INDEX.

Testimony.

Writ of Certiorari.

(Allowed April 26, 1917.)

NEW JERSEY, *ss*:

The State of New Jersey to Hon. Mark Sullivan, Judge of the Common Pleas Court of Hudson County, and John J. McGovern, Clerk of the Common Pleas Court of the County of Hudson, and Jerry Sorrentino, by next friend. [L. S.]

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GREETING:

We being willing for certain reasons to be certified of a certain petition, order, answer, determination and judgment, made and given by Mark Sullivan, Esquire, Judge of the Court of Common Pleas of the County of Hudson, in a certain action, plaint or proceedings brought against the D. V. G. Manufacturing Corporation, a corporation, at the suit of Jerry Sorrentino, by next friend, to recover compensation as the result of an accident alleged to have been sustained, arising out of and in the course of the employment of the defendant with the prosecutor herein, under the provisions of an Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, &c.," approved April 4th, 1911, and the supplements thereto and the amendments thereof, do command you that you send under your seals to our justices of our Supreme Court of Judicature at Trenton, on the 14th day of May instant, the said petition, order, answer, determination, and all other proceedings in the

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said matter, made and given as aforesaid, and all things touching and concerning the same, as fully as they remain in the said Court of Common Pleas of the County of Hudson, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, aforesaid, this 26th day of April, Nineteen Hundred and Seventeen.

WILLIAM C. GEBHARDT,
Clerk.

KALISCH & KALISCH,
Attorneys.

Allocatur.

FRANCIS J. SWAYZE,
J. S. C.

Petition.

Filed December 27, 1917.

Hudson County Court of Common Pleas.

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JERRY SORRENTINO, by next friend, *Petitioner,* *vs.* D. V. G. MANUFACTURING CORPORATION, *Respondent.*	*On Petition etc.* *Petition.*

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To the Honorable one of the Judges of the Hudson County Court of Common Pleas.

Your petitioner, Jerry Sorrentino, respectfully shows:

1. That on September 11th, 1916, he was employed by the respondent, D. V. G. Manufacturing Corporation, in its factory in the City of Hoboken, Hudson County, New Jersey, as a helper on a box squeezing machine, and received as wages for such services the sum of $10.50 per week.

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2. That on September 11th, 1916, aforesaid, while working in said capacity for the defendant herein, an elevator broke and caused a piece of iron or steel to strike your petitioner in the head, fracturing his skull and injuring your petitioner to such an extent that he lost his right eye, and sustained numerous other injuries to and about his head, by reason of which injuries

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he was obliged to seek medical attention at St. Mary's Hospital, in the City of Hoboken aforesaid, where he remained until October 10th, 1916, since which time he has been under medical treatment to the date hereof.

3. Said accident arose out of and in the
10 course of the employment of your petitioner by the respondent herein, and said respondent had due knowledge of the happening of said accident.

4. Your petitioner and the respondent have failed to agree upon the amount of compensation due to your petitioner by reason of the fact that they could not agree upon the extent of the injuries your petitioner has received.

Your petitioner therefore prays that your
20 Honor will determine the amount of compensation due to your petitioner from the said respondent, under the Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," ap-
30 proved 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 ever pray, etc.

WELLER & LICHTENSTEIN,
Petitioner's Attorneys.

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Petition.

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

Jerry Sorrentino, 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.

JERRY SORRENTINO.

Sworn and subscribed before
me this 20th day of December,
A. D. 1916.

G. EARL BRUGLER,
Attorney at Law of New Jersey.

Order for Hearing.

(Filed December 27, 1916.)

HUDSON COUNTY COURT OF COMMON PLEAS.

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JERRY SORRENTINO, by next friend, *Petitioner,* *vs.* D. V. G. MANUFACTURING CORPORATION, *Respondent.*	*On Petition, etc.* *Order for Hearing.*

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A petition having been filed in this cause by Jerry Sorrentino, petitioner, praying for the compensation payable by D. V. G. Manufacturing Corporation, the respondent, it is on this 27th day of December, A. D. 1916, on motion of Weller & Lichtenstein, attorneys for petitioner:

ORDERED, that the hearing of said matter be and hereby is set down for Thursday, the 25th day of January, 1917, at the Court House, in the City of Jersey City, at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard.

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MARK A. SULLIVAN,
Judge of the Hudson County Court of Common Pleas.

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Answer.

(Filed.)

HUDSON COUNTY COURT OF COMMON PLEAS.

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JERRY SORRENTINO, by next friend, *Petitioner,* *vs.* D. V. G. MANUFACTURING CORPORATION, *Respondent.*	*On Petition.* *Answer.*

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Respondent, answering the petition filed in the above stated cause, says that:

1. It admits paragraphs one, three and four of complaint.

2. It admits that petitioner was treated in the St. Mary's Hospital, but as to the balance of the paragraph it neither denies or admits the same and leaves the petitioner to his proof thereof.

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Dated, January 11th, 1917.

KALISCH & KALISCH,
Attorneys of Respondent.

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Answer.

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

Isidor Kalisch, being duly sworn upon his oath, deposes and says; that he is the attorney of the respondent named in the foregoing answer and its agent in this behalf; that he has read the foregoing answer and that the matters and things therein contained are true to the best of his knowledge and belief.

Sworn and subscribed to before me this
day of January, A. D., 1917.

Opening.

HUDSON COUNTY COURT OF COMMON PLEAS. PART I.

JERRY SORRENTINO, *Petitioner,* *vs.* D. V. G. MANUFACTURING COMPANY, *Respondent.*	*Compensation Suit.*

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Thursday, February 8th, 1917.

This cause came on for trial before Honorable Mark A. Sullivan, Judge, in Part 1 of the Hudson County Court of Common Pleas, holden in the Hudson County Court House in the City of Jersey City, on this eighth day of February, nineteen hundred and seventeen.

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J. R. Tiffany, attorney at law, appeared for the petitioner.

Isidor Kalisch, attorney at law, appeared for the respondent.

Mr. Tiffany. There is no dispute except as to the extent of the injuries, as I understand.

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Mr. Kalisch. We admit that his eye was lost in an accident in and during the course of his employment. We reduce the extent of the injuries, except loss of eye. We admit loss of eye.

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JERRY SORRENTINO, called in support of petitioner and sworn, testifies as follows:

Direct examination by Mr. Tiffany:

Q You are the petitioner in this case? A Yes.

10 Q Have you received any compensation from the company? A No.

Q How long were you in St. Mary's Hospital? A Four weeks.

Q Have you worked since the accident? A No.

Q Do you have any pain in your head? A Except headaches.

Q You mean you have headaches? A Yes.

Q When do you have headaches? A Mostly

20 at night.

Q How often. A Twice or three times a week.

Q About what time at night? A Usually around six or half-past six.

Q Is there anything the matter with you besides the loss of your eye since that accident, your nose, or anything? A I can't smell any more.

Q Have you lost any of your other functions:

30 that is, your hearing, or anything of that kind?

(Objected to as leading, and also that there is no allegation in the petition of other injury. Question overruled as leading.)

Mr. Tiffany. The petition states and also injuries in and about the head.

The Court. You can't prove under that. You must apprise the defendant of the nature of the injury sustained. You can't

40 prove loss of taste or smell under that.

Mr. Tiffany. I ask to amend the petition in that respect.

The Court. I will allow you to amend, but I will adjourn the case in order to allow the defendant to meet that phase of the case, if the defendant desires the adjournment.

Mr. Tiffany. I think I will ask for the adjournment under your Honor's ruling. 10

Mr. Kalisch. I ask that arrangement be made. I am here with doctors whom I must pay for this attendance and I am ready to meet the situation set forth in the petition, and I think the petitioner should help to defray the expenses by reason of this adjournment.

The Court. I think you should pay their expenses under this state of the pleadings, Mr. Tiffany. 20

Mr. Tiffany. I will proceed under the petition as it is. I ask an exception.

The Court. You don't need an exception.

Q Have you worked since the accident? A No, sir.

Q Why not? A I couldn't.

Q Were there any other injuries except those to the head? A What do you say? 30

By the Court.

Q Were you injured any other place except about the head; were your legs, or arms, or your body hurt? A No. Just in the head.

No Cross Examination.

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DR. GEORGE F. SULLIVAN, called by the petitioner and sworn, testifies as follows:

Direct examination by Mr. Tiffany.

Q You are a physician how long?

(Qualifications admitted by respondent.)

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Q You treated Jerry Sorrentino? A I operated on him in St. Mary's Hospital.

Q When was that? A Some time, I think, in September.

Q What did you do? A I saw him in the afternoon of his accident and found him unconscious, and the front part of his head was smashed in, that is if you drew a line in the direction of this arch coming through the orbit of the eye the bone resembled an egg shell, crushed as if struck with a hammer. His eye was split in two and was lost, and he was in such a state of shock that it was impossible to operate on him; we expected him to die, and I told the interne to watch him carefully and whenever he was recovered from the shock to let me know; and later that afternoon his condition was sufficiently good to operate on, and I removed his eye and removed the soft tissue around the eye, and with a pair of forceps picked a large number of pieces of bone from his frontal process, head, his frontal sinus, which was smashed against his brain, and through here, his nose, the anterior ethmoidal cells were smashed—

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(Objection is made to any evidence of injury which is not included in the petition. Objection overruled.)

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Q Anything else? A And at the aperture the orbit was split.

Q What do you mean by the orbit? A The bony covering back of the eye which separates the eye from the brain. The first day the brain was oozing out profusely. The loss of brain matter was probably a small teacupful. It was an unusual case and we had no hopes of him, and two or three times while he was on the table we had recourse to artificial respiration, and it looked as if he would go any moment. We removed his sinus and put in a plate and sent him downstairs, and he had a precarious twenty-four hours, and after about forty-eight hours he started to pick up.

Q He has lost his eye? A He has lost his right eye.

Q And due to the injury to his head you say part of his brian was taken out? A At least a small teacupful.

Q What effect would that have on him? A The centres of the frontal lobe of the brain are fairly defined, and we know that the centres of memory are located there which he has evinced since by the loss of memory—

(Objected to and motion made to strike out as not within the petition. Objection overruled.)

Q Anything else? A He has lost his sense of smell entirely.

(Stricken out.)

Q Anything else wrong? A His hearing is deficient.

(Stricken out.)

Q Is the remaining eye affected? A Due to the loss of the right eye he has a loss of about forty per cent. in the other eye.

(Motion to strike out on the ground that there is nothing in the petition about that. Motion denied.)

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Witness. I wish to correct that. I don't mean to infer that it is directly due to the injury he has lost in his other eye. He has at the present time about 20/40 of vision in his left eye.

(Objected to. Testimony allowed to stand.)

Q What would you say was the percentage that this young man had lost of his ability to work by reason of this accident? A Taking everything into consideration, his sight, and the condition of his skull as it is?

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Q Leaving out the one eye as fixed by the statute. A I should say that his condition is reduced fifty per cent.

Cross examination by Mr. Kalisch.

Q You thought some time after he got to the hospital he was going to die? A No. After he left the operating room.

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Q And you took care of him entirely? A Yes, except when the internes came in.

Q But all the work on the man himself you did? A Yes, sir.

Q You have had a great deal of experience in this kind of work? A Yes.

Q And there is no paralysis? A No. We expect none at that point.

Q You consider the result was very good? A I am very happy over it.

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Q As the man is today you consider the result very good? A With the extent of his injury I think it is.

Q You say he has a fifty per cent. disability? A Yes, considering everything.

Q Excluding the loss of his eye what would you call it? A That is hard for me to say. If you don't include the loss of the eye it would be hard for me to make any conjecture. 10

Q That is a large part of the fifty per cent? A No. I think it is twenty per cent. of the fifty.

Q Leaving a balance of ~~fifty~~ thirty per cent. of brain loss? A Due to brain injury and skull injury.

Q And in that do you reckon the loss of hearing and of smell? A I consider everything. 20

Q And of taste? A I have not testified to any taste.

Q But you place your conclusion of traumatic disability on certain elements? A I would not consider it is very much.

Q The loss of smell and hearing are what portion of thirty per cent? A About five.

Q That leaves twenty-five per cent.. What is that twenty-five per cent. made of? A Brain injury and skull injury and what the future may bring forth. 30

Q What do you think may be brought forth by the future? A I did not include that as to the future.

Q Did you consider anything else except the brain injury and the skull and the fracture? A We did consider the hearing.

Q But I mean in the twenty-five per cent? A No. 40

Q What part did you consider the brain injury? A That would be very hard to say.

Q What part did you consider the fracture? A Hard to say. I would say include both in the twenty-five per cent. If you wanted to say the fracture only, it would be very difficult to say; no doctor could tell you what the brain injury and the fracture would amount to separately.

Q Can you give us your opinion? A It would be a conjecture.

Q Can't you divide the two elements? A No, sir.

Q Why not? A It is practically impossible to do so.

Q Eliminating the loss of the eye would reduce the general loss thirty per cent. Is that right? A Yes.

Q And eliminating hearing and smelling? A And you said taste.

Q But you have not considered taste? A No.

Q Eliminating hearing and smelling, you reduce that to twenty-five per cent.? A Yes, to twenty-five per cent.

Q And you can't divide the brain and skull loss? A No.

Q There is no reason why this man can't work as well as a one-eyed man? A Every reason in the world for the reason that he has lost so much brain tissue.

Q As well as a one-eyed man? That is my question. A He cannot work as well. I have testified that he has had a loss of about twenty-five per cent. in the vision of the other eye.

Q You don't know whether that is due to the accident? A No, sir.

Dr. George F. Sullivan, cross.

Q You think he has suffered twenty-five per cent. except those elements you took out piece by piece from your estimate? A That is figuring on the basis of fifty per cent. general disability.

By the Court.

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Q Do I understand the forward part of his skull was smashed in? A Yes, smashed in.

Q And that smashing is extended over the right eye? A Yes.

Q What would be the natural result of a fracture of the skull? A Twenty out of every hundred fractures of the skull develop dementia or some form of insanity.

Q I mean what injuries would you expect to grow from a fracture of the skull? A I don't quite understand. Do you mean the condition today?

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Q No. Right after the fracture or within a month of the fracture up to the present time? If you were told that a man had his skull fractured by a piece of iron falling down, what would you expect to result by a piece from that fracture? A Eight times out of ten he would die.

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Q And that would be because the brain was injured? A Because the brain was injured and there was shock.

Q But that would not be the result unless the fracture was so extensive as to involve the brain? A Yes, sir. Some fractures do not involve the brain, but seldom are fractures so severe as this—here the brain just oozed out.

Q Has the contour of the head been restored to the original before the accident? A To a great extent.

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Q Is there any disfigurement? A Yes. He will never be able to wear an artificial eye; it would destroy the filament in front of the brain.

Q What disfigurement is there apparent?

(Petitioner exhibits his eye.)

10 A This is still discharging from this point. There is not enough protection for the brain there. With an ordinary loss you would be expected to put an artificial eye in it. Look up with that eye. (Spoken to petitioner.) He can't do it. Here is a loss. And here is a loss: you can't put an artificial eye in that socket.

Q Then a portion of this frontal bone that the eyebrow covers is gone altogether out of this skull? A Yes.

Q And a part of the skull has been removed
20 altogether? A Yes, sir.

Q That part of the skull which projects over the eye? A Yes.

Q And for that reason he cannot wear an artificial eye? A That is right. At any rate I would be loath to make him do it because his brain is right here and is exposed.

Re-cross by Mr. Kalisch.

Q Could you repair the muscle over the eye?
30 A No, sir. I would hate to tackle that again.

Re-direct by Mr. Tiffany.

Q Are there any possibilities that this injury will cause a condition in the future that you cannot foresee now?

(Objected to as being a new basis and not covered by the petition.)

Mr. Tiffany. I ask it as foundation for applying in the future for further relief.

40 *The Court.* I will sustain the objection.

Re-cross by Mr. Kalisch.

Q When did he reach the condition that he is in now with reference to the disabilities with respect to which you have testified? A I don't understand the question.

By the Court.

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Q When did he get as well as he is now? A I should say about three or four weeks ago; in fact he was better than he is today, because he did not then have a discharge from the upper part of the eye as you see it now; that broke open about a week ago.

By Mr. Kalisch.

Q When will he reach the point at which you don't expect him to be better for the rest of his life? A About in three or four months more.

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By the Court.

Q Does this discharge show an active condition yet? A Yes. It shows a loose bone in there that may have to be removed, it has the signs from discharging bone.

Q Then in your opinion it will require another operation? A Yes, sir. If it is a small piece of bone it may come out itself. I would hate to operate on him again, it would be very dangerous.

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Q How long would it require to determine whether it must be operated on again? A In about two months, provided the condition does not become inflamed or more acute.

Q Your percentages are based on a total and permanent disability of the man? A As he is.

Q When you say taking the whole injury he has fifty per cent. of disability, you mean fifty

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per cent. of the total temporary and permanent disability? A Yes.

PETITIONER RESTS.

RESPONDENT RESTS.

10 *Mr. Tiffany.* There is no question of the compensation being 100 weeks for a lost eye, and I think the full period of temporary disability should be allowed. The doctor has testified that there is twenty-five per cent. of disability total, for the total partial disability—

The Court. The statute would allow four hundred weeks.

Mr. Tiffany. That would be a hundred
20 weeks of it. And then he has a temporary condition which the doctor testifies he cannot expect to cease within four months. And I think the defendant should show that that has ceased, instead of the petitioner being required to show that it continues.

Mr. Kalisch. My view is a hundred weeks for the lost eye, also temporary disability from the date of the accident up to two
30 months from today.

The Court. Should I only find today that he is suffering from temporary disability with regard to the loss of that eye or part of the bones there? The doctor testifies it may be necessary to perform another operation and he cannot determine that until two months more elapse; and then he might have to perform another operation, and then there would be another period of temporary
40 disability.

Mr. Kalisch. I think we can only consider the condition of the man today. The doctor says there may be two months more in which he may be temporarily disabled. But I think the petitioner is bound to show temporary disability, and they have shown it up to two months from now, and that he is entitled to 100 weeks for temporary disability. The statute protects this man if the Court makes an allowance such as this man is entitled to which will cover four years, two hundred weeks, and after fifty-two weeks he may come in and show his injuries have increased. Why should we be called upon to come in when the statute protects him for the period of fifty-two weeks?

The Court. I will allow him one hundred weeks for the loss of the eye as permanent disability; and I will decide that he is now suffering from a temporary disability from the loss of the skull or brain or crushing in of the skull, and I will not find today as to what the amount of the temporary disability is for the loss of the skull or brain.

Mr. Tiffany. I understand that here is a double partial disability which you do not determine on now? What about the temporary disability?

The Court. That it exists and will continue to exist. So far as his eye is concerned I have determined it at 100 weeks; and as to the skull and brain I have not determined it.

Mr. Tiffany. That places us in the position of again applying when the temporary disability ceases.

Certificate of Court Reporter.

The Court. I will put in the order leave to either party to apply to this Court at any time the defendant may say the temporary disability has stopped, or to the petitioner to make such application in order to have the permanent disability for that injury fixed.

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JERSEY CITY, HUDSON COUNTY, N. J.

I, the undersigned, JACOB MOESER, hereby certify that I am the regular reporter in the Court of Common Pleas in Hudson County, presided over by Mark A. Sullivan, Judge, and that I was such reporter on the eighth day of February, nineteen hundred and seventeen, and upon that day reported the testimony and proceedings in the case of Jerry Sorretino versus the D. V. G. Manufacturing Company then being tried in said court, and that the foregoing is a correct transcript of said testimony and proceedings and of the whole thereof.

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Dated, April 11th, 1917.

J. MOESER.

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Determination of Facts and Rule for Judgment.

(Entered March 24, 1917.)

HUDSON COUNTY COURT OF COMMON PLEAS. 10

JERRY SORRENTINO, by next friend, *Petitioner,* *vs.* D. V. G. MANUFACTURING CORPORATION, a corporation, *Respondent.*	*On Petition for Compensation.* *Determination of Facts and Rule for Judgment.*

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A petition having been filed in the above stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and provisions of an act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder" (approved April 4th, 1911), together with the several supplements thereto and acts amendatory thereof; and a time and place for the hearing of the said petition having been fixed; and it appearing to the Court that said petition and order fixing time and place of said hearing have been duly served upon the respondent on the 3rd day of January, 1917, and an answer having been filed by said respondent on the 25th day 30 40

of January, 1917, and the petitioner and respondent having appeared on the 8th day of February, 1917, the date to which the hearing on the said petition was adjourned, the petitioner being represented by J. Raymond Tiffany, for the firm of Weller & Lichtenstein, as his attorney, and the respondent by Isidor Kalisch, as his attorney; and the Court having heard the testimony offered in behalf of the parties hereto and counsel having been heard·

I do find and determine from the evidence taken in this cause as follows:

1. The petitioner was on September 11th, 1916, employed by the respondent as a helper on a box squeezing machine.

2. That at the time of the injury the said petitioner, Jerry Sorrentino, received wages in said employment at the rate of $10.50 per week.

3. On September 11th, 1916, while the petitioner was workig in the course of his employment by the respondent as such helper on a box squeezing machine at its place of business in the City of Hoboken, New Jersey, an elevator managed and controlled by the respondent, its agents and servants, broke and fell, causing a piece of iron or steel to strike the petitioner's head with such great force that it tore out his right eye and crushed or mashed in a considerable portion of the petitioner's skull, causing about a small teacupful of brain matter to ooze out of the brain cavity; that the petitioner was removed to St. Mary's Hospital in the City of Hoboken, where he remained for a period of twenty-nine days, during which time his life was despaired of; that by reason of the nature of the injury to the petitioner's head and a

continuous discharge of pus from the eye-socket, it is impossible at this time to say how long the temporary disability will continue; that another operation may or may not be necessary, which fact cannot at this time, according to the undisputed testimony, be determined; that in addition to the loss of the eye, petitioner sustained a disability partial in character but permanent in quality, the extent of which cannot be determined until the temporary disability has ceased.

4. That said accident arose out of and in the course of the employment of the petitioner herein by the above named respondent.

5. That the respondent herein had knowledge of the said accident.

6. The petitioner is entitled to compensation at the rate of 50% of his weekly wages, to wit, $10.50, or compensation at the rate of $5.25 per week for an injury causing a temporary disability, beginning on the 25th day of September, 1916, and continuing until said temporary disability has ceased, not to exceed, however, a total of 300 weeks, and with leave to either party to apply at any time for an order modifying this award; and that said petitioner is entitled to further compensation at said rate for a period of 100 weeks by reason of the loss of said right eye, and to compensation for a disability partial in character but permanent in quality for a period, the duration of which I will determine upon the termination of the temporary disability, in no case, however, is said compensation to run for a period of more than 400 weeks.

7. That the petitioner is entitled to the costs of this proceeding.

It is, therefore, on this 24th day of March, 1917, on motion of J. Raymond Tiffany, Esquire, representing Weller & Lichtenstein, representing the petitioner, ORDERED, that the respondent herein pay or cause to be paid to the said petitioner the sum of $5.25 per week for a period beginning on September 25th, 1916, and continuing during the duration of said temporary disability, and then for a period of 100 weeks as compensation for the loss of said right eye; and further at the expiration of said 100 weeks, for a period to be determined hereafter upon proof that the temporary disability has ceased, but in no event shall said compensation run for more than 400 weeks from said 25th day of September, 1916, and also the costs of this proceeding to be taxed.

And it is Further Ordered, that Weller & Lichtenstein, attorneys for this petitioner, be and they are hereby allowed the sum of $100 as a counsel fee herein.

Judge of the Hudson County
Court of Common Pleas.

It is hereby considered that judgment final is entered in the above entitled cause in favor of Jerry Sorrentino, petitioner, and against the D. V. G. Manufacturing Corporation, respondent, for compensation at the rate of $5.25 per week, beginning on September 25th, 1916, and continuing until the date herein and until the further order of this Court, but in no case for a period greater than 400 weeks from the said 25th day of September, 1916.

Rule actually entered this 24th day of March, 1917, on motion of

Reasons.

Acknowledged May 3d, 1917.

New Jersey Supreme Court.

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D. V. G. Manufacturing Corporation, a corporation, *Prosecutor,* *vs.* Court of Common Pleas in and for the County of Hudson and John J. McGovern, Clerk of the said Court of Common Pleas, and Jerry Sorrentino, by next friend, *Defendants.*	*On Certiorari.* *Reasons.*

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

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1. Because the Trial Court erroneously and improperly allowed a maximum compensation of four hundred weeks.

2. Because the Trial Court erroneously and improperly allowed a maximum of three hundred weeks for temporary disability.

3. Because the Trial Court erroneously and improperly found that temporary disability was still existing at the time of hearing.

4. Because the Trial Court erroneously and improperly refused to make a finding of the

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percentage of permanent and total disability from which injured was suffering at the time of hearing.

5. Because the Trial Court erroneously and improperly allowed compensation for a temporary disability upon the possibility that within two months from hearing an operation might be determined upon.

6. Because the Trial Court practically permitted the injured to fix his own temporary disability.

7. Because the Trial Court erroneously and improperly determined "by reason of the nature of injury to injured's head and a continuous discharge of pus from the eye socket, it is impossible at this time to say how long the temporary disability will continue, that another operation may or may not be necessary, which fact cannot at this time, according to the undisputed testimony, be determined," and because the above finding continued the compensation payments to a maximum of three hundred weeks.

8. Because the Trial Court erroneously and improperly disregarded the uncontradicted testimony adduced at the trial, namely: that at the time of trial the injured was suffering from a 25% loss of general efficiency.

9. Because at the time of trial the Trial Court erroneously and improperly refused to make a finding as to injured's condition at that time, with regard to both permanent and temporary disability.

10. Because the Trial Court's findings with regard to temporary and permanent disability are not based upon facts adduced at the trial.

KALISCH & KALISCH,
Attorneys of Prosecutor.

Opinion.

Filed September 14, 1917.

NEW JERSEY SUPREME COURT.

JUNE TERM.

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D. V. G. MANUFACTURING CORPORATION, a corporation, *Prosecutor,* *vs.* COURT OF COMMON PLEAS OF HUDSON COUNTY, *et als.,* and JERRY SORRENTINO, *Defendants.*	*On Certiorari.*

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Submitted June 6th, 1917. Decided September 14th, 1917.

Before Justices Swayze, Bergen and Black.

For the prosecutor, Messrs. Kalisch & Kalisch.

For the defendants, Messrs. Weller & Lichtenstein.

Per Curiam.

This is a workman's compensation case, in which there is no dispute except as to the extent of the injuries and the method of making the award for compensation. On September 11th, 1916, while the petitioner was working in the course of his employment, as a helper on a box squeezing machine in the City of Hoboken, an elevator broke and fell causing a piece of iron or steel to strike the petitioner's head with such force, that it tore out his right eye, crushed or mashed a portion of petitioner's skull, causing

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brain matter to ooze out of the brain cavity. The trial Court found that the petitioner was entitled to compensation at the rate of $5.25 per week for an injury causing a temporary disability, beginning on the 25th day of September, 1916, and continuing until such temporary disability has ceased, not to exceed 300 weeks with leave to either party to apply at any time for an order modifying the award, to a further compensation at the same rate for a period of 100 weeks for the loss of the right eye and to compensation for a disability partial in character, but permanent in quality for a period, the duration of which will be determined upon the termination of the temporary disability, but in no case is said compensation to run for a period of more than 400 weeks. The prosecutor insists, that the Court should beginning two weeks after the accident award compensation for the temporary disability for a period up to the date of trial and for three months thereafter; and beginning at that time, compensation for the permanent disability with regard to the loss of the eye and a further allowance of permanent disability for the twenty-five per cent. loss of general efficiency for one hundred weeks more. It was not error for the trial Court to make the award of compensation as was made in this case, under the evidence. The judgment of the Court of Common Pleas of Hudson County is affirmed with costs.

Order of Affirmance.

Dated September 18, 1917.

NEW JERSEY SUPREME COURT.

D. V. G. Manufacturing Corporation, a corporation, *Prosecutor,* *vs.* Court of Common Pleas of Hudson County, *et als.,* and Jerry Sorrentino, *Defendants.*	*On Certiorari.* *Order of Affirmance of Judgment.*

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This cause having been duly argued at the June Term, 1917, of this court by Kalisch & Kalisch, Esqs., of counsel for the prosecutor, and J. Raymond Tiffany, Esq., of Weller & Lichtenstein, of counsel for defendants, and the court having considered the same and finding no error in the judgment of the Court of Common Pleas of Hudson County;

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It is Thereupon Ordered and Adjudged that the judgment of the Court of Common Pleas of Hudson County removed by writ of certiorari in this cause, be affirmed with costs; and that the record be remitted to the Court of Common Pleas of Hudson County to be proceeded with in accordance with this judgment and the practice in such case made and provided.

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On motion of

WELLER & LICHTENSTEIN,
Of Counsel with Defendants.

Dated September 18, 1917.

A true copy,

Wm. C. Gebhardt,
Clerk.

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Notice of Appeal and Reasons.

Filed September 21, 1917.

NEW JERSEY SUPREME COURT.

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D. V. G. Manufacturing Corporation, a corporation, *Prosecutor-Appellant,* *vs.* Jerry Sorrentino, by next friend, *et als.,* *Defendant-Appellee.*	*On Certiorari.* *Notice of Appeal and Reasons.*

20 Weller & Lichenstein, Esqs.,
Attorneys of Defendants-Appellee.

Sirs:

Please Take Notice that the prosecutor-appellant appeals from the entire judgment entered in the New Jersey Supreme Court, to the Court of Errors and Appeals, on the following grounds:

1. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment
30 of the Hudson County Common Pleas Court in allowing a maximum compensation of four hundred weeks.

2. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment of the Hudson County Common Pleas Court in allowing a maximum of three hundred weeks for temporary disability.

3. Because the New Jersey Supreme Court erroneously and improperly affirmed the judg-
40 ment of the Hudson County Common Pleas Court

in holding that temporary disability was still existing at the time of hearing.

4. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment of the Hudson County Common Pleas Court in refusing to make a finding of the percentage of permanent and total disability from which injured was suffering at the time of hearing.

5. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment of the Hudson County Common Pleas Court in allowing compensation for a temporary disability upon the possibility that within two months from hearing an operation might be determined upon.

6. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment wherein the defendant-appellee was practically permitted to fix his own temporary disability.

7. Because the New Jersey Supreme Court erroneously and improperly affirmed the judgment of the Hudson County Common Pleas Court wherein it was determined "by reason of the nature of injury to injured's head and a continuous discharge of pus from the eye socket, it is impossible at this time to say how long the temporary disability will continue, that another operation may or may not be necessary, which fact cannot at this time, according to the undisputed testimony, be determined," and because the above quoted finding continued the compensation payments to a maximum of three hundred weeks.

8. Because the New Jersey Supreme Court erroneously and improperly affirmed the judg-

ment of the Hudson County Common Pleas Court in disregarding the uncontradicted testimony adduced at the trial, namely: that at the time of trial the injured was suffering from a 25 per cent. loss of general efficiency.

9. Because at the time of trial, the New Jersey Supreme Court erroneously and improperly affirmed the Hudson County Common Pleas Court in refusing to make a finding as to injured's condition at that time, with regard to both permanent and temporary disability.

10. Because the New Jersey Supreme Court erroneously and improperly affirmed the Hudson County Common Pleas Court's findings with regard to the temporary and permanent disability, whereas such findings are not based upon the facts adduced at the trial.

KALISCH & KALISCH,

Attorneys for Prosecutor-Appellant.

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

New Jersey Court of Errors and Appeals

D. V. G. MANUFACTURING CORPORATION, a corporation, *Prosecutor-Appellant,* *vs.* COURT OF COMMON PLEAS, in and for the County of Hudson, and JOHN J. MCGOVERN, Clerk of the said Court of Common Pleas, and JERRY SORRENTINO, by next friend, *Defendants-Respondents.*	*On Appeal.*

Brief for Appellant.

This is an appeal from the Supreme Court, affirming the Determination of Facts and Order, or judgment of the Hudson County Court of Common Pleas.

The action was based upon the provisions of the Workmen's Compensation Act, through an accident in which Jerry Sorrentino, while in an elevator which fell, was struck by a piece of steel in the head, with the result that his right eye was lost and his skull injured.

The reasons on appeal appear on pages 32 and 33 of the State of the Case, and are ten in number, of which the most important refer to two questions—first, with regard to the propriety of the court's award with respect to the temporary disability; and, the second, with respect to the court's award of compensation for permanent disability.

The appellant's contention is, that the trial court failed to make a proper determination

with regard to both the temporary and permanent disabilities. Reason Ten, on appeal, might read in this manner:

> *"Can a Common Pleas Court Judge enter a judgment, under the Workmen's Compensation Act, without a single fact in evidence to support such judgment?"*

Some of the other Reasons on Appeal incidentally cover this same point, but we shall hereinafter refer to such other reasons.

On certiorari, the New Jersey Supreme Court disposed of all the questions raised, by merely stating:

> "It was not error for the trial court to make the award of compensation as was made in this case, under the evidence."

While this disposition of the points raised resulted in an affirmance of the judgment entered in the Hudson County Common Pleas Court, it did not tend to clarify the situation, but rather to confuse the effect of previous decisions of the Supreme Court covering similar subject matter. By the affirmance of the Common Pleas Court, the Supreme Court practically answered the opening question of this brief in the affirmative; and this is contrary to its previous ruling in the case of *Long* v. *Bergen Common Pleas,* 84 N. J. L., p. 117. The Court of Appeals in this State, in *Nevich* v. *D. L. & W. R. R. Co.,* 100 At. Rep., p. 234, strongly held that there must be evidence to support a finding of the trial court. How can these diametrically opposed opinions, namely, that rendered in the Supreme Court in this case, and the two cited cases stand, since, if the one is correct, the other must be incorrect?

We beg to refer to Reasons Four, Eight, and Nine, which relate to the failure of the trial court to make a proper allowance for the permanent partial disability. In attempting to convince the court of this failure, it seems proper to state first the undisputed medical testimony in the case—there being only one doctor produced, and he appeared as the expert for the injured man. By the perusal of the testimony of Dr. Sullivan, the doctor referred to, and by the perusal of the rest of the testimony in the case, if it is necessary to read any other testimony, it will stand out without contradiction, what injuries were suffered by the claimant of compensation, and what degree of disability was caused by such injuries. What injuries, does the doctor testify, were suffered by the respondent, and, secondly, what disability resulted from said injuries? There is no dispute that the respondent's right eye was lost (p. 13, Case, ll. 19 to 20). The respondent's doctor was of the opinion that the eye socket condition, or skull injury, as distinguished from the loss of the eye, was of a permanent nature, because he included this condition in his estimate of a 25% loss of total and permanent efficiency, which would have entitled the respondent to compensation of 100 weeks, inasmuch as the statute provides 400 weeks as the maximum for permanent and total disability.

Dr. Sullivan's Testimony.

> "Q You say he has a 50% disability? A Yes, considering everything.
>
> Q Excluding the loss of his eye, what would you call it? A That is hard for me to say. If you don't include the loss of the eye it would be hard for me to make and conjecture.

Q That is a large part of the 50%? A No. I think it is 20% of the 50%.

Q Leaving a balance of 30% of brain loss? A Due to brain injury and skull injury.

Q And in that do you reckon the loss of hearing and of smell? A I consider everything.

Q And of taste? A I have not testified to any taste.

Q But you place your conclusion of traumatic disability on certain elements? A I would not consider it is very much.

Q The loss of smell and hearing are what portion of 30%? A About 5%.

Q That leaves 25%. What is that 25% made of? A *Brain injury and skull injury* and what the future may bring forth.

Q What do you think may be brought forth by the future? A I did not include that as to the future.

Q Did you consider anything else except the brain injury and the skull and the fracture? A We did consider the hearing.

Q But I mean in the 25%? A No.

Q What part did you consider the brain injury? A That would be very hard to say.

Q What part would you consider the fracture? A Hard to say. I would say include both in the 25%. If you wanted to say the fracture only, it would be very difficult to say; no doctor could tell you what the brain injury and the fracture would amount to separately." (Page 15 Case, l. 7, to p. 16 Case, l. 12.)

The same witness testified as follows:

> "Q You think he has suffered 25%, except those elements you took out piece by piece from your estimate? A That is figuring on the basis of 50%, general disability." (Page 17, Case, l. 5 to l. 9.)

The above excerpts of testimony clearly describe the injuries, and certainly, in no uncertain fashion, estimate the extent of disability caused thereby. It will be seen, that excluding the loss of the eye, for which, under the Compensation Act the injured was entitled to 100 weeks' compensation, the remaining elements of permanent impairment amounted to a disability equal in extent to a 25% loss of general efficiency. If there were some testimony in the case which would create a doubt, with regard to the propriety of such estimate, or the correctness of the estimate, there might be some brief for the trial court's findings; but by an examination of the entire testimony, we challenge the discovery of a single statement in the case which will, in any way, contradict Dr. Sullivan's testimony as we have hereinbefore stated it. If the trial court, indeed, by looking at the injured, could see for himself an actual loss which the doctor's estimate did not cover, the former might be warranted in calling the doctor's attention to such condition, or in some way having an allowance made for this condition, not provided for in the doctor's estimate; but such a contingency did not arise in this case, because each injury received by the respondent was considered by the doctor, who estimated a certain percentage of loss, which these injuries together, totalled; and this is in conformity to the statute, since the estimate was made in regard to disabilities which are

not specifically mentioned in the schedule under the Compensation Act, but which are comparable with the section providing compensation for 400 weeks in cases of permanent and total disability. There was nothing inherently untruthful, uncertain, or doubtful about the medical testimony, inscribing the injuries and the disabilities caused thereby, now was the same disputed, and therefore, the trial court was bound to accept it, and make it a part of his findings. (*Bauldauf* v. *Russell,* 96 Atl. Rep., p. 96.)

There is one part of Dr. Sullivan's testimony which the Trial Court did accept, and which was incorporated in his findings, and that was, that there was *a permanent and partial disability* caused by the injuries received by the respondent, for in the Determination of Facts and Order, the following statement appears:

> "* * * in addition to the loss of the eye, petitioner sustained a disability, partial in character, and permanent in quality, the extent of which cannot be determined until the temporary disability has ceased." (Page 25 Case, l. 10 to l. 14.)

The evidence does support the statement that there was a permanent and partial disability, but it does not support the finding that the extent of the permanent and partial disability could not be fixed at the time of the hearing. Compensation for permanent disability, under the statute, starts at the termination of the period during which compensation for temporary disability has been paid; but the time at which compensation for a permanent disability is to start, is not indicative of the time when the extent of the permanent disability is fixed. This concrete example may be given:

Suppose a man has his hand cut, so as to reduce permanently the use of the fingers on

the hand, and at the same time, it takes three weeks before the fingers are healed sufficiently to attempt to use them. While the layman may not be able to say what the permanent loss of use is, still a medical expert may look beyond the temporary inability to use the fingers, and conclude that when the cuts are healed that, by the severance of this tendon or that tendon, a certain loss of use will be present, which would amount to a certain percentage of the loss of the hand. So, although the expert, directly after the accident may determine what the permanent disability will be, the compensation for it under the statute cannot be paid until the termination of the temporary disability.

The Trial Court has misconstrued the provision of the act regarding the times when payments for permanent and temporary disability shall start, ~~but~~ and has applied the rule when fixing the extent of such ~~testimony and permanent~~ disabilities. Under the testimony, the compensation for temporary disability would have run to a point three or four months after the hearing, at which time compensation for the permanent disability would begin. (Page 19 Case, l. 19 to l. 21.)

For the purpose of clearly setting forth the correctness of the doctor's estimate of the permanent and partial disability we wish to say that it is to be remembered that the loss of smell and hearing was excluded from consideration, and that the claim for the same was abandoned. (Page 10 Case, l. 29, to p. 11 Case, l. 23; p. 13 Case, l. 32 to l. 40; p. 16 Case, l. 26 to l. 28.)

The court assured itself of the basis of the doctor's estimate, as will be seen by the ques-

tion put by the court, and the doctor's answer thereto:

> "Q Your percentages are based on a permanent and total disability of the man? A As he is." (Page 19 Case, l. 37 to l. 38.)

In going over the doctor's testimony, a statement by him will be found suggesting a 50% of permanent and total disability, but that estimate, it will be seen, included certain claims which were not set up in the petition, and were abandoned, and also the loss of the eye, which, of course, should have been excluded from his estimate, since under the act, there is fixed statutory allowance for the loss of the eye. From the reading of the doctor's testimony it will be seen that by eliminating the eye injury, his 50% estimate would be reduced to 30%. (Page 15 Case, l. 13 to l. 20.) There is a further 5% elimination, because of the fact that there was no claim set up in the petition for loss of smell and hearing. (Page 15 Case, l. 27 to l. 32.)

Whether the Trial Court was not impressed with the ability of Dr. Sullivan, we cannot say; but if he were not, and did not wish to take the doctor's estimate, the hearing could have been continued, and the injured might have been permitted to produce further medical testimony with regard to his condition. If the court did not believe that the doctor was capable enough, he might have questioned the doctor and so allowed counsel to see wherein the doctor's testimony was doubted; but instead, the court permitted all the doctor's testimony to stand, and then disregarded it. There can be no doubt that as the case stood at the end of the trial, Doctor Sullivan was the only witness produced, capable of testifying with regard to the

injuries received and the disabilities caused thereby. What basis did the court have to say that Dr. Sullivan's estimate of 25% disability was incorrect, or was not acceptable to the court? If a Trial Court is permitted to disregard the uncontradicted testimony of a medical witness, he would be then setting himself up as a better judge of a physical condition, which requires expert knowledge, than the expert himself, who has made a study of the subject, and who has been brought into court as an expert witness thereon. An expert, at least, submits his views of a physical condition to cross examination; but if a Trial Court may captiously disregard medical testimony, and make findings, without evidence to support them, it will be seen that his views are not subject to any cross examination. He may be familiar, to a certain degree, with such physical condition and, again, he may not.

If it is proper for the court, after an expert has said that there is a 25% permanent loss, to file a conclusion that it is impossible to estimate the loss, the court may, with equal propriety, after such testimony, file a conclusion that the loss amounts to 90%.

Since the percentage loss was ascertainable at the time of trial, the court was bound to make his findings, having due regard to the testimony adduced.

> "The proper course was to deal with the case, exactly as it stood at the time (meaning at the time of trial); that is, a case of permanent disability, and to allow compensation, etc." (*Braunstein* v. *Feldman,* 87 N. J. L., bottom page 21).

This ruling would require the Trial Court to find as a fact, that there was a loss of 25%,

for which the injured man was entitled to compensation for a period of 100 weeks, in addition to the compensation for the loss of the eye, and for the temporary disability, which will hereinafter be discussed.

We therefore maintain that the ruling of the Trial Court should be modified to the extent that the permanent disability should be fixed as equal to 25% of total and permanent disability.

Reasons One, Two, Five, Six and Seven may be considered together, as they refer to the propriety of the court's allowance of the maximum of 300 weeks for the temporary disability, for which allowance there was no basis, as far as the evidence adduced at the trial will show; and the following excerpt of the Determination of Facts and Order, we desire to comment briefly upon:

> "* * * it is impossible, at this time, to say how long the temporary disability will continue; that another operation may or may not be necessary, which fact cannot at this time, according to the undisputed testimony, be determined." (Page 25 Case ,l. 5 to l. 9.)

This quotation from the Determination of Facts and Order contains a bald mis-statement of the evidence, since the doctor testified that the temporary disability would not last longer than 4 months from the date of the trial. (Case, p. 19, ll. 19-25.)

Just before the beginning of this excerpt, the court states as his reason for concluding that the temporary disability cannot be estimated at the time of trial, was because of the nature of the injury to the petitioner's head, and the continuous discharge of pus from the

eye socket. (Page 24 Case, to the top of page 25.)

This reasoning is incorrect, because on the doctor's re-direct examination, referring to the discharge of pus, the doctor testified:

> "Q What disfigurement is there apparent? (Petitioner exhibits his eye.) A This is still discharging from this point." (Page 18 Case, l. 8 to l. 10.)

It is to be remembered that the doctor considered this condition as part of the permanent condition; but even assuming that it should be considered a temporary disability, the court's conclusion would be incorrect, since the doctor stated that the temporary condition would disappear within three or four months. The doctor knew of this skull condition when he said that the temporary disability would cease in three or four months. Therefore the court could not find to the contrary.

> "Q When will he reach a point at which you don't expect him to be better for the rest of his life? A About in three or four months more." (Page 19 Case, l. 19 to l. 21.)

This testimony fixes the end of the period of temporary disability, according to the decisions in this State. (*Vishney* v. *The Empire Steel & Iron Co.*, 87 N. J. L., p. 481.) and more particularly

Birmingham v. Le
& Wilkesbarre Co
95 Atl.p.242,

Therefore, at the time that the injured man reached a point where there would be no change in his condition, his temporary disability was at an end, and from that time compensation for his permanent condition should commence.

The court was misled by the possibility of another operation which might be performed at the end of two months from the time of the

hearing, and because if such an operation should be performed, there would be another period of temporary disability. (Page 20 Case, ll. 31-40.)

Braunstein v. *Feldman,* 87 L., p. 21.

It was improper for the court to consider, at the time of this hearing, the vague possibility of an operation in the future, because it was problematical, and depended entirely upon the decision of the injured man. It cannot be doubted that if the injured man determined not to have an operation, that his condition was permanent; *and the likelihood was that there would be no operation, because his doctor thought it was dangerous.* (Page 19 Case, ll. 28-32.)

Therefore it was the duty of the court to fix some time definite at which the temporary disability would end, which, as we have before stated, would be three months from the date of the hearing, according to Dr. Sullivan's testimony. (Page 19 Case, ll. 19 to 21.)

The possibility of an operation in the future must be disregarded in fixing the temporary disability, because if an operation were performed, and there was another period of temporary disability, a thing which the court feared would occur, the extent of such disability would be readily ascertainable, and the injured might make an application for a modification of the order in the manner prescribed by the statute, namely, after a year from the date of Determination of Facts and Order in this proceeding, and in that way a further allowance might be made for the intervening temporary disability, while recuperating from the operation. There would be no hardship upon the injured, either,

because there was an allowance of 100 weeks' compensation for the permanent loss of his eye, and this would carry the compensation payments for more than a year from his hearing, when the application for a modification of the original award could be made. (*Braunstein* v. *Feldman,* 87 N. J. L., p. 21.)

The court might just as well have permitted the temporary disability to run until the end of the 300 weeks, at which time the injured could submit to an operation, and in that way obtain the benefit of the full period of weeks allowed by the statute for temporary disability.

We have referred to the fact that injured's doctor stated that an operation was dangerous, and that he would not like to perform it. (Page 19 Case, ll. 28 to 32.)

This eye socket condition is the only one upon which a claim for temporary disability is based, and we therefore maintain that the order should have allowed no compensation for temporary disability after May 8th, 1917, which would be three months from the date of hearing. The burden of showing both the permanent and temporary disability remains with the petitioner throughout the trial. (*Bryant* v. *Fissell,* 84 N. J. L., p. 72.) In the Determination of Facts, however, the Trial Court has shifted the burden to the employer, so that if the latter doesn't continually have the injured man watched, and pay for periodical medical examinations of the injured man, to lay the foundation for an application for a re-hearing, the allowance for temporary disability would continue during the 300 weeks, the maximum which the statute allows for temporary disability. If the burden rests with the injured to prove his case, it is improper for the Trial Court to shift that bur-

den, so that the maximum compensation for temporary disability will result, unless the employer makes an application to reduce it. Why would it not be equally proper, as the Braunstein case holds, for the application for a modification to be made by the injured? In this way the burden remains where the statute places it. We think that the entire opinion in the Braunstein case is applicable to all the facts in the one at bar.

And therefore, in conclusion, we beg to state that the court's finding, that the extent of the temporary disability could not be determined, should be modified to the extent that the same should run for a period of three or four months from the date of the hearing, inasmuch as the testimony supports that conclusion.

The material parts of the Determination of Facts with which the prosecutor is dissatisfied in point of law, appear on pages 24 and 25 of the case. We shall briefly sum up what we consider to be erroneous conclusions appearing therein.

The court allowed the possibility of an operation to influence his finding as to both temporary and permanent disability. His remarks at the close of the trial indicate that the operation was a paramount thought in his mind.

> "*The Court.* Should I only find today that he is suffering from temporary disability with regard to the loss of that eye or part of the bones there? The doctor testifies it may be necessary to perform another operation and he cannot determine that until two months more elapse; and then he might have to perform another operation, and then there would be another period of

temporary disability." (Page 20 Case, ll. 31 to 40.)

The vague possibility in the future of the operation had great weight, and was improperly considered by the Trial Judge. And this is considered to be strictly improper by Justice Swayze in the case of *Braunstein v. Feldman,* above referred to, for he says:

> "It is for the court, under the statute, to determine the compensation, and the court can act only on the facts before it—not upon the uncertain possibility of the future.
>
> "The proper course was to deal with the case exactly as it stood at the time, that is, a case of permanent disability."

The error is not dered harmless b reservation of t right to a modif tion in the ever an earlier termi of temporary dis lity, Birminghan Lehigh & Wilkesb Coal Co. 95 Atl.

This permanent disability, we claim, would start three months after the hearing. (Page 19 Case, ll. 19 to 21.)

We have heretofore referred to the fact that the court admitted that there was a permanent and partial disability. (Page 25 Case, ll. 10 to 14.) He merely refused to take the doctor's opinion as to its extent, and determined therefore, that he could not fix the extent of the permanent disability until after the temporary disability had ended.

It is our contention that the compensation to the injured should have been as follows:

Medical fees during the first two weeks after the accident, and beginning at that time, compensation for the temporary disability for a period up to the date of trial, and for three months thereafter; and beginning at that time, compensation for the permanent disability with regard to the loss of the eye, for 100 weeks, and a further allowance of permanent disabil-

ity for the 25% loss of general efficiency for 100 weeks more.

Any other finding under the facts adduced at the trial, would be improper. We therefore respectfully submit that the judgment under review should be reversed or modified in accordance with the views expressed herein.

Respectfully submitted,

KALISCH & KALISCH,
Attorneys of Prosecutor.

ISIDOR KALISCH,
On the Brief.

New Jersey Court of Errors and Appeals 10

D. V. G. MANUFACTURING CORPORATION, a corporation, Prosecutor-Appellant, vs. COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF HUDSON, JOHN J. MCGOVERN, Clerk of said Court of Common Pleas, and JERRY SORRENTINO, by next friend, Defendants-Respondents.	On Certiorari, On Appeal from Supreme Court. 20

BRIEF OF THE RESPONDENT, JERRY SORRENTINO.

On September 11th, 1916, Jerry Sorrentino, 30
while employed by the D. V. G. Manufacturing Corporation, at its factory at Hoboken, Hudson County, New Jersey, as a helper on a box squeezing machine, was struck on the head by a piece of iron or steel, his skull was fractured and smashed or crushed over his right eye, which was gouged out and he was otherwise injured about his head (12-15; 13-6, 17-11). He was removed to St. Mary's Hospital where he remained until October 10th,

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1916; *he was still under medical treatment at the time of the trial* (19, 10, etc.).

The only question involved was the extent of the injury and the period for which compensation should be allowed.

Respondent's wages were $10.50 per week, and it was admitted that the accident arose out of and in
10 the course of the employment of the respondent by the appellant herein.

An examination of appellant's reasons on appeal discloses his principal complaints to be, first, that the Supreme Court erred in affirming the Findings of the Trial Judge whereat appellant contended that the Trial Judge erred in not fixing a definite date for the termination of temporary disability, and, second, because the Trial Court allowed the question of the extent of the total and
20 permanent disability, other than the loss of the eye, to rest in abeyance, pending the termination of the temporary disability.

We respectfully contend that in so doing the action of the Trial Court, in view of all the evidence, was proper and the approval thereof by the Supreme Court should not be disturbed but rather affirmed.

The injury sustained by the defendant herein was extremely severe and violent (12, 15-35, 13,
30 1-30, 18, 1-30).

> "Q. What did you do? A. I saw him in the afternoon of his accident and found him unconscious, and *the front part of his head was smashed in, that if you drew a line in the direction of this arch coming through the orbit of the eye, the bone resembled an egg shell, crushed as if struck with a hammer. His eye was split in two and was lost, and he was in*
> 40 *such a state of shock that it was impossible*

to operate on him; we expected him to die, and I told the interne to watch him carefully and whenever he was recovered from the shock to let me know; and later that afternoon his condition was sufficiently good to operate on, *and I removed his eye and removed the soft tissue around the eye, and with a pair of forceps picked a large number of pieces of bone from his frontal process, head, his frontal sinus, which was smashed against his brain, and through here, his nose, the anterior ethmoidal cells were smashed—* 10

Objection is made to any evidence of injury which is not included in the petition.

Objection overruled. (13, 1-30.)

Q. Anything else? A. *And at the aperture the orbit was split.*

Q. What do you mean by the orbit? A. *The bony covering back of the eye which separates the eye from the brain. The first day the brain was oozing out profusely. The loss of brain matter was probably a small teacupful. It was an unusual case and we had no hopes of him, and two or three times while he was on the table we had recourse to artificial respiration, and it looked as if he would go any moment.* We removed his sinus and put in a plate and sent him downstairs, and he had a precarious twenty-four hours, and after about forty-eight hours he started to pick up. 20 30

Q. He had lost his eye? A. *He had lost his right eye.*

Q. *And due to the injury to his head you say part of his brain was taken out?* A. *At least a small teacupful.*

Q. What effect would that have on him? A. *The centers of the frontal lobe of the brain* 40

are fairly defined, and we know that the centres of memory are located there which he has evinced since by the loss of memory—17, 10-40).

Q. *Do I understand the forward part of his skull was smashed in?* A. *Yes, smashed in.*

Q. *And that smashing in extended over the right eye?* A. *Yes.*

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Q. *What would be the natural result of a fracture of the skull?* A. *Twenty out of every hundred fractures of the skull develop dementia or some form of insanity.*

Q. I mean what injuries would you expect to grow from a fracture of the skull? A. I don't quite understand. Do you mean the condition to-day?

Q. No. Right after the fracture or within a month of the fracture up to the present time? If you were told that a man had his skull fractured by a piece of iron falling down, what would you expect to result by a piece from that fracture? A. Eight out of ten he would die.

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Q. And that would be because the brain was injured? A. Because the brain was injured and there was shock.

Q. But that would not be the result unless the fracture was so extensive as to involve the brain? A. Yes, sir. *Some fractures do not involve the brain, but seldom are fractures so severe as this—here the brain just oozed out.*

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Q. Has the contour of the head been restored to the original before the accident? A. To a great extent (18, 1 to 30).

Q. Is there any disfigurement? A. Yes. *He will never be able to wear an artificial eye; it would destroy the filament in front of the brain.*

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Q. What disfigurement is there apparent? (Petitioner exhibits his eye.)

Q. *This is still discharging from this point. There is not enough protection for the brain there.* With an ordinary loss you would be expected to put an artificial eye in it. Look up with that eye. (Spoken to Petitioner.) He can't do it. Here is a loss. And here is a loss; you can't put an artificial eye in that socket. 10

Q. *Then a portion of this frontal bone that the eyebrow covers is gone altogether out of this skull?* A. *Yes, sir.*

Q. *That part of the skull which projects over the eye?* A. *Yes.*

Q. And for that reason he cannot wear an artificial eye? A. Yes.

Q. And for that reason he cannot wear an artificial eye? A. *That is right. At any rate I would be loath to make him do it because his brain is right here and is exposed.* 20

Re-cross by Mr. Kalisch:

Q. *Could you repair the muscle over the eye?* A. *No, sir; I would hate to tackle that again."*

The hearing took place on February 8th, 1917, and a discharge from the eye cavity was still occurring and would continue for about three or four months, and the question as to whether or not an operation would be necessary was problematical and depended on whether or not the condition became inflamed on more acute (19-33). The only certain permanent disability was the loss of an eye, for which an award was made of 100 weeks (pages 20-21). 30

The temporary disability, therefore, continued at the time of the hearing and would continue into 40

the future at least three or four months, and it could not be determined until the expiration of two months, if then, whether or not an operation would be necessary. At the time of the trial his condition was worse than three or four weeks previous (19-11). The doctor testified, "I would hate to operate on him again; it would be very dangerous" (19, 27-32), at the best it was merely an *expectation* on the doctor's part as to when the temporary disability would cease, pages 19-20, and the time then was uncertain.

In view of these facts it was impossible for the Court to determine with any degree of certainty that the temporary disability would cease at a certain time *in futuro. There was no question but that it would continue three or four months at least; then an operation, very dangerous to the life of the defendant, might be necessary. This could not be determined for two months at least, possibly longer, depending on the condition not becoming inflamed or more acute. If an operation were necessary, the temporary disability would be continued over a greater period during convalescence, a period which, by its very nature, could not by any possible conjecture be determined at the time of hearing.*

If the Court had fixed the temporary disability at four months, the appellant could have maintained, with the same degree of propriety that his present contention merits, that the period should have been the minimum of three months, or the date at which the question of whether or not an operation would be necessary, the outcome of which was uncertain. If death or something unforeseen resulted, the temporary disability would cease immediately, or it might continue for an uncertain period. Where such uncertainty exists, in all fairness and justice to the petitioner below, the only

award possible on the question of temporary disability was to allow disability for an undetermined period, subject to the right of the appellant to apply for a modification when, in its opinion, the period had ceased.

Section 2, paragraph 17, of the act grants the employer the privilege of an examination of the employee as often as may be reasonably requested; so it cannot be maintained that such a determination in this case would permit the defendant to fix his own compensation.

We find no fault with Braunstun vs. Feldman, 87 N. J. L., 21, wherein Mr. Justice Swayze, one of the justices, by the way, who sat in the branch of the Court below in the case at bar and voted an affirmance notwithstanding the fact that the Feldman case was called to his attention by the brief of counsel for the prosecutor below, said "the proper course was to deal with the case exactly as it stood (at the time of the trial)." We submit that this course was adopted in the case at bar for the extent of the injury was uncertain and could not be determined with any degree of accuracy and the Court so found. In the Feldman case the injury was to an eye, the exact compensation for the loss of which is fixed by the statute; there the injury would be only temporary, if an operation were submitted to, or otherwise 90% of the loss of an eye. Surely, to have held other than this Court did in that case would have permitted the employee to forego the operation and receive 300 weeks or to have delayed the operation over a long period and then claimed the permanent disability, and thus receive far more than the total loss of the eye would have entitled him to. But not so in the case at bar. Sorrentino's eye was gone—"his eye was split in two and was lost." The temporary disability here was due to the smashed and crushed

skull, the oozing out of the brain and the discharge from the upper part of the eye due to the broken skull bone—a condition for which the Act does not specifically provide. No definite date for the termination of this temporary condition could be laid down by the Court, as the necessity of an operation was uncertain, and the only proper
10 course was that pursued.

We feel "that the testimony justified the inference drawn by the Court of Common Pleas that the injury produced" was such that it was impossible then to say how long the temporary disability would continue.

Nevick vs. D., L. and W. R. R. Co., 100 Atl., 234.

20 No injustice has been done, for either party has the right to apply for a modification of the order.

Birmingham vs. The Lehigh & Wilkes Barre Coal Co., 95 Atl., 242, has no application to the case at bar for in that case the Trial Court allowed compensation for at least 50 weeks more than the statute provided and it is obvious that such error would not be rendered harmless by the reservation of the right of either party to modify.

Upon what hypothesis can it be said that the
30 period should have been made of short duration and compel the employee to again apply, and possibly again and again; where, on the other hand, by leaving the period undetermined, subject to the maximum allowed by the statute, the whole question could be settled by one hearing when the disability had actually ceased, with a maximum for all injuries fixed by the statute at 400 weeks.

The determination of facts and order of judgment on the question of temporary disability was
40 as follows (25, 20, etc.):

"6. The petitioner is entitled to compensation at the rate of 50% of his weekly wages, to wit: $10.50, or compensation at the rate of $5.25 per week for an injury causing a temporary disability, beginning on the 25th day of September, 1916, *and continuing until said temporary disability has ceased, not to exceed, however, a total of* 300 *weeks, and with leave to either party to apply at any time for an order modifying this award.*" 10

Temporary, as distinguished from permanent disability under the Workmen's Compensation Act, is a condition that exists until the workman is as far restored ~~in~~ as the permanent character ~~will per-mit~~ of the injuries will permit.

It may be argued that in view of *McNally* vs. *Hudson & Manhattan Railroad Co.*, 95 Atl., 122, the 20 defendant would not be obliged to submit to an operation, and hence the uncertainty of the outcome is not to be considered. The obvious answer to such a contention is that there is still no evidence in this case to permit the Court to find any definite date at which the temporary disability would continue without the operation, or at what time thereafter his condition would cease to improve and become permanent. No evidence was before the Court on this point sufficient to say 30 whether the condition at the time the operation became necessary would not become worse, improve or remain the same. It was impossible to say—he had been better two weeks before the hearing than he was then. The doctor's best evidence was he "expected" the condition to be as well as ever in three or four months, and then promptly testified as to the necessity of an operation in about two months.

We respectfully submit in this respect the Trial 40 Court did not err.

We now come to the question as to whether it was proper for the Trial Court, in view of the uncertainty of duration of the temporary disability, to allow the fixing of the permanent disability, other than for the loss of the eye, which the statute fixes, to remain in abeyance until such time as the temporary disability should cease.

10 The respondent had suffered horrible injuries—injuries such as in eight cases out of ten cause death—his condition at the time of the hearing was uncertain, to say the least. An operation, if necessary, would be eminently dangerous, for at the point of injury the brain was exposed. It is true Dr. Sullivan testified that at the *time of the trial* he "considered" the disability to be about 25% permanent; but he had also testified that the outcome of the next three or four months was prob-
20 lematical, in view of the fact that the respondent's condition was then worse than two weeks previous, a condition which he described as due to "a loose bone that may have to be removed (19-25). *Had the Court said that instead of 25% it found the permanent disability to be 30%, 40%, 50%, or any other per cent. certain, then it might possibly be argued that the Court's finding was improper, as he should have taken the doctor's testimony up to that extent.* But that is not this case; for here
30 the Court finds by reason of the uncertainty of the petitioner's condition at the time of the hearing it is impossible to then determine the exact extent of the permanent disability. No harm is done the appellant. No harm is done the respondent. Each have leave, under the Act, as set forth in the findings, to apply for an amplification or modification of the order upon the cessation of the temporary disability. This right was also reserved in the Court's findings and rule for judgment. The extent
40 of the temporary disability was a question of

fact of which the judgment of the Court of Common Pleas is conclusive and binding.

P. L. 1911, page 134, par. 18, vide;
Sexton vs. Newark Dist. Tel. Co., 84 N. J. L., 85;
Hettley vs. Moosbrugger, 88 N. J. L., 161;
Nevich vs. D., L. & W. R. R., 100 Atl., 234. 10

There was no testimony to guide the Court as to the percentage of permanent disability, should an operation be necessary and successful, for the reason that it was impossible to determine when an operation would or would not be necessary and the subsequent uncertainty of the temporary disability to follow the operation. The Court was not willing "to act on the uncertain possibilities as to the future," and fix permanent disability, but took the course which we submit was legal and fair—allowed the matter to remain in abeyance for the time being. 20

Finally: The appellant has no standing at this time to contest the determination of the Trial Court. It admits its liability for temporary disability for at least three or four months after the date of the hearing, as well as its liability for 100 weeks for the loss of the eye, as well as 25% permanent disability. The proper course for it would have been to have awaited the termination of the temporary disability for three months, and then, after the expiration of 100 weeks from that date, applied for a modification and to have the permanent disability fixed. 30

It has not been aggrieved by the findings in this respect, as the Court has not found any award as to extent of the permanent disability other than

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the admitted liability of 100 weeks for the loss of the eye.

In closing we desire to say we have not over-looked the cases cited by counsel for the respondent and not herein specifically distinguished; in fact we have read them very carefully and do not believe they are pertinent to the case at bar and hence will not comment thereon.

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We respectfully submit that the decision of the Supreme Court should be affirmed.

WELLER & LICHTENSTEIN,
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J. RAYMOND TIFFANY,
of Counsel.

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