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Dependent's Claim Petition for Compensation.

Dependent's Claim Petition for Compensation.

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU,

Trenton, N. J.

October 23, 1924.

10

DOMINICKA SMOLSKA,

Petitioner,

vs.

M. W. KELLOG Co.,

Respondent.

*Claim
Petition
No.*

Attorneys for petitioner, Raskin & Hornstein,
1 Exchange Place, Jersey City, N. J.

20

To the Workmen's Compensation Bureau of
New Jersey:

The claimant respectfully alleges the follow-
ing facts:

1. What was the full name of the decedent?
Joseph Smolska.
2. Where did decedent live? 132 Steuben St., Jersey City, N. J. 30
3. Sex of decedent. Male.
4. Date of birth of decedent? March 19, 1879.
5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

40

Dependent's Claim Petition for Compensation.

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Dominick Smolska	37	August, 1887	Wife
Rosie Smolska	8	July 1, 1916	Daughter
John Smolska	6	May 6, 1918	Son
Martha Smolska	3	February 13, 1921	Daughter
Lottie Smolska	1	Aug. 6, 1923	Daughter

- 10 6. By whom was decedent employed at the time of accident? (Give name and business address.) M. W. Kellog Company, 117 West Side avenue, Jersey City, N. J.
7. What was the business of the employer? Pipe bending, etc.
8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
- 20 9. Did he receive such notice from the employer? No.
10. Did the employer have knowledge of this accident? Yes.
11. Did you notify the employer of this accident? Yes.
12. If so, on what date? November 22, 1923.
13. Have you made claim to the employer for compensation? No.
- 30 14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Pipe bender.
15. When did the accident happen? November 22, 1923.
16. Where did the accident happen? At Kellog's plant, Jersey City, N. J.
17. What was the nature of the accident, and how did it happen? While in the course of his employment, was handling sewer pipes and large iron pipe fell on his left foot, necessitating amputation of leg, and causing death.
- 40

Dependent's Claim Petition for Compensation.

18. Did deceased work any after the accident? Yes.
19. If so, give date he was compelled to stop work? After he had been treated by the company's doctor, he stayed home for 31 days.
20. Give date of death. March 16, 1924. 10
21. Were his wages fixed by piecework? No.
22. If so, what was his average weekly wage? \$31, \$35 and \$40.
23. If wages were fixed by the hour, state rate per hour. 65 cents.
24. Give number of hours in an ordinary working day. 8 hours and overtime.
25. Give number of days in an ordinary working week. 48 hours and overtime.
26. State the amount of weekly wages. \$31, \$35 and \$40. 20
27. How much money have you received from the employer as compensation (not medical aid) since the accident? Nothing.
28. Has the employer promised to pay you any compensation? No.
29. If so, how much? Nothing.
30. Was medical aid required? Yes.
31. If so, was this service furnished by the employer? Yes. 30
32. What other sum did you expend for medical, surgical or hospital service? \$250.00.
33. Give name and address of physician and hospital. Dr. H. B. Robbins, 144 Mercer St., Jersey City.
- Dr. George Cannon, 354 Pacific Ave., was called, and he had him sent to the City Hospital on or about Feb. 15th, 1924.
- 40

Dependent's Claim Petition for Compensation.

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

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

10 Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 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.

DOMINICKA SMOLSKA,
132 Steuben St., Jersey City, N. J.
c/o Mrs. Anne Zak, Jersey City, N. J.

30

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

DOMINICKA SMOLSKA, 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.

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DOMINICKA SMOLSKA,
Petitioner.

Dependent's Claim Petition for Compensation.

Subscribed and sworn to before me
this 30th day of October, 1924,
at Jersey City, N. J.

E. JEREMIAH CAHUKIO.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.) 10

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. 20

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

WORKMEN'S COMPENSATION BUREAU,

Secretary. 30

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

W. E. STUBBS.

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Answer to Dependent's Claim Petition.

Respondent's Answer to Dependent's Claim Petition.

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU,

10 Trenton, N. J.

November 18, 1924.

DOMINICKA SMOLSKA,
Petitioner,
vs.
M. W. KELLOG Co.,
Respondent.

*Claim
Petition
No. 3353.*

20 Attorney for respondent, Richard W. Baker,
175 W. State St., Trenton, N. J.

In answer to Claim Petition filed in this cause:

- 1. What was decedent's name?
- 2. Where did decedent reside?
- 3. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify. Yes, as have no knowledge in regard to the same.
- 30 6. Was the decedent in your employ at the time of the alleged accident? Yes.
- 7. State your business. Pipe.
- 8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
- 9. Did you give such notice to him? No.
- 40 10. When did you first have knowledge of this accident? On filing of petition.

Answer to Dependent's Claim Petition.

11. Did you receive notice of this accident from the petitioner? No.

12. If so, on what date?

13. Has any claim for compensation been made? No.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Regular occupation laborer, but had no knowledge of any accident. 10

15. When did the accident happen? Don't know.

16. Where did the accident happen? Don't know.

17. What was the nature of the accident, and how did it happen? No accident received by the deceased within the knowledge of the respondent. 20

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

19. If so, give date he stopped work. Discharged, December 12, 1923.

20. Give date of death. Don't know.

21. Were his wages fixed by piecework?

22. If so, what was his average weekly wage?

23. If wages were fixed by the hour, state rate per hour. 30

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

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

26. State the amount of weekly wages. About \$20.00.

27. How much have you paid as compensation (not medical aid) since the accident? None.

28. Have you promised to pay compensation? No. 40

Answer to Dependent's Claim Petition.

- 29. If so, how much?
- 30. Was medical aid required? Don't know.
- 31. If so, did you furnish all the medical, surgical or hospital services, or other expense of last sickness? No.
- 10 32. Between what dates was service rendered?
- 33. Give name and address of physician and hospital rendering service at your direction.
- 34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion.

20 Respondent has no knowledge of any accident whatever happening to the deceased and denies that any accident happened to the deceased while working for the respondent. No accident having been reported within the required time the respondent claims that the petition should be dismissed.

M. W. KELLOG CO.,
Jersey City, N. J.

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.

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

RICHARD W. BAKER,
Respondent.

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Answer to Dependent's Claim Petition.

Subscribed and sworn to before me this 18th day of November, 1924, at Trenton, N. J.

M. M. MEREDITH,
Notary Public of N. J.

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

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I, WILLIAM E. STUBBS, Deputy Commissioner & Secy. of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the answer filed in this cause.

W. E. STUBBS.

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Dismissal.

Dismissal.

DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU.

10	DOMINICKA SMOLSKA, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> M. W. KELLOGG Co., <div style="text-align: right;"><i>Respondent.</i></div>	}	<i>Claim Petition No. 3353. Dismissal.</i>
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20 A formal petition having been filed in the above matter asking for compensation under the terms of the Compensation Law of this State and an answer having been duly filed on November 18, 1924, the same came on for a hearing before me in Jersey City on April 9, 1926, on a motion of the attorney for the respondent to dismiss this case as not having been moved for a period of over a year. The petitioner was represented by Attorney Victor Ruskin and the respondent by Attorney Richard W. Baker.

30 After hearing the argument of both attorneys, I hereby find that as this case has not been moved since the case was duly at issue and for a period of more than a year, the motion of the attorney for the respondent should be granted.

Accordingly, I hereby order that this case be dismissed without cost to either party.

CHARLES E. CORBIN,
Deputy Commissioner.

Dated, April 20, 1926.

Notice of Appeal to Court of Common Pleas.

I, WILLIAM E. STUBBS, Deputy Commissioner & Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the dismissal filed in this cause.

W. E. STUBBS.

Notice of Appeal.

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

20	DOMINICKA SMOLSKA, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> M. W. KELLOGG Co., <div style="text-align: right;"><i>Respondent.</i></div>	}	<i>On Claim Petition No. 3353. Notice of Appeal.</i>	20
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To the Honorable Charles E. Corbin, Deputy Commissioner, and Richard W. Baker, attorney for respondent:

30 TAKE NOTICE that Dominicka Smolska, the petitioner, appeals to the Hudson County Court of Common Pleas from an order dismissing the petition in the above-entitled cause on April 9th, 1926, on the following grounds:

1. Because said order was improper, illegal and arbitrary.

2. Because the case had in all respects been restored to the active list by the signing and filing of interrogatories therein on March 22nd, 1926.

Notice of Appeal to Court of Common Pleas.

3. That the respondent waived its rights to a dismissal of said petition by reason of the fact that they did not move to dismiss the same at the termination of one year from the filing of said petition.

10 4. That the respondent was in laches in not moving to dismiss said petition until the case had been restored by the making and filing of an order requiring answers to certain interrogatories propounded in said cause.

5. That the Deputy Commissioner erroneously and illegally refused to hear testimony in support of petitioner's claim for compensation.

6. That the said order dismissing the petition herein is in other respects improper and illegal.

20 Dated, April 17, 1926.

RASKIN & HORNSTEIN,
Attorneys of Petitioner-Appellant.

Service of a copy of the within notice of appeal is hereby acknowledged this 20th day of April, 1926.

30

RICHARD W. BAKER,
Atty. of Respondent.

40

Notice of Argument.

Notice of Argument.

HUDSON COUNTY COURT OF COMMON PLEAS.

DOMINICKA SMOLSKA, <i>Petitioner-Appellant,</i>	}	<i>On Claim Petition No. 3353.</i>	10
<i>vs.</i>			
M. W. KELLOGG Co., <i>Respondent-Appellee.</i>		<i>Notice of Argument.</i>	

To Richard W. Baker, Esq., attorney of respondent-appellee, 175 West State Street, Trenton, New Jersey:

20 TAKE NOTICE that the appeal in the above-entitled cause from the decision of Deputy Commissioner Charles E. Corbin of the New Jersey Department of Labor, Workmen's Compensation Bureau, will be argued before the Honorable Daniel T. O'Regan, at the Court House in Jersey City, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, on the 8th day of June, 1926.

Dated, May 7, 1926.

20

DANIEL O'REGAN,
Judge.

30

Service of a copy of the within notice of argument is hereby acknowledged this 20th day of April, 1926.

Filed Clerk's Office May 10, 1926, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

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Order of Continuance.

Order of Continuance.

HUDSON COUNTY COURT OF COMMON PLEAS.

10	DOMINICKA SMOLSKA, <i>Petitioner-Appellant,</i>	<i>On Claim Petition No. 3353.</i>
	<i>vs.</i>	
	M. W. KELLOGG, <i>Respondent-Appellee.</i>	<i>Order of Continuance.</i>

Upon application duly made by Kellogg & Chance, Esqs., attorneys of the respondent-appellee, the hearing in the above cause is hereby continued until the day of _____, 1926.
Dated, June 8, 1926.

DANIEL O'REGAN,
Judge.

Filed Clerk's Office June 9, 1926. Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

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Order of Continuance.

Order of Continuance.

HUDSON COUNTY COURT OF COMMON PLEAS.

10	DOMINICKA SMOLSKA, <i>Petitioner,</i>	<i>On Claim Petition No. 3353.</i>
	<i>vs.</i>	
	M. W. KELLOGG, <i>Respondent.</i>	<i>Order of Continuance.</i>

It Is, on this 24th day of September, 1926, on motion of Raskin & Hornstein, attorneys of the petitioner,

ORDERED, That the hearing of the appeal in the above matter be, and the same is hereby continued until the 10th day of December, 1926, at the same time and place.

ROBERT V. KINKEAD,
Judge of Hudson County
Court of Common Pleas.

Filed Clerk's Office September 24, 1926.
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

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Order of Continuance.

Order of Continuance.

HUDSON COUNTY COURT OF COMMON
PLEAS.

10	DOMINICKA SMOLSKA, <i>Petitioner-Appellant,</i> <i>vs.</i> M. W. KELLOGG, <i>Respondent-Appellee.</i>	} <i>On Claim Petition No. 3353. Order of Continuance.</i>
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IT IS, on this 10th day of December, 1926, on motion of Raskin & Hornstein, attorneys of the petitioner-appellant,

20 ORDERED, that the hearing of the appeal in the above matter be, and the same is hereby continued until the 14th day of December, 1926, at the same time and place.

ROBERT V. KINKEAD,
Judge of Hudson County
Court of Common Pleas.

Filed Clerk's Office December 10, 1926.
Hudson County, N. J.

30 JOHN J. MCGOVERN,
Clerk.

Order Fixing Time & Place for Hearing Appeal.

**Order Fixing Time and Place for Hearing
Appeal.**

HUDSON COUNTY COURT OF COMMON
PLEAS.

10	DOMINICKA SMOLSKA, <i>Petitioner-Appellant,</i> <i>vs.</i> M. W. KELLOGG, <i>Respondent-Appellee.</i>	} <i>On Appeal from Workmen's Compensation Bureau. Order Fixing Time and Place for Hearing Appeal.</i>	10
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On motion of Raskin & Hornstein, attorneys of appellant in the above-entitled matter,

IT IS hereby ORDERED, that the 7th day of January, 1927, at 10 o'clock in the forenoon, be, and the same is hereby fixed as the time, and the Hudson County Court House in Jersey City as the place, for the hearing of the appeal in said matter.

CHARLES M. EGAN, 30
Judge, Hudson County Court of Common Pleas.

Filed Clerk's Office Dec. 14, 1926. Hudson
County, N. J.

JOHN J. MCGOVERN,
Clerk.

Determination.

Determination.

HUDSON COUNTY COURT OF COMMON PLEAS.

10	DOMINICKA SMOLSKA, <i>Petitioner-Appellant,</i>	}	<i>On Appeal</i>
	<i>vs.</i>		<i>from</i>
	M. W. KELLOGG Co., <i>Respondent-Appellee.</i>		<i>Workmen's</i>
			<i>Compensation</i>
			<i>Bureau.</i>
			<i>Determina-</i>
			<i>tion.</i>

20 This appeal from the Workmen's Compensation Bureau coming on to be heard in the presence of attorneys for the respective parties on the transcript transmitted, and arguments having been heard, and it appearing by the said transcript that no steps were taken on the petition before the Workmen's Compensation Bureau for a period of over a year, and that the Workmen's Compensation Bureau dismissed the petition on that ground, and this Court finding that the petition should be dismissed, and that no cause has been shown or appears to the contrary;

30 It is, on this 4th day of April, 1927, ORDERED that the findings appealed from are sustained and that the petition be and hereby is dismissed without costs to either party.

CHARLES M. EGAN,
Judge, Court Common Pleas.

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

JOHN J. MCGOVERN,
Clerk.

Writ of Certiorari.

WRIT OF CERTIORARI.

NEW JERSEY, ss.

The State of New Jersey to the Court of Common Pleas in and for (L. s.) the County of Hudson and M. W. Kellogg Co., GREETING:

10 We being willing for reasons to be certified of and concerning a certain determination and judgment rendered on the 4th day of April, 1927, by the Honorable Charles M. Egan, one of the Judges of the said Court of Common Pleas in and for the said County of Hudson, in certain proceedings brought on behalf of Dominicka Smolska, petitioner, against M. W. Kellogg Co., respondent, for the determination and recovery of compensation under an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplementary thereto, we command you that the said determination and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same, as fully and entirely as before you they remain or are in your custody and control, you do certify and send, together with this writ to our Justices of our Supreme Court of Judicature at Trenton, on the 16th day of June, 1927, that therein may be caused to be done what of right and according to law ought to be done.

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Writ of Certiorari.

WITNESS, HON. WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, this 8th day of June, 1927.

EDWARD J. KELLEHER,
Clerk.

10 RASKIN, HORNSTEIN & RUSKIN,
Attorneys.

This writ is allowed; let it be sealed.

Dated, May 27, 1927.

JAMES F. MINTURN,
J. S. C.

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30

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Return.

RETURN.

HUDSON COUNTY COURT OF COMMON PLEAS.

DOMINICKA SMOLSKA,

vs.

M. W. KELLOGG Co.

On Certiorari. 10

Return.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

The determination and statement of facts and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same as fully and entirely as before us they remain, or are in our custody or control, whereof mention is within made, we do hereby certify and send under our seal, in the schedule hereto annexed, as within we are commanded.

20

CHAS. M. EGAN,
Presiding Judge of the Hudson County Court of Common Pleas.

(SEAL) JOHN J. McGOVERN,
Clerk of Court of Common Pleas.

30

Filed Clerk's Office, June 17th, 9:33 A. M., 1927. Hudson County, N. J.

40

Reasons.

REASONS.

Filed June 18, 1927.

NEW JERSEY SUPREME COURT.

10	DOMINICKA SMOLSKA, <i>Prosecutrix,</i> <i>vs.</i> COURT OF COMMON PLEAS OF HUDSON COUNTY, JOHN J. MCGOVERN, CLERK, and M. W. KELLOGG Co., <i>Respondents.</i>	<i>On</i> <i>Certiorari.</i> <i>Reasons.</i>
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20 The said prosecutrix, by her attorneys, comes and prays that the action, proceedings, determination, and judgment of the Workmen's Compensation Bureau and the affirmance thereof by the Court of Common Pleas of Hudson County, may be set aside, reversed, and for nothing holden for the following reasons:

30 1. The Workmen's Compensation Bureau erred in dismissing the petition of the prosecutrix for failure to move the same within a year because prosecutrix applied for and was allowed an order for interrogatories within one year after the last previous step in said suit.

40 2. The Workmen's Compensation Bureau was not invested with the power to dismiss the petition for the reasons assigned in dismissing the same, inasmuch as the Workmen's Compensation Bureau is a statutory tribunal, and has only those powers expressly granted to it by the Legislature; and no such power exists as that attempted to be exercised in the instant case.

Reasons.

3. The order dismissing the proceedings below should be set aside and vacated as provided by Paragraph 112, 3 Compiled Statutes, Page 4087, in which it is provided that "Where judgment is entered against either party because of the failure of such party to file any proper pleading, the Court shall, on application within one year, re-open said judgment, if in the opinion of the Court wrong has resulted." 10

4. Because the alleged failure of the prosecutrix to take any steps within one year was not taken advantage of by the respondent, M. W. Kellogg Co., by availing itself of a rule to plead as provided by Paragraph 100, 3 Compiled Statutes, Page 4082.

5. That the said action of the Workmen's Compensation Bureau and the affirmance thereof by the Court of Common Pleas of Hudson County, as aforesaid, is in divers other respects illegal, unjust and oppressive, and should be set aside and for nothing holden. 20

RASKIN, HORNSTEIN & RUSKIN,
 Attorneys of Prosecutrix.

Service of copy of above reasons is acknowledged this 18th day of June, 1927. 30

KELLOGG & CHANCE,
 Attorneys of Respondent.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed February 10, 1928.

NEW JERSEY SUPREME COURT.

No. 253, October Term, 1927.

10

DOMINICKA SMOLSKA,
Petitioner,
Prosecutrix-in-Certiorari,

vs.

COURT OF COMMON PLEAS OF
HUDSON COUNTY, JOHN J. Mc-
GOVERN, Clerk, and M. W.
KELLOGG Co.,

20

Respondents,
Defendants-in-Certiorari.

Submitted November 4, 1927; decided February 10, 1928.

On certiorari, etc.

Before Justices Trenchard, Kalisch and Katzenbach.

30

For the prosecutrix in certiorari, Raskin, Hornstein & Ruskin (Isidore Hornstein of counsel).

For the defendants in certiorari, Kellogg & Chance.

Per Curiam.

40

This writ brings up for review a workman's compensation case in which the Hudson County Common Pleas sustained the Workmen's Compensation Bureau on appeal and dismissed the petition.

Opinion of Supreme Court.

In this matter a petition for compensation dated October 23, 1924, was filed. The date of filing does not appear.

The next step was the filing of an answer dated November 18, 1924, which was filed November 18, 1924.

After filing the answer on November 18, 1924, no order of any kind was made in the cause until March 22, 1926, when a paper entitled order for interrogatories, without notice to the defendant, was filed. 10

Thereafter on April 20, 1926, the matter came on for hearing on respondent's motion to dismiss the case, in the presence of attorneys for both parties and same was dismissed for not having been moved for a period of over a year.

On April 20, 1926, an appeal from the dismissal of the petition by the Workmen's Compensation Bureau was taken to the Court of Common Pleas. 20

After adjournments, the appeal came on before the Hudson Common Pleas which found that no steps were taken on the petition before the Workmen's Compensation Bureau for over a year and the order was that the petition be dismissed. This determination by the Hudson Common Pleas was made April 4, 1927. 30

Then on May 27, 1927, this writ of certiorari was allowed to review the Common Pleas determination sustaining the Workmen's Compensation Bureau and dismissing the petition.

The only meritorious question involved here is whether the failure by the petitioner to take any action on the petition for a period of over a year justified the dismissal of the petition. All the arguments of the prosecutrix fail if this question is answered in the affirmative. 40

Opinion of Supreme Court.

We think that the petition was properly dismissed because of the failure of petitioner for over a year to take any action on the petition. *Ringwalt Linoleum Works v. Liquor*, 89 N. J. L. 452. That case is controlling in this court. It was a case where the petition was filed under the

10 Workmen's Compensation Act prior to the creation of the Workmen's Compensation Bureau. The 20th section of the Workmen's Compensation Act then in force provided that after filing petition the Judge of the Common Pleas shall fix a time and place for hearing, and required him to file his determination within thirty days after final hearing. It further provided that "at

20 "in a summary manner decide the merits of the controversy." It was held that the proceedings under the act are intended to be of a summary nature and the failure of the petitioner to move the hearing during an interim of over a year warranted the defendant in concluding that the proceeding had been abandoned. Accordingly an order fixing a day for hearing by the Middlesex Common Pleas Court was set aside on certiorari. That was a proceeding brought by a

30 widow for the benefit of herself and alleged dependents of her deceased husband. Manifestly unless there is something in the change of procedure brought about by the creation of the Workmen's Compensation Bureau calling for a different result the ratio decidendi of this case called for the dismissal of this proceeding as was done by the Deputy Commissioner in the first instance and by the Common Pleas on appeal.

40 An examination of the statute creating the Workmen's Compensation Bureau, however, re-

Opinion of Supreme Court.

veals nothing to alter the rule of the *Ringwalt Linoleum-Liquor* case. Paragraph 10, as amended by chapter 229 of the Laws of 1921, provided as follows:

"10. The procedure for the determination of claims by said bureau, except as herein otherwise provided, shall be conducted in the manner 10 provided by this act and the act to which this act is a supplement, and its supplements and amendments. The Commissioner of Labor, each deputy commissioner and each referee is hereby authorized to hear and determine the matter in dispute in a summary manner, and each shall have power under the act to which this act is a supplement, to modify any award of compensation and to provide for the commutation of any such 20 award."

Paragraph 11, as amended by chapter 229 of the Laws of 1921, provides for the prompt filing with the county clerk of a copy of the decision of the Commissioner, deputy commissioner or referee.

In the case of *Ringwalt Linoleum Works v. Liquor*, 89 N. J. L., p. 452, the opinion says:

"The manifest and clear intent of the act is to secure that inexpensive and expeditious determination of the controversy, which theretofore 30 was claimed to be a fatal defect in existing legal procedure. The procedure followed in the case at bar obviously violates the spirit of the act. The proceedings being entirely statutory, it was incumbent upon the petitioner to present her case upon the day fixed for hearing, or to continue it by stated adjournments in regular manner upon the records of the court, either by consent of the defendant or by an application made upon notice to the other side, so that the defendant 40

New Jersey Court of Errors and Appeals

DOMINICKA SMOLSKA,

Petitioner,
Prosecutrix-in-Certiorari,

vs.

COURT OF COMMON PLEAS OF
HUDSON COUNTY, JOHN J. Mc-
GOVERN, Clerk, and M. W.
KELLOGG Co.,

Respondents,
Defendants-in-Certiorari.

*On
Certiorari.*

*Appeal from
Supreme
Court.*

BRIEF ON BEHALF OF PROSECUTRIX.

Preliminary Statement.

This appeal is taken from a judgment of the Supreme Court affirming the decision of the Hudson County Court of Common Pleas in dismissing a petition filed in a Workmen's Compensation suit. The appellant relies upon the same points which were raised in the Supreme Court.

Statement of the Facts.

Joseph Smolska died March 16, 1924, as a direct result of injuries he received while in the employ of M. W. Kellogg Co. (hereinafter called the respondent). He left him surviving the prosecutrix (hereinafter called petitioner), his widow, and four infant children, all of tender years.

On October 23, 1924, a petition was filed by petitioner on behalf of herself and her children for compensation. Because of her poverty, petitioner requested an informal hearing, which was granted, and the matter was informally heard by the Workmen's Compensation Bureau, on December 12, 1924. Respondent, although it admitted that the decedent was in its employ, denied that an accident had occurred, denied

knowledge of an accident and further denied that decedent died as the result of injuries received while in its employ. This put petitioner upon her proof, strictly and technically. Aside from medical testimony, all the proof was peculiarly within the knowledge of the respondent. Several efforts were made to obtain the names of eye-witnesses, but these efforts proved futile. Finding herself thus baffled at every turn, in her last extremity, petitioner applied for and obtained an order for the respondent to answer certain interrogatories (Case, p. 12a). This was on March 22, 1926. During the interval which had elapsed since the filing of the petition the case had been held in abeyance by order of the Workmen's Compensation Bureau dated March 23, 1925, a copy of which is hereinafter fully set forth. On March 22, 1926, the order for interrogatories had been signed by the Deputy Commissioner. Immediately upon receipt thereof, respondent served notice of motion to dismiss, not the order, but the petition, as not having been moved for a period of over a year. It should be noted that during said interval, the respondent took no step in the cause, and particularly, *being in laches itself*, that it served no notice of its intention to move the case on the merits as is the prevailing practice in suits at law. The respondent did not object to the interrogatories nor take any step with respect thereto nor answer them. Its motion to dismiss the petition was proceeded with, and the Workmen's Compensation Bureau did on April 9, 1927, make an order dismissing the petition for the reason that it had not been moved for a period of over a year. From this order an appeal was taken to the Hudson Common Pleas, where it was sustained. Certiorari then issued to review the order of the Hudson Common Pleas affirming the order of dismissal of the Workmen's Compensation Bureau and the Supreme Court affirmed the proceedings below. This appeal is taken from the judgment of the Supreme Court.

POINT I.

The Hudson Common Pleas Court erred in affirming the order of the Workmen's Compensation Bureau dismissing the petition for failure to move the same within a year.

On March 23, 1925, petitioner's attorneys received a letter (inadvertently omitted from printed State of Case), from the Workmen's Compensation Bureau, and the following is a copy:

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION
BUREAU

Trenton, N. J., Mar. 20, 1925.

RASKIN & HORNSTEIN,
1 Exchange Place,
Jersey City, N. J.

Dear Sir: IN RE: CLAIM PETITION
#3353.

Smolska *v.* M. W. Kellogg Co.

The above case has been assigned to me for hearing. I note that you are the attorney for the petitioner. I therefore desire to call your attention to the rule issued by authority of paragraph 17 of chapter 149, Laws of 1918, concerning the procedure for setting cases for formal hearing.

"After a Claim Petition has been filed and served in accordance with the statute the case shall be assigned by the Secretary to a Deputy Commissioner, for hearing, and the Deputy Commissioner upon receiving the assignment shall notify the attorney for petitioner that, when he is prepared to have the case heard, he shall prepare a blank order and two copies for fixing a day for hearing, and send them to the Deputy Commissioner in charge, who shall fix a date for the hearing on said order, sign same and make service. The case will then come on

for hearing upon the date fixed by the Deputy Commissioner, and if there is an adjournment for any cause, the case shall stand as not moved until the attorney for the petitioner shall prepare a further order fixing a date for the adjourned hearing, unless otherwise ordered by the Deputy Commissioner.

I shall hold this case in abeyance, therefore, for your action in accordance with the above rule.

This notice is sent you in duplicate. Kindly acknowledge receipt on one copy and return it to

Yours very truly,
CHARLES E. CORBIN,
Deputy Commissioner of Compensation.

Receipt of the above rule is hereby acknowledged on this 23d day of March, 1925.

RASKIN & HORNSTEIN,
1 Exchange Place, Jersey City.
Signed.

On March 22, 1926, less than a year thereafter, petitioner applied for and obtained an order for interrogatories (Case, p. 12a). *This was a step in the cause* and effectually removed the case from the operation of the rule mentioned in the letter of the Workmen's Compensation Bureau. The learned Deputy Commissioner based his decision on the interpretation which he placed on the opinion of Justice Minturn in the case of *Ringwalt Linoleum Works v. Theresa Liquor*, 89 N. J. L. 452. In that case, the learned Justice said,

"to countenance this application after twelve months have expired since the last regular step was taken in the proceeding is, in effect, to ignore the very purpose of this legislation, and to give to the party in laches an advantage which he could not have attained under legal procedure as it existed anterior to this enactment."

The foregoing opinion seemed to be an insurmountable obstacle to the Deputy Commissioner, for he was unable to distinguish the language therein employed from the true and sympathetic construction thereafter placed upon the Workmen's Compensation Act by the same jurist in the later case of *Antonie Luszczy v. Seaboard By-Products Company*, 125 Atl. 136 (reversed on other grounds, 127 Atl. 212), in which it was said:

"but when it is recalled that this act had its genesis in a public policy, calling for the support of the widow and the orphan, in whose behalf the State intervened as *parens patriae*, for the purpose of placing the burden of support upon its primal cause rather than upon the public as a principle of economic necessity, hesitation and doubt would seem to find no abiding place. Without this underlying theory of economic necessity, superimposed upon the public, by a situation of industrial necessity, legislation of this character under our constitutional guarantees, would be unjustified, and indefensible * * * where the husband has passed away, and his immediate dependents are *ex necessitate* before us as supplicants. * * * Legislation of this character, should receive a liberal rather than a strict or strained construction, consistently with the public policy which called it into being, without doing injustice to the one who *pro bono publico* must sustain the burden, as an incident of his undertaking, citing *Wilson v. Dorflinger*, 218 N. Y. 84."

The foregoing language, although it had specific reference to a particular section of the act, is nevertheless analogous, insofar as it relates to the physical situation of the parties to the suit, who are before this Court as supplicants in the true sense of the word, and this because of the strict construction of the opinion in the case of *Ringwalt Linoleum Works v. Theresa*

Liquor, supra. There it was held that if a petition was not moved within twelve months after filing, it would be dismissed. The Court ruled thus on the ground that the adverse party would be under a disadvantage to produce its witnesses if petitioner were allowed to come in after twelve months and move the case. In the instant case the situation is the reverse. The advantage, from the very beginning was with the respondent. It had exclusive knowledge of the facts; the witnesses were known to it and unknown to the petitioner. In this case, it is respectfully submitted that there would be no disadvantage to the respondent, and that a liberal construction of the rule enunciated in *Ringwalt Linoleum Works v. Liquor* would permit a hearing of the petition filed in this case on the merits without disadvantage or injustice to the respondent.

POINT II.

The Workmen's Compensation Bureau is not invested with the power to dismiss the petition for the reasons assigned in dismissing the same inasmuch as the Workmen's Compensation Bureau is a purely statutory tribunal, and has only those powers expressly granted to it by the legislature; and no such power exists as that attempted to be exercised in the instant case.

Nowhere in the act or in its amendments is a Commissioner given power to dismiss a claim as not having been moved within one year. We maintain that the Deputy Commissioner has no such power. The Workmen's Compensation Bureau is a creature of statute, AND HAS NO GREATER POWER THAN THAT WHICH THE STATUTE HAS EXPRESSLY GIVEN IT.

The statute does say, however, P. L. 1918, Chap. 149, page 432,

"At such hearing, evidence, exclusive of *ex parte* affidavits, may be produced by both parties, but the official conducting such hearing shall not be bound by the rules of evidence."

This is indicative of the legislative intent, to have these hearings in a more or less equitable manner. That is, that the parties should have the issues determined as to the *substantial* rights of the parties, and not as to whether the technical procedural points are strictly followed. This statute follows the New York statute and the case of *Scalise v. Uvalde Paving Co.*, 98 N. J. L. 696, comments on our statute in the following manner, page 700:

"Section 9 of the Act of 1918 apparently had its origin in section 68 of the New York Statute dealing with the same matter under consideration here. The New York Statute, however, is more explicit than ours and is worth quoting here because it is in a measure explanatory of the rules of evidence as a part of the procedure."

Section 68 provides:

"The Commissioner or Commissioners in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, except as provided by this chapter; but may take such investigation or inquiry or conduct such hearings in such manner as to ascertain the substantial rights of the parties."

In construing this section in *Caroo v. Knickerbocker Ice Co.*, 218 N. Y. 435; 113 N. E. Rep. 507, Mr. Justice Cuddenback, speaking for the Court of Appeals (at p. 508) of the latter reports says,

"That section does not declare probative force of any evidence, but it does declare

that the aim and end of the investigation by the commissioner shall be to determine the *substantial rights* of the parties. No matter what latitude the commission may give to its inquiry, it must result in a determination of the substantial rights of the parties, otherwise the statute becomes grossly unjust and a means of oppression."

"Our courts have repeatedly held that where a question arising for the first time in this state out of a provision of an act which was taken from a statute of a sister state and construed by her courts, such construction is entitled to great weight and will be followed unless it is contrary to some declared legislative policy of this state."

POINT III.

The order dismissing the proceedings below should be vacated and set aside.

The Workmen's Compensation Act does not prescribe any definite form of procedure. No precise rules have been laid down to guide the practitioner before that Bureau. It is natural and logical that we should turn to the Supreme Court for light in the exigency. The rules of the Supreme Court provides that:

"When an issue joined in this court is duly noticed for trial at the circuit, and the plaintiff fails to move the same when regularly called for trial, the justice of this court holding the circuit, or the judge to whom such issue has been referred for trial, may consider the reasons, if any, alleged by the plaintiff for such failure; and if no reason be alleged, or those alleged be insufficient to excuse the default, said justice or judge may order that the plaintiff be non-suited, and on the filing of his order a judgment of non-suit shall be entered. Such order, or the refusal of the justice or judge to make such an order, shall be subject to review at the next term of this court (Rule 42, 1905, modified)."

Again, it is provided, 3 Comp. Stat. 4087, paragraph 112:

"if in any action judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading, the court or the judge shall on application within one year after the entry of such judgment, open such judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court or the judge injury has resulted or may result from such failure."

In the instant case the petition was dismissed because of the failure to file a proper pleading, to wit: an order adjourning the case from time to time. It is conceded by our adversaries and it will be observed from a reading of the opinion in the case of *Ringwalt Linoleum Works v. Theresa Liquor, supra*, that the filing of such an order, obtainable on request, and a mere formality, would have taken the case out of the operation of the rule and resulted in a denial of the motion to dismiss the petition. Such was the opinion of the Deputy Commissioner. That injury or wrong has resulted from the dismissal of the petition in this case, because of the neglect to apply for and file a formal order, needs no elaborate or persuasive argument. If in the opinion of the Supreme Court such wrong has resulted the order of dismissal should be vacated and set aside, and this also, because of the humane and generous construction of the Workmen's Compensation Act. If the common law courts, with their characteristic rigor, permit the reopening of a judgment where wrong or injury has resulted or may result because of a technicality in the failure to file a pleading, if application is made within one whole year, is it too much to ask or fervently hope that the present appli-

cation will be granted, when made immediately after the judgment of dismissal was entered, and great wrong will result?

Assuming likewise, that petitioner's attorneys had failed to file a proper pleading within the required time, nevertheless this board of statutory parentage, which is not bound by rules of evidence, which is supposed to see that *substantial* rights are ascertained, may even then reopen its decision if wrong or injury has resulted. What are the substantial rights of the parties? The petitioner merely asks that she shall be afforded an opportunity to present the facts relating to her husband's death, and have a judicial determination of the respondent's liability, *on the merits of the case*. What injury has resulted from the present decision? A widow and four dependent children (Case, p. 2, ll. 5 to 8) will be left penniless and without support, due to a technicality which the legislature never intended should deprive them of legal relief.

POINT IV.

The alleged failure of prosecutrix to take any step within one year was not taken advantage of by respondent who was itself in laches.

It is provided, in 3 Comp. Stat. page 4082, paragraph 100, as follows:

"if a party would take advantage of the failure of the adverse party to file any pleading within the time limited or granted, he should do so before or at the term next after such failure; *AND IF HE FAIL TO DO SO, IT SHALL BE CONSTRUED AS A WAIVER OF HIS RIGHT, and HE SHALL NOT AFTERWARDS HAVE SUCH JUDGMENT, UNLESS HE SHALL RULE THE PARTY TO PLEAD.*"

There are admittedly no stated terms in the Workmen's Compensation, which is presumably always open. By again turning for light to the prevailing practice in our courts of law, we find the above rule. Tested by the above rule, enacted undoubtedly in a sense of fairness, and for the manifest purpose of not permitting either party an undue advantage over the other in such a situation, the respondent herein should have brought the matter on for hearing within the time which ordinarily composes a term of court, *or within a reasonable time*.

In a California case, a proceeding was dismissed by the Workmen's Compensation Commissioner where, after a delay of a year from the filing of the claim, *and notice to the parties*, no steps were taken to proceed with the case. *Hunter v. Mitchell*, 2 Cal. Ind. Acc. Com. 813.

Notice should be made of the fact that the respondent sat idly by and permitted the petition to lie unmoved without complaint of any kind, until petitioner had procured and served the order for interrogatories. There, instead of objecting to the interrogatories it paid no attention thereto and served notice of motion to dismiss. It is respectfully urged that the respondent, in order to dismiss the petition, should have either answered or objected to the order for the interrogatories, and thereafter, in order to dismiss the petition, should have served notice of its intention to move the case as is the practice in our courts of law, and upon failure or inability of the petitioner for any reason, to proceed to trial on the date fixed, the petitioner's petition may have been non-suited or dismissed. No such notice was served in this case; the respondent suffered no harm, its position was not jeopardized or in anywise affected by the failure of the petitioner to move the case.

POINT V.

The order of the Workmen's Compensation Bureau dismissing the petition and its refusal to hear and determine the claim on the merits was contrary to laws as to the minor children, and the Court of Common Pleas erred in affirming the order.

Assuming for the purpose of argument that the petitioner was negligent or dilatory, still it is public policy that courts should guard carefully the rights of minors, and that a minor should not be precluded from enforcing its rights unless clearly debarred from so doing by some statute or constitutional provision. From time immemorial the status of a minor of tender years has been recognized in law to be different from that of one of more mature years.

In the case of *McDonald v. Spring Valley*, 285 Ill. 52, 2 A. L. R. 1359, a suit brought by a minor by her next friend in trespass on the case against the City of Spring Valley, it was held:

"that the statute requiring written notice six months after an injury by any person intending to sue a city did not apply to a child seven years old, who was physically and mentally incompetent to give such notice, and that the act, though general in its terms and containing no specific exception, must be construed as having been passed with due regard to the established rules of law for the protection of incompetent persons."

The policy of our own state with respect to the protection of minors is so well known and judicially established, that we feel it unnecessary to burden the Court with citation of authorities.

The Workmen's Compensation Act does not contain any provision authorizing a dismissal of a petition filed in behalf of minors. For a fuller discussion of the interpretation of a similar statute, see the case of *Walgreen Company v. Industrial Commission*, 48 A. L. R. 1199, and cases therein cited.

"The failure of a widow to make claim for compensation for the death of her husband within the time prescribed by a state workman's compensation act does not deprive minor dependent children of their right to claim and receive compensation, where the mother has not been appointed tutrix for them, notwithstanding a provision in the act that where there is a surviving parent the compensation shall be paid to him or her for the common benefit of the survivor and minor dependent children, since that provision does not imply that the right of dependent minors to receive compensation is dependent upon the will or disposition of the parent to accept compensation."

Gospel v. Southern Carbon Co. (1926.) 4 La. App. 272, 48 A. L. R. 1204. 48 A. L. R.—1202 *et seq.*

We have been unable to find a case directly in point decided by the courts of our own State. When determined, it will be a case of first instance, especially with regard to the claims of the infants. It is respectfully urged, considering the humane and liberal interpretation universally accorded workmen's compensation acts everywhere, that the substantial rights involved should be determined on the merits and not waived aside for failure to file a formal plea; that the substantial rights of the children should be carefully safeguarded, consistent with the policy heretofore established in this State, and that the beneficent purposes of the Workmen's Compensation Act should not be subverted, particularly, when

by so doing, it will further the interest of a party in *laches*. It is further urged that the *facts* of the case warrant a reversal of the order entered in the Court of Common Pleas affirming the order of the Deputy Commissioner dismissing the petition.

For the causes aforesaid, the judgment of the Supreme Court affirming the order of the Hudson County Court of Common Pleas, affirming the order of the Workmen's Compensation Bureau dismissing the petition should be reversed.

Respectfully submitted,

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Prosecutrix-Appellant.

ISIDORE HORNSTEIN,
Of Counsel.

New Jersey Court of Errors and Appeals

DOMINICKA SMOLSKA,
*Petitioner-
Prosecutrix in Certiorari
Appellant,*
vs.
COURT OF COMMON PLEAS OF
HUDSON COUNTY, *et al*,
*Respondents-
Defendants in Certiorari,
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*On Appeal
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DEFENDANT'S BRIEF FOR AFFIRMANCE

This appeal is from a judgment of the Supreme Court which dismissed writ of certiorari. The writ in question brought up for review a workmen's compensation case in which the Hudson County Common Pleas sustained the Workmen's Compensation Bureau on appeal and dismissed a petition for Workmen's Compensation. The opinion of the Supreme Court appears at page 24 of the State of the Case, and the rule of affirmance appears at page 29 of the State of the Case.

Appellant has not served respondents with a brief, but has stated in a letter that the same brief used in the Supreme Court will be used on this appeal. On this assumption respondent prepares this brief.

STATEMENT OF FACTS

Under this head counsel for the prosecutrix-appellant goes beyond the record and asserts as facts, matters the defendant disputes. For instance the statement that Joseph Smolska died of injuries he received while in the employ of the M. W. Kellogg Company has no other foundation in the record than the allegation of the petition for compensation. Contrary to it is the sworn answer of the M. W. Kellogg Company denying notice or knowledge of any accident to Joseph Smolska. (Answer Case, page 7, lines 6, 13, 19 and 20). The counsel for prosecutrix-appellant also says all the proof was within the knowledge of the respondent. It is a matter for wonder just how the respondent knew "all the proof" when it swears it did not know of any such accident. No good purpose, however, can be served by detailed dispute on matters not in the record as the only proper concern of the court is what questions are presented by the record.

In this matter a petition for workmen's compensation dated October 24th, 1924, was filed (case, page 1). The date of filing does not appear.

The next step in the case was the filing of an answer dated November 18th, 1924 (case, page 6), which was filed November 18th, 1924, according to the statement in the order of Deputy Commissioner Corbin dismissing the petition (case, page 10, line 21).

After filing the answer on November 18th, 1924, no order of any kind was made in the cause until March 22nd, 1926, when a paper entitled order for interrogatories, made without notice to the defendant, was filed (case, page 12-a). Incidentally it may be noted that respondent-defendant in certiorari contends this order for interrogatories was a

nullity because there is no jurisdiction given by the statute to the Workmen's Compensation Commissioner to make such an order in any case, and furthermore in this case jurisdiction was theretofore lost and the case terminated by the failure of the petitioner to make any motion or take any action on the petition, for over a year.

Thereafter on April 20th, 1926, the matter came on for hearing on defendant's motion in the presence of attorneys for both parties and was dismissed for not having been moved for a period of over a year (case, page 10).

On April 20th, 1926, an appeal from the dismissal of the petition by the Workmen's Compensation Bureau was taken to the Court of Common Pleas (case, page 12).

After adjournments, the aforesaid appeal came on before Hon. Charles M. Egan, Judge of the Hudson Common Pleas who found that no steps were taken on the petition before the Workmen's Compensation Bureau for over a year and the order was that the findings appealed from are sustained and that the petition be and hereby is dismissed. This determination by the Hudson Common Pleas was made April 4th, 1927 (case, page 18).

Then on May 27th, 1927, this writ of certiorari was allowed to review the Common Pleas determination sustaining the Workmen's Compensation Bureau and dismissing the petition.

The only meritorious question involved here is whether the failure by the petitioner to take any action on the petition for a period of over a year justifies the dismissal of the petition. All the arguments of prosecutrix-appellant fail if this question is answered in the affirmative. Hence the general reasons for affirmance will be discussed as one

Paragraph 11 of said act, as amended, by said chapter of the laws of 1921, provides for the prompt filing with the county clerk of a copy of the decision of the Commissioner, deputy commissioner or referee.

It seems clear that the reasoning in the case in 89 N. J. L., 452, applied to the situation which confronted Deputy Commissioner Corbin and the Common Pleas when they dismissed the petition.

In the case of *Ringwalt Linoleum Works vs. Liquor*, 89 N. J. L., 452, the opinion says:

"The manifest and clear intent of the act is to secure that inexpensive and expeditious determination of the controversy, which theretofore was claimed to be a fatal defect in existing legal procedure.

The procedure followed in the case at bar obviously violates the spirit of the act. The proceedings being entirely statutory, it was incumbent upon the petitioner to present her case upon the day fixed for hearing, or to continue it by stated adjournments in regular manner upon the records of the court, either by consent of the defendant or by an application made upon notice to the other side, so that the defendant would have notice of the proceeding, and be cognizant of the status of the case. To countenance this application after twelve months have expired since the last regular step was taken in the proceeding is, in effect, to ignore the very purpose of this legislation, and to give to the party in laches an advantage which he could not have attained under legal procedure as it existed anterior to this enactment. *Wolf vs. Watson, Stillman Co.*, 79 N. J. L., 284.

There is always, of course, the consideration to be noted in such a situation as is presented by this record, that the adverse party deeming the proceeding to have been abandoned may find it difficult, if not entirely impracticable, to procure the witnesses to the controversy, who, when the petition was filed, may be presumed to have been readily accessible."

A comparison of the statute prescribing the present procedure with that of the statute in force when this decision was rendered shows this reasoning to be as pertinent now as when uttered and Deputy Commissioner Corbin and the Hudson Common Pleas correctly decided that the failure to proceed with the present petition for over a year barred further action thereon.

The foregoing contentions were upheld by the opinion of the Supreme Court (see Case, page 24).

POINT 2. BRIEF OF PROSECUTRIX-APPELLANT SHOWS NO REASON FOR REVERSING THE SUPREME COURT, WHICH UPHeld THE ACTION OF THE HUDSON COMMON PLEAS AND THE WORKMEN'S COMPENSATION BUREAU.

1.

On the argument of his first point the counsel of prosecutrix-appellant sets out what purports to be a letter from Deputy Commissioner Corbin. While such a letter is no part of the record its receipt by counsel furnishes no justification for failure to proceed for over a year. On the contrary if it could have any effect it would seem that with such a reminder from the Commissioner it was all the more incumbent upon the petitioner to move the case and inaction for over a year is all the more inexcus-

able. Despite the fact that answer was filed November 18th, 1924, and this letter was written by the Commissioner, March 20th, 1925, it was not until March 22nd, 1926, that the petitioner made any move toward proceeding with the case. On the last named date the so-called order for interrogatories was signed. But this order does not help the prosecutrix-appellant. It was a nullity because the statute gave the Workmen's Compensation Bureau no jurisdiction to make such an order in any case. Furthermore a year, four months and four days had elapsed between the filing of the answer and the time that so-called order for interrogatories was made. Even if the letter of Commissioner Corbin could be considered as an order in the case (a contention defendant considers ridiculous) it was dated March 20th, 1925, that is one year and two days before March 22nd, 1926, when the order for interrogatories was dated. So there had already been over a year of inaction. The fact that counsel of prosecutrix-appellant says copy was received three days after it is dated would be immaterial. If it had any effect (which we deny) the effective date was when signed March 20th, 1925.

The effort of prosecutrix-appellant's counsel to gain support from certain words used in the Supreme Court decision in *Luszczy vs. Seaboard By-Products Company* must also fail in view of the Court of Errors and Appeals opinion reported in 101 N. J. L., 170, reversing the Supreme Court. The argument of counsel seems to indicate that he thinks the fact that a widow and orphans are supplicants furnishes some ground for a departure from the law applicable to a case. He says the reversal was on other grounds. From our reading of the Court of Errors and Appeals decision we

feel positive that the same does not bear out any such notion.

Neither do we find anything in that opinion which deprives the *Ringwalt Linoleum Works-Liquor* case, 89 N. J. L., 452, of its controlling applicability to the question now before the court or which should call for reversal of the decision of the Supreme Court now under review.

2.

The second point that the Bureau has no power to dismiss a petition as not having been moved within a year because the statute does not expressly so state seems to need no further answer than the recollection that the statute involved in *Ringwalt Linoleum Works vs. Liquor*, 89 N. J. L., 452, had no such statement in it, but the court in that case held that the one year hiatus in the record ended the case. Prosecutrix-appellant's argument overlooks that the Workmen's Compensation proceeding is supposed to be summary and expeditious and not intended to give a petitioner forever in which to move his case. The provisions of the statute that the commissioner is not bound by rules of evidence and reference to cases of a similar provision in the law of other states have no bearing on the propriety of the dismissal of the petition. The question here is not what evidence a case should be decided upon when duly brought to hearing, but as to the effect of the failure to duly bring the case to a hearing.

3.

On the argument of his third point our adversary states "the Workmen's Compensation Act does not prescribe any definite form of procedure." This

is not correct. As its title indicates the original Workmen's Compensation Law was one among other things "regulating procedure for the determination of liability and compensation thereunder." (Chapter 95, Laws of 1911.) Paragraph 20 of that act as amended, begins, "Procedure in case of dispute shall be, &c.," and paragraph 10 of the statute creating the Workmen's Compensation Bureau, as amended by chapter 229 of the laws of 1921, quoted above, prescribes the procedure before the Workmen's Compensation Bureau.

Even if the procedure were not thus provided for, there is no basis for counsel's effort to apply to a compensation case, rule 42 of the Supreme Court relating to Supreme Court issues at the circuit. Nor is his reference to the statute relating to default judgment for failure to file a pleading in an action applicable here, because the dismissal of the petition in this case was not for failure to file a pleading. Furthermore, the section of the act which counsel cites does not relate to the statutory procedure given by the Workmen's Compensation Act. Counsel says that the dismissal was for failure to file an order adjourning the case and calls such order a pleading. Such an order is no pleading. Furthermore there was not only no continuance of the case but the petitioner's counsel never took an order fixing a day for hearing, so little did they seem to think of their case then.

The argument based upon the idea that the Compensation Bureau is a "board of statutory parentage" having power to reopen decisions at any time is unique, but we fail to find any case which recognizes any right or duty of the Workmen's Compensation Bureau to proceed with a case after the petitioner has let it lie over a year without doing anything about it. The suggestion that all the peti-

tioner asks is an opportunity to present the facts overlooks the outstanding fact that she had over a year to present evidence which she did not do, and that after lying dormant for over a year, until witnesses to refute her may have died or disappeared, she has nobody but herself to blame for her inability to get a hearing now.

4.

The comment of counsel under his point IV about a provision of another statute touching failure to file a pleading has no proper bearing on this case. The default here was not in the filing of a pleading but the failure to have a day fixed for hearing, and the failure to keep the case alive by due continuance.

Furthermore the burden of making out a case is on the petitioner. If she does not think enough of her case to move it why should the defendant?

5.

The only remaining claim asserted by our opponent is that because the alleged dependents are minors the petition should not have been dismissed, because it is supposed to be the policy of the court to protect minors. Without going into detail as to the decisions of the courts in respect to minors we have no hesitation in asserting that there is no policy of the courts so broad as opposing counsel contends. The gauge of the position of the court as to minors and widows is *Ringwalt Linoleum Works vs. Liquor*, 89 N. J. L., 452, which was also a case where the alleged dependents were minors and a widow. If the statutory representatives sleep along over a year, that should end the matter. An employer is entitled to some consideration and to

have some time when he may know there will be no further claims of liability against him. (See Errors and Appeals opinion *Luszy vs. Seaboard By-Products Company*, 101 N. J. L., 170, at 174.)

And it may be incidently noted that the above mentioned decision shows that the cases cited by appellant as giving minors an exemption from the law prescribing when and how workmen's compensation claims must be made, if the law anywhere, are not authority in New Jersey.

CONCLUSION

The case of *Ringwalt Linoleum Works vs. Liquor*, 89 N. J. L., 452, has stood unquestioned by any decision ever since the early days of the Workmen's Compensation Law in New Jersey. On its authority the Supreme Court affirmed the decisions of the Hudson Common Pleas and the Workmen's Compensation Bureau. For the reasons hereinbefore stated, decision appealed from should be affirmed.

Respectfully submitted,

KELLOGG & CHANCE,
*Attorneys for and of Counsel
with Respondent.*