necessary and as may come within the terms of this paragraph and the employer shall be liable to pay therefore; *provided, however*, that the employer shall not be liable for any amount expended by the employee or by any third person on his behalf for any such physician's treatment and hospital services, unless such employee or any person on his behalf shall have requested the employer to furnish the same and the employer shall have refused or neglected so to do, or unless the nature of the injury required such services, and the employer or his superintendent or foreman, having knowledge of such injury, shall have neglected to provide the same, or unless the injury occurred under such conditions as make impossible the notification of the employer, or unless the circumstances are so peculiar as shall justify, in the opinion of the Workmen's Compensation Bureau, the expenditure assumed by the employee for such physician's treatment and hospital services, apparatus and appliances. All fees and other charges for such physicians' and surgeons' treatment and hospital services shall be reasonable and based upon the usual fees and charges as prevail in the same community for similar, physicians', surgeons' and hospital services."

The petition to the Compensation Bureau, among other things, shows the necessity for medical attention and asks for compensation therefor. The findings of the Commissioner, after the introduction of testimony, were that the amount awarded was expended (p. 12, *et seq.*).

The answer of the prosecutor to the petition and his argument at the hearing (pp. 10-12) were to the effect that compensation or expenses for medical services were not chargeable to him mainly on the ground that the shooting was not an accident and did not arise out of the employment of the defendant and not that the amount was excessive or unreasonable. Consequently, the prosecutor cannot seriously, at this time, urge that the award for hospital, medical and nursing expenses was contrary to law.

Under ground of appeal 8 the prosecutor urges that the awarding of \$1,792.95 to the petitioner in a lump sum by the Workmen's Compensation Bureau was contrary to law (p. 103).

To this argument there is no merit, because the award was not a lump sum but a mere addition of the accrued payments for compensation and medical expenditures up to the time of the hearing. Undoubtedly the inclusion of that ground of appeal was under a misapprehension.

It is therefore urged that under the facts of this case the defendant has shown that he was injured as the result of an accident arising out of and in the course of his employment and that the award made by the Workmen's Compensation Bureau and the decisions of the Essex County Court of Common Pleas and Supreme Court affirming it should be upheld.

Respectfully submitted,

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