

INDEX.

	PAGE
Writ of Certiorari.....	1
Allocatur	2
Return to Writ.....	2
Employee's Claim Petition for Compensation	3
Respondent's Answer to Employee's Claim Petition	8
Determination of Facts and Rule for Judgment	10
Notice of Appeal.....	13
Substitution of Attorney.....	14
Order Fixing Date of Argument.....	15
Conclusion	16
Determination and Judgment.....	17, 20
Reasons	21
Testimony	22
Certificate of Deputy Compensation Commissioner	29, 40, 61
Certificate of Court Reporter.....	29, 40, 61
Motion for Dismissal of Petition.....	50
Opinion of Supreme Court.....	62
Rule	64
Notice and Grounds of Appeal.....	65

WITNESSES FOR PETITIONER.

Leo Diamond,	
Direct	22
Cross	25

	PAGE
Bernhard Koepfel,	
Direct	30
Cross	34
Steve Kronicz,	
Direct	41
Cross	43

WITNESS FOR RESPONDENT.

Vincent Geiger,	
Direct	44
Cross	46

Writ of Certiorari.

New Jersey Supreme Court

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY to the PRESIDENT JUDGE
OF THE ESSEX COUNTY COURT 10
(L. S.) OF COMMON PLEAS and RUSSELL C. GATES, Clerk of said Court—GREETING:

We being willing for certain reasons appearing by verified petition filed in this cause to be certified of a certain judgment entered in the Essex County Court of Common Pleas by the Honorable Walter D. Van Riper and dated February 3rd, 1944. We command you that the said judgment together with all matters touching and concerning the same as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the 1st Tuesday of May next, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done. 20

WITNESS, THOMAS J. BROGAN, Esq., Chief Justice of the Supreme Court, at Trenton, this 8th day of April, 1944. 30

(s) JAMES J. GAVIN,
Clerk.

On motion of

JOHN A. LAIRD,
Of Counsel with Prosecutor.

Allocatur.

This writ is allowed.

Let it be sealed.

April 8, 1944.

CHARLES W. PARKER,
J. S. C.

10

Return to Writ.

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

I, W. STANLEY NAUGHRIGHT, Judge of the Court of Common Pleas in and for the County of Essex and State of New Jersey and RUSSELL C. GATES, Clerk of the Court of Common Pleas, in and for the County of Essex and State of New Jersey,

20

Do HEREBY CERTIFY and return to the Supreme Court of Judicature of the State of New Jersey, the judgment of the Court of Common Pleas and Determination and Award and Proceedings made and given by the Workmen's Compensation Bureau of New Jersey, Department of Labor, in the Compensation Proceedings of Bernhard Koepfel, Petitioner-Appellant *vs.* Irvington Window Cleaning Co., Inc. and New Jersey Manufacturers Casualty Insurance Co., Respondent-Appellees, together with all things touching and concerning the same as by the within writ to us directed and as commanded.

30

IN WITNESS WHEREOF, we have hereunto set our hands and Official Seal the Twenty-first day of April, 1944.

W. STANLEY NAUGHRIGHT,
Judge of the Court of Common Pleas.

40

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

Employee's Claim Petition for Compensation.

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

<p style="text-align: center;">BERNHARD KOEPPEL, Petitioner,</p> <p style="text-align: center;"><i>vs.</i></p> <p>IRVINGTON WINDOW CLEANING Co., INC. and NEW JERSEY MANUFACTURERS CASUALTY IN- SURANCE Co.,</p> <p style="text-align: center;">Respondent.</p>	}	<p>Received at Trenton Sept. 24, 1942.</p> <p>Claim Petition No.</p> <p>Date of Accident, 194...</p>	<p>10</p>
---	---	---	-----------

If known, state name of insurance company
New Jersey Manufacturers Casualty Insur-
ance Co. 20

Attorney for Petitioner David Roskein, 17
Academy Street, Newark, N. J.

To the Workmen's Compensation Bureau of New
Jersey:

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

1. What is your name? Bernhard Koepfel.
2. Where do you live? 282 Nesbitt Terrace, Irv-
ington, N. J.
3. Sex Male.
4. Age 44.
5. Marital Status Married. 40

Employee's Claim Petition for Compensation.

6. By whom were you employed at the time of the accident? Irvington Window Cleaning Co., Inc., 282 Nesbitt Terrace, Irvington, N. J.
7. What was the business of your employer?...
8. Did you give written notice to your employer at the time you were hired, or later, that Article 2 of the Workmen's Compensation Law of New Jersey should not apply to you? No.
- 10 9. Did you receive such notice from your employer? No.
10. Did your employer have knowledge of your injury? Yes.
11. If so, on what date?.....
- 20 12. Did you notify your employer of such injury? Yes.
13. If so, on what date? Employer had knowledge.
14. What was your regular occupation?.....
15. What kind of work were you doing at the time of accident?.....
16. When did the accident happen? July 25, 1942.
- 30 17. Where did accident happen?.....
18. What was the nature of the accident, and how did it happen? While operating automobile figured in accident sustaining injuries.
19. On what date were you compelled to stop work because of the injury? At once.
20. On what date were you well enough to work again? Not yet returned.
- 40 21. If still disabled, on what date do you think you will be able to work? Don't know.

Employee's Claim Petition for Compensation.

22. Give nature of any injury from which you will recover
23. Has any permanent injury resulted? If there has been amputation or loss of usefulness of any member or impairment of any physical organ, explain fully Injuries to head, back, body, extremities, internal injuries and injuries to nervous system. 10
24. Were your wages fixed by piece-work?.....
25. If so, what was your average weekly wage?..
26. If wages were fixed by the hour, state rate per hour.....
27. Give number of hours in an ordinary working day..... 20
28. Give number of days in an ordinary working week.....
29. State the amount of weekly wages \$30.
30. Have you been paid compensation? No.
31. If so, how much?..... Compensation Rate Temporary Disability..... Permanent Disability
32. Has your employer promised to pay you any compensation?..... 30
33. If so, how much?.....
34. Was medical aid required? Received some medical treatment.
35. Did you receive any medical, surgical or hospital service?
36. Did you request your employer to furnish these services? 40

Employee's Claim Petition for Compensation.

- 37. Were they furnished?
- 38. If so, between what dates?
- 39. If not, what sum did you expend for medical, surgical or hospital services?
- 10 40. Give name and address of physician and hospital
- 41. What other facts are there which you believe important?
- 42. Have you made claim to your employer for compensation

20 Your petitioner therefore prays that the Workmen's Compensation Bureau will determine the amount of compensation due to your Petitioner from said respondent, under Revised Statutes of New Jersey, 1937, Title 34, Chapter 15, 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 pray, etc.

BERNARD KOEPEL.
Petitioner.

30

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

BERNARD KOEPEL, of full age being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the mat-

40

Employee's Claim Petition for Compensation.

ters and things set forth are true according to the best of his knowledge and belief.

BERNARD KOEPEL.
Petitioner.

Subscribed and sworn to before me, this 15th day of September, 1942, at Newark, N. J. 10

MORTIMER WALD,
An Attorney at Law of New Jersey.

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

TO THE RESPONDENT:

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. Unless an answer in duplicate is filed within ten days after the service of this notice, with the Secretary of the Bureau, in the State House at Trenton, the Petitioner will proceed with proof of claim according to law. 20

WORKMEN'S COMPENSATION BUREAU,
.....
Secretary. 30

I, DANIEL A. SPAIR, Secretary of the Workmen's Compensation Bureau, do hereby certify the foregoing to be a true copy of the Employee's Claim Petition filed in this cause.

(s) DANIEL A. SPAIR,
Daniel A. Spair, 40
Secretary.

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

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

10

BERNHARD KOEPPPEL,
Petitioner,

vs.

IRVINGTON WINDOW CLEANING CO.
INC. and NEW JERSEY MANU-
FACTURERS CASUALTY INS. CO.,
Respondent.

Received at
Trenton,
Oct. 16, 1942.
Claim Petition
No. 65495.

20

Attorney for Respondent GEORGE E. MERE-
DITH, 175 W. State St., Trenton, N. J. N. J. M.

* * * * *

See Answer to Question No. 37.

30

37. If you deny that compensation is payable in this case explain your reasons for this conclusion. By its failure to answer questions 1 to 36 inclusive herein the Respondent does intend to admit the material allegations of the petition, nor does the Respondent by this type of answer waive any defenses which it has to the alleged cause of action.

The Respondent denies that the Petitioner met with an accident arising out of and in the course of his employment and therefore puts the Petitioner to his proof as to each and every material allegation of the petition.

40

IRVINGTON WINDOW CLEANING CO. INC.
(Respondent)

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

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } SS.:

GEORGE E. MEREDITH, of full age, being duly sworn according to law, on his oath deposes and says: That he is the Attorney and Agent 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. 10

GEORGE E. MEREDITH,
Attorney and Agent for the Respondent.

Subscribed and sworn to before me, this 15th 20
day of October, 1942, at Trenton, New Jersey.

EDMUND B. PIERCE,
Notary Public of New Jersey.

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

I, DANIEL A. SPAIR, Secretary of the Workmen's Compensation Bureau, do hereby the foregoing to be a true copy of the Respondent's Answer filed in this cause. 30

(s) DANIEL A. SPAIR,
Daniel A. Spair.
Secretary.

(Seal)

Filed Jun 15 9:20 AM '43
Russell C. Gates, Clerk
By.... AMT....

**Determination of Facts and Rule for
Judgment.**

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU.

10

BERNARD KOEPPPEL,
Petitioner,

vs.

IRVINGTON WINDOW CLEANING CO.,
INC. and NEW JERSEY MANU-
FACTURERS CASUALTY INSUR-
ANCE Co.,

Respondent.

Claim Petition
No. 65495.

Determination
of Facts and
Rule for
Judgment.

20

This matter came on before this Court in Newark, New Jersey, on March 30, 1943, and trial was completed on April 20, 1943, Mortimer Wald, Esq., appeared for David Roskein, Esq., attorney for the petitioner, and Walter W. Hubley, Jr., Esq., appeared for George E. Meredith, Esq., attorney for the respondent.

30

At the onset of the trial of the case it was stipulated between counsel for the parties that the question of liability only would be submitted to the Court for determination, and on this issue trial was had.

40

The petitioner was called and testified in his own behalf. His testimony was to the effect that he was employed by the respondent corporation as a window cleaner and salesman, and it was also brought out, on cross examination, that he was president of the corporation, which was operated out of his home.

Determination of Facts and Rule for Judgment.

His further testimony was to the effect that on July 24, 1942, after working on one of the respondent's jobs in Irvington, New Jersey, he had gone to Verona to look over a job that his company had bid on for the Verona Board of Education, and that after looking over this job he had then gone to a hotel located at Verona Lakes, a well known vacation resort in that locality. On the following morning, while going through the Orange Mountain Reservation, on his way to a job in Irvington, it appears that an insect got in the car and while endeavoring to remove same he lost control of his car and ran into a tree. 10

Cross examination brought out that the petitioner's wife was vacationing at the hotel at Verona Lakes, and that the petitioner had joined her at the hotel that night, and had stayed at same as a convenience. He admitted that had his wife not been at this hotel, he would have returned to his home at the evening of the day before, inasmuch as he had a job for the following day in Irvington. From the testimony there was no dispute but that the petitioner was on his way to a job in Irvington at the time of the accident. 20

From the cross examination of the petitioner and the testimony of Mr. Vincent Geiger, supervising principal of Verona Schools, considerable question was raised as to whether or not the petitioner actually had any reason to go to Verona school as he alleged. It appears that the bids for the job had already been submitted, and that the petitioner's corporation had made the low bid, but contracts had not as yet been issued. It further appears that the petitioner's corporation had done the work on the schools of Verona the previous year and, as I have stated before, this Court was not at all satisfied that the petitioner's 30 40

Determination of Facts and Rule for Judgment.

story of going to the Verona school is worthy of too much credit, but it does, nevertheless, not materially affect the issue in this matter.

10 From the consideration of this case and the testimony adduced, I am satisfied that the Petition must be dismissed. Solely for his own convenience and pleasure the petitioner saw fit to go to a resort hotel in Verona to be in the company of his wife. His home and place of business was in Irvington. The job to which he was going at the time of the alleged accident was located in Irvington. This case clearly falls within that line of cases that hold that such deviation from the employment takes the injured out of the scope of the Workmen's Compensation Act. While the petitioner was admittedly on his way to a job at the time of
 20 the accident, he had not reached same, nor as a matter of fact was he anywhere near the vicinity of same at the time of the accident. He was on his way to work over a route which he was forced to take because he had spent the night before at the resort hotel mentioned, and with no benefit or value to his employer whatsoever being associated with this venture. To the mind of this Court the accident occurred clearly outside of the scope of the employment, arising neither out of nor in
 30 the course of the employment.

It is, therefore, on this 4th day of May, 1943,
 ORDERED that the Petition be DISMISSED.

JOHN C. WEGNER,
 Deputy Commissioner.

Notice of Appeal.

ESSEX COUNTY COURT OF
COMMON PLEAS.

<p style="text-align: center;">BERNHARD KOEPPEL, Petitioner-Appellant, <i>vs.</i> IRVINGTON WINDOW CLEANING CO., INC. and NEW JERSEY MANU- FACTURERS CASUALTY INSURANCE Co., Respondents-Appellees.</p>	}	<p>On Appeal from Workmen's Compensation Bureau. C. P. No. 65495. Notice of Appeal.</p>	<p>10</p>
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To Daniel A. Spair, Secretary
Workmen's Compensation Bureau,
Wallach Building, Trenton, N. J. 20

Russell C. Gates, Clerk
Essex County Court of Common Pleas,
Court House, Newark, New Jersey.

George E. Meredith, Esquire,
Attorney for Respondents,
175 West State Street, Trenton, N. J.

Sirs: 30

PLEASE TAKE NOTICE that the petitioner, Bernhard Koepfel, hereby appeals to the Essex County Court of Common Pleas, from an order of dismissal entered in the Workmen's Compensation Bureau by the Honorable John C. Wegner, Deputy Commissioner, dated May 4th, 1943, wherein the petition for compensation filed in the Workmen's Compensation Bureau by Bernhard Koepfel as petitioner against Irvington Window Clean-

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Order Fixing Date of Argument.

ESSEX COUNTY COURT OF
COMMON PLEAS.

<p>BERNHARD KOEPPPEL, Petitioner-Appellant, <i>vs.</i> IRVINGTON WINDOW CLEANING Co., INC. and NEW JERSEY MANU- FACTURERS CASUALTY INSURANCE Co., Respondents-Appellees.</p>	<p>On Appeal from Workmen's Compensation Bureau. Order Fixing Date of Argument.</p>	<p>10</p>
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An appeal having been taken to the Essex County Court of Common Pleas from a determination and judgment of the Workmen's Compensation Bureau of New Jersey, and an application having been made for an order fixing the time and place for the hearing of said appeal; 20

It is, on this 8th day of November, 1943, on motion of David Roskein, attorney for the petitioner-appellant:

ORDERED, that argument in the above entitled cause be heard before the Essex County Court of Common Pleas at the Essex County Court House, Newark, New Jersey, on the 14th day of December, 1943, at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard. 30

(Signed) DALLAS FLANNAGAN,
Judge.

Conclusion.

COURT OF COMMON PLEAS.

DALLAS FLANNAGAN
WALTER D. VAN RIPER
DANIEL J. BRENNAN
RICHARD HARTSHORNE
President Judges

10

Newark, New Jersey
February 2, 1944.

Arthur T. Vanderbilt, Esq.,
Counsellor at Law,
744 Broad Street,
Newark, New Jersey.

20

David Roskein, Esq.,
Counsellor at Law,
17 Academy Street,
Newark, New Jersey.

Gentlemen:

30

After a careful reading of the testimony and having listened to the argument of counsel in the matter of *Koeppel v. Irvington Window Cleaning Company* I have reached the conclusion that the order of the Bureau dismissing the petition of the petitioner should be affirmed and I will sign a determination accordingly, but it should be submitted to me not later than Thursday of this week.

Very truly yours,

WALTER D. VAN RIPER.

Filed Feb 14 12:09 PM '44

Russell C. Gates, Clerk

40

Determination and Judgment.

ESSEX COUNTY COURT OF
COMMON PLEAS.

<p style="text-align: center;">BERNHARD KOEPPEL, Petitioner-Appellant,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">IRVINGTON WINDOW CLEANING CO., INC. and NEW JERSEY MANU- FACTURERS CASUALTY INSURANCE Co., Respondent-Appellees.</p>	}	<p style="text-align: center;">On Appeal from Workmen's Compensation Bureau. Determination and Judgment.</p>	10
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The above entitled matter came on before me 20
for hearing on appeal from the Workmen's Com-
pensation Bureau in the presence of David Ros-
kein, Esq., and John A. Laird, Esq., attorney and
of counsel, respectively, of petitioner-appellant,
and Arthur T. Vanderbilt, Esq., and G. Dixon
Speakman, Esq., attorney and of counsel, respec-
tively, of respondent-appellees. This matter had
been submitted to me for decision after oral argu-
ment and upon briefs, and, having considered the 30
same and having reviewed the transcript and pro-
ceedings of the Workmen's Compensation Bureau,
I do hereby find and determine as follows:

1. This is a proceeding brought by Bernhard
Koeppel, under Section 2 of the Act, commonly
known and designated as the Workmen's Compens-
ation Act, R. S. 34:15-7 *et seq.*, upon a claim peti-
tion duly filed.
2. After hearing of said matter before the New 40
Jersey Department of Labor, Workmen's Com-

Determination and Judgment.

pensation Bureau, the court, on May 4, 1943, made a determination of facts and rule for judgment in effect as follows:

- 10 A. That counsel for the respective parties stipulated that the question of liability only would be submitted to the court for determination and on that issue trial was had.
 - B. That solely for his own convenience and pleasure petitioner-appellant went to a resort hotel in Verona, New Jersey, to be in the company of his wife who was vacationing there, and where he remained overnight.
 - 20 C. That the following day petitioner-appellant proceeded in his automobile to go to a job in Irvington, New Jersey, and while proceeding through Orange Mountain Reservation he met with an automobile accident and thereby received various injuries.
 - D. That the home and place of business of petitioner-appellant was in Irvington, New Jersey.
 - 30 E. That the trip to the resort hotel in Verona, New Jersey, was a deviation from petitioner-appellant's employment and was of no benefit or value to his employer.
 - F. That on the day of the occurrence of the accident he was on his way to work over a route which he was forced to take because he had spent the night before at the resort hotel in Verona, New Jersey.
3. The Deputy Commissioner, after taking testimony, determined that petitioner-appellant's accident occurred outside of the scope of his employ-
- 40

Determination and Judgment.

ment, arising neither out of nor in the course of his employment, and, therefore dismissed the petition.

4. The appeal of petitioner-appellant is grounded on the proposition that at the time of the occurrence of the accident in which he suffered his injuries, he was in the course of his employment. 10

5. The weight of the credible testimony indicates that petitioner-appellant's accident occurred outside of the scope of his employment arising neither out of nor in the course of his employment.

6. I find that the petitioner-appellant has failed to establish that the accident arose out of and in the course of his employment within the meaning of the aforementioned statute, and accordingly the findings of the Workmen's Compensation Bureau are affirmed, and judgment is hereby entered in favor of respondent-appellees. 20

It is, therefore, on this 3 day of February, 1944, ORDERED that the appeal herein be dismissed.

WALTER D. VAN RIPER, 30
Judge.

Determination and Judgment.

ESSEX COUNTY COURT OF
COMMON PLEAS.

10

Misc-5891

BERNHARD KOEPEL,
Petitioner-Appellant,

vs.

IRVINGTON WINDOW CLEANING CO.,
INC. and NEW JERSEY MANU-
FACTURERS CASUALTY INSURANCE
Co.,
Respondent-Appellees.

On Appeal
from Workmen's
Compensation Bureau.
Determination and
Judgment.

By Order of the Court.
Judgment Entered
February 3, 1944.

Judge,
Walter D. Van Riper.

20

ARTHUR T. VANDERBILT, Atty. for Respondent-
Appellees.

On Appeal from Workmen's Compensation Bureau, Determination and Judgment, By Order of the Court in the above entitled action was rendered on the Third day of February, 1944, ORDERED that the appeal herein be dismissed.

30

I find that the petitioner-appellant has failed to establish that the accident arose out of and in the course of his employment within the meaning of the aforementioned statute, and accordingly the findings of the Workmen's Compensation Bureau are affirmed, and judgment is hereby entered in favor of respondent-appellees Irvington Window Cleaning Co. Inc. and New Jersey Manufacturers Casualty Insurance Co. and against the petitioner-appellant Bernhard Koepel.

Judgment signed and Entered February 3, 1944.

40

CHARLES W. PARKER,
J.

Book Z2 Page 4
Common Pleas Judgments

Reasons.

NEW JERSEY SUPREME COURT.

BERNHARD KOEPPEL, Prosecutor, <i>vs.</i> IRVINGTON WINDOW CLEANING Co., INC. and NEW JERSEY MANU- FACTURERS CASUALTY INSURANCE Co., Respondents.	}	On Certiorari. Reasons.	10
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The following are the reasons upon which prosecutor will rely for setting aside the judgment before this Honorable Court by writ of certiorari: 20

1. The Essex County Court of Common Pleas erred in finding that the prosecutor did not meet with an accident arising out of and in the course of his employment.
2. The Essex County Court of Common Pleas erred in affirming the findings of fact and conclusions of law of the Deputy Commissioner of Labor in the Workmen's Compensation Bureau wherein the prosecutor's claim petition for compensation was dismissed. 30
3. The judgment of the Essex County Court of Common Pleas in divers other respects is illegal, erroneous and oppressive to the prosecutor.

DAVID ROSKEIN,
 Attorney for Prosecutor.

Testimony.

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

10

BERNHARD KOEPPPEL,
 Petitioner,

vs.

IRVINGTON WINDOW CLEANING Co.,
 INC., and NEW JERSEY MANU-
 FACTURERS CASUALTY Co.,
 Respondents.

Testimony.

20

March 2, 1943.

Before: HONORABLE JOHN C. WEGNER, Deputy
 Compensation Commissioner.

Appearances:

DAVID ROSKEIN, Esq., for the petitioner.

GEORGE E. MEREDITH, Esq., by WALTER W.
 HUBLEY, Esq., for the respondent.

30

LEO DIAMOND, called as a witness on behalf of
 the petitioner, being first duly sworn, testified as
 follows:

Direct examination by Mr. Roskein:

Q. By profession you are a dentist? A. That
 40 is right.

Leo Diamond, for Petitioner—Direct.

Q. Did you have occasion to see Bernhard Koeppel subsequent to July 25, 1942? A. Yes.

Q. When? A. I saw him on June 15, 1942.

Q. Subsequent to July 25th, Doctor; after. A. Oh. I saw him September 9, 1942.

Q. And when prior to September 9, 1942, had you last seen him professionally? A. On June 15, 1942. 10

Q. Now, Doctor, on June 15, 1942, were you engaged in doing some work for him? A. Yes.

Q. What was it? A. I extracted a lower bicuspid.

Q. And what was the condition of his mouth at that time as far as artificial dentures were concerned? A. According to my report, his teeth were in very good condition. He had a bridge which I had made in March, 1941, extending from the left central incisor to the left first bicuspid, replacing the left cuspid and the left lateral. Those were the artificials. 20

Q. When you saw him on July 9th, Doctor—

The Court: July 9th?

By Mr. Roskein:

Q. —September 9, 1942, what was his condition?

A. When I examined him on September 9th I found that he had seven teeth missing. They were as follows: The upper left first molar, upper left second bicuspid, upper left first bicuspid, upper left cuspid, which was one of the artificial ones, upper left lateral, which was an artificial one, upper left central, and the upper right central. 30

Q. So that was five natural teeth missing? A. That is right.

Q. And two— A. Replacements. 40

Leo Diamond, for Petitioner—Direct.

Q. (Continuing)—artificial teeth? A. That is right.

Q. And did he give you a history, Doctor, that these were damaged and lost in this accident that he was involved? A. That is right.

Q. On July 25, 1942? A. That is right.

10 Q. Doctor, have you treated or furnished any dental service to him subsequent to September 9, 1942? A. When I examined him in September he had all these teeth missing and he was in no condition to come to my office because of his other injuries. It had injured his health to the extent he had no teeth to chew with, and because he could not come to my office I had to make him a temporary denture to tidy him over until he was able to come to my office, until his gums healed up

20 firmly. So that was the work I did.

Q. What was the charge for the service you rendered him? A. The charge for the temporary denture was \$50.

Q. Now, Doctor, what is necessary in order to replace the five natural teeth that had been lost in this accident and to fit him up in a manner befitting his physical and financial condition?

30 Mr. Hubley: Objected to, if it please the Court. I don't know what is meant by fitting him up in conjunction with his physical condition.

Mr. Roskein: I withdraw that question.

By Mr. Roskein:

Q. What, Doctor, in your opinion, should be done or is required to be done as far as his teeth and his mouth are concerned to replace the damage that was done in this accident? A. Well, in

40 order to replace his mouth to the condition as near

Leo Diamond, for Petitioner—Cross.

as possible as it was prior to the accident I figure a gold removable partial denture.

Q. And what does that consist of? A. You mean——

Q. What is the purpose of it and where does it go? A. It would go from the upper left—replace all those missing teeth. 10

Q. And what would the reasonable cost of that be? A. \$450.

Q. You are aware that he went in the Armed Services of the United States? A. That is right.

Q. And your testimony is taken out of turn for that reason? A. That is right.

Q. Your testimony fee is left to the discretion of the Court? A. That is right.

Mr. Roskein: That is all. 20

Cross examination by Mr. Hubley:

Q. Doctor, how much of that \$450 will be charged for the replacing of the five natural teeth? How much would be charged for the replacing of the five natural teeth? Not replacing the lost denture, but the replacing of the five natural teeth? A. Well, you can't replace the five natural teeth without making a partial denture.

Q. That is right. How much would you charge for the partial denture to replace the five natural teeth? A. What type? 30

Q. The type that you would use in this instance. A. A gold partial, \$450.

Q. No matter how many teeth you use to put on it? A. No. The more teeth there are on it, the more expensive.

Q. You are going to put on seven? A. That is right.

Q. How much would you charge to make a denture for the five? A. Let me explain—— 40

Leo Diamond, for Petitioner—Cross.

Q. I understand all that, Doctor, but assuming only five teeth had been lost. A. It only—

Mr. Roskein: I will have to object to that.

Mr. Hubley: I press it.

10 Mr. Roskein: I don't think it is material as to what work would be required in any other person. It is the work required on this man.

The Court: I will allow the question.

Mr. Roskein: All right, sir.

By Mr. Hubley:

Q. Will you answer it, please, Doctor? A. In order to replace five teeth—

20 Q. Let me withdraw the question and put it this way:

Instead of a seven-tooth denture, what would you charge for a five-tooth denture, using the five natural teeth as the basis for it in this case? A. It would be about a hundred dollars less.

Q. Now, Doctor, that would be the charge you would contemplate making in this case to Mr. Bernhard Koepfel, is that right? A. That is right.

30 Q. But if a man came in to you, Doctor, who— for instance, a laboring man with a twenty-dollar a week income, you would not make him a \$450 plate for his mouth, would you, Doctor?

Mr. Roskein: I will have to object to that, sir. I think all medical and dental services are all rendered on the basis of the financial ability of the patient to pay, his financial status and position in life.

40 Mr. Hubley: Well, if that were so, your Honor, we would not be limited to a fee of

Leo Diamond, for Petitioner—Cross.

\$2 in the office and \$3 at home under the Compensation Act, because that is exactly what many physicians charge, and the law has made it equal for all, whether rich or poor. The Act is for the laboring people, who don't have a large income, and the cases have held that an insurance carrier is not to be placed in the position of having to pay other than the average, not for any individual patient's character or position in life. 10

Mr. Roskein: What I object to is the twenty-dollar a week income.

By Mr. Hubley:

Q. Any income, Doctor, then. In other words, Doctor, the \$450 gold removable partial denture is the best you can give this man, isn't it? A. That is right. 20

Q. Well, in the case of an average man, for instance, what would that cost? A. Well, it so happens that in my office I prescribe the finest type of denture.

Q. I am sure you do, Doctor, but assuming he had not come to your office but had gone to somebody else who did not prescribe such fine treatment, what would he be able to get such a denture for other than a gold partial removable denture, approximately? A. Other than a gold partial removable denture? 30

Q. Yes. Assuming, in other words, we don't want to buy the most expensive and we can't afford it. A. Oh, he can get a good denture for \$250.

Q. That is for the seven teeth? A. That is for the seven teeth. 40

Leo Diamond, for Petitioner—Cross.

By Mr. Roskein:

Q. Would you call it any particular name, Doctor? A. Well, there is the non-base metals, vitallium, nobilium, ticonium—

10 By Mr. Hubley:

Q. You say they would run about \$250 for the seven teeth? A. That is right.

Q. Somewhat less for five natural teeth? A. I beg your pardon?

Q. I said, somewhat less for five natural teeth than \$250 for the seven? A. It would be less, a few dollars less for the five.

20 Q. There are many people who use that kind of metal, aren't there, Doctor—that kind of bridge? A. Many people use vulcanite.

Q. But this is—what you described as a good denture is used by many people, is it not? A. Yes.

Mr. Hubley: That is all, Doctor.

By Mr. Roskein:

Q. Those metals you mentioned, vitallium and the others, they are hard to obtain because of the war effort? A. They are the non-precious metals.

30 Mr. Roskein: That is all. Thank you, sir.

(Thereupon the hearing was adjourned to a future date.)

Certificate of Deputy Compensation Commissioner.

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

JOHN C. WEGNER, 10
Deputy Compensation Commissioner.

Certificate of Court Reporter.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the proceedings in this matter, as taken stenographically by me, at the time, place and date hereinbefore set forth. 20

WILLIAM D. KLIGER,
Certified Shorthand Reporter.

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40

Bernhard Koepfel, Petitioner—Direct.

March 30, 1943.

[HEARING CONTINUED.]

Before: HONORABLE JOHN C. WEGNER, Deputy
Compensation Commissioner.

10

Appearances:

MORTIMER WALD, Esq., for the petitioner
(DAVID ROSKEIN, Esq.).

WALTER HUBLEY, Esq., for the respondent.

20

BERNHARD KOEPEL, the petitioner, called as a
witness on his own behalf, being first duly sworn,
testified as follows:

The Court: Can we stipulate anything?

Mr. Hubley: Wages in excess of \$30.
other than that, I think, nothing.

Mr. Wald: I presume then we can stipu-
late he was employed by the respondent?

Mr. Hubley: Yes.

The Court: All right.

30 *Direct examination by Mr. Wald:*

Q. Mr. Koepfel, how old are you? A. Forty-
four.

Q. And how long have you been in the employ
of the Irvington Window Cleaning Company? A.
Since March, 1938.

Q. Now, were you in their employ on July 25,
1942? A. Yes.

40 Q. Do you recall what day of the week that
was? A. Saturday.

Bernhard Koepfel, Petitioner—Direct.

Q. And what was your position, or what was the nature of your duties while employed for the Irvington Window Cleaning Company? A. Cleaning windows, soliciting, everything.

Q. Where was it necessary for you to perform your work? A. Where?

Q. Yes. A. All over in Jersey. 10

Q. All over New Jersey? A. Yes.

Q. And just what would you do when you had work to do? A. Well, I would take the car—

Q. Whose car is this you would use? A. My own. I would use my car and take ladders and tools for cleaning.

Q. And where would you carry these tools and ladders? A. In the car. The ladders we have in the bracket and carry them on top of the car; and the tools in the car. 20

Q. Who would pay the expenses of operating the car going to and from these places of employment? A. The company.

Q. The company would pay them? A. Yes.

Q. Now, on July 25, 1942, did anything unusual occur while you were in the employ of the Irvington Window Cleaning Company? A. Yes, it did. I had an accident with my car.

Q. What time did this accident occur? A. Around seven o'clock, five after seven in the morning. 30

Q. Where did this accident occur? A. It occurred on the way from—it was in the South Mountain Reservation in West Orange.

Q. And how did the accident happen? A. I was chasing a bee from the windshield. I had the little window open, that is how she came in and even killed the bee, and at the same time ran into a tree to my left side. I actually couldn't say how everything happened in seconds. 40

Bernhard Koepfel, Petitioner—Direct.

Q. You lost control of the car? A. Yes.

Q. In what direction?

(Discussion off the record.)

10 Mr. Hubley: It is agreed between counsel that the matter is being submitted to your Honor on the question of liability. The liability question won't take very long. The disability question might be lengthy. And I think in fairness to both sides if your Honor feels we are liable in this case, we should have the opportunity, both sides to see if it can be adjusted. We feel there is no liability, and counsel thinks there is. So that we can get rid of it on that point.

20 Mr. Wald: That is agreeable, Mr. Hubley.

By Mr. Wald:

Q. Now, at the time of this accident, in what direction were you going? A. I was going in the direction to Irvington to the job.

30 Q. And what was your objective in Irvington?
A. It was my object 485 Lyons Avenue, the Iron and Steel Company or the Irvington Iron and Steel Company, where we had started on the job on Wednesday morning and performed work on Wednesday and Thursday and had only left a certain part of that plant on the inside part where the welders work and we could not disturb them so it was put for Saturday as the only day, Saturday or Sunday when that work could be performed.

Q. And did you have your tools with you at the time? A. Yes, I had all my tools with me.

40 Q. And where were these tools? A. My working jacket was right in the car and the tools were in the trunk.

Bernhard Koeppel, Petitioner—Direct.

Q. Where had you been coming from? A. I came from Verona Lake.

Q. And where had you been the day before?

A. The day before, the whole day in Maplewood, and in the evening around four o'clock I went to Verona to check on schools which we had to start work on next week, the coming week.

10

Q. And did you have a contract to perform with these schools? A. Yes, I had a contract with them.

Q. And what was your object in going there on the day before? A. To find out what kind of ladders I'll need there and where I'll find it convenient to start.

Q. And how far is Verona from your home? A. Well, about ten or twelve miles or so.

Q. And what time did you look at the job on the schools in Verona? A. Around five or six.

20

Q. And after that where did you go? A. After that on my way back I stopped in on Green's Hotel, which is on the way to Irvington and slept there over night.

Q. And the next day you got up what time? A. Around 6:30 and went straight to the job.

Q. Do you work at any particular place, any one particular place in the course of your duties?

A. Well, we are listed in the yellow pages as the Irvington Window Cleaning Company and we go as far—last year we worked in Packanac Lake. We were up there for weeks. We work in Morristown, in Boonton. Wherever we are called, we go.

30

Q. And how many of these jobs do you perform in a day? A. It is hard to say. Sometimes you stay on the job a week too, and sometimes only hours; depends on the job.

Q. When you leave in the morning do you report in the office of the Irvington Window Clean-

40

Bernhard Koepfel, Petitioner—Cross.

ing Company? A. Well, not exactly. We usually have our schedules for the whole week so that we don't have to report. And then during the day wherever I am I call up the office and if there is anything that has to be done the same day I simply change my schedule.

- 10 Q. Now, this job that was to be finished at 485 Lyons Avenue, did you get to the job that day?
A. No; instead I got to the hospital.

Mr. Wald: Well, insofar as the question of liability is concerned, I can stop at that point with the questioning of the petitioner.
The Court: All right.

Cross examination by Mr. Hubley:

- 20 Q. Now, Mr. Koepfel, let's see. You told the Court that you work for the Irvington Window Cleaning Company? A. That's right.

Q. Cleaning windows and soliciting? A. Yes.

Q. As a matter of fact, you are president and treasurer and owner of the Irvington Window Cleaning Company? A. It is a corporation and—

Q. It is a corporation? A. Yes. And I am president, that's right.

- 30 Q. Just answer the question.

You testified in answer to counsel's question that your job with the Irvington Cleaning Company was cleaning windows and soliciting. As a matter of fact, your job with the Irvington Window Cleaning Company, which you remind me is a corporation, is as president and treasurer, isn't it so? A. Yes.

Q. And who is the vice-president? A. We have no vice-president.

- 40 Q. Who is the secretary? A. My wife is the secretary.

Bernhard Koeppel, Petitioner—Cross.

Q. Your wife is the secretary? A. Yes.

Q. And, as a matter of fact, it is a family corporation, isn't it? A. Well, I don't know.

Q. So as president and treasurer of this corporation you also work for the corporation, is that right? A. Yes.

Q. Now, when you had this accident you were chasing a bee in your automobile, is that right? A. Yes. 10

Q. The bee hadn't stung you or didn't sting you, did it? A. No.

Q. You saw the bee in your car, you tried to chase it out, and while doing so you ran into a tree, is that right? A. Yes.

Q. And that car, sir, is owned by you, is it not? A. Well, I drive it, but it is bought for the corporation's money, which I can prove. I drive it—— 20

Q. Just answer the question? A. Yes.

Q. In whose name is the registration? A. In my name.

Q. Bernard Koeppel? A. That's right.

Q. And what is the address where you garage it? A. 282 Nesbitt Terrace.

The Court: Where is that?

By Mr. Hubley:

Q. You also told the Court in answer to your counsel's question that you don't have to go back to the office every day because your schedules are made out for the week, is that right? A. I didn't say every day. 30

Q. You said you don't have to go back to the office. A. No, because we usually have our schedule set for a whole week.

Q. Now, 282 Nesbitt Terrace is where you live, isn't it? A. That's right. 40

Bernhard Koepfel, Petitioner—Cross.

Q. It is your home, isn't that right? A. It is our home and the office at the same time.

Q. Your office is in your home, is that right? A. Yes.

Q. And 282 Nesbitt Terrace is the address of that place, is that right? A. That's right.

10 Q. You don't have any office in any business section of this City, in any of the office buildings in this City? A. No.

Q. Away from your home, do you? A. No.

Q. Now, then, you live at 282 Nesbitt Terrace and out of that place you run this business? A. Yes, that's right.

20 Q. So that when you say you don't have to go back every day, the schedules are made up during the week, as a matter of fact your bed were you sleep is in 282 Nesbitt Terrace, isn't it? A. I live at 282 Nesbitt.

Q. That is your house, your home, isn't it? A. Yes.

Q. Now, you said you were up in Verona and slept at the Green Hotel in Verona Lake? A. Yes.

Q. Sunday? A. Friday night.

30 Q. The reason you went to Verona Lake to sleep in Green's Hotel was because Mrs. Koepfel was staying at Green's Hotel rather than at 282 Nesbitt, isn't that so? A. That's right.

Q. And how long had she been there? A. Just a few days.

Q. She was vacationing there? A. Just a few days.

Q. I don't care how long. She was vacationing there? A. Yes.

Q. And you went up there Friday night to stay with Mrs. Koepfel? A. I didn't go up there.

Bernhard Koepfel, Petitioner—Cross.

- Q. You went to Green's Hotel in Verona Lake?
 A. No. You must understand that Verona—
- Q. Just answer the question. I know it is right next to where the job was. A. It is exactly on the way. You must pass that hotel.
- Q. If Mrs. Koepfel hadn't been at Green's Hotel you would have gone back to 282 Nesbitt to sleep in your home, wouldn't you? A. Well, most likely. 10
- Q. Mrs. Koepfel happened to be vacationing in Green's Hotel in Verona, is that right? A. Yes.
- Q. You went and stayed in Green's Hotel, Verona, Friday night, is that right? A. Yes.
- Q. The next day driving through the South Orange Reservation from Green's Hotel the bee got in the car and while chasing it out you ran into a tree, is that right? A. Yes. 20
- Q. You hadn't gone back to 282 Nesbitt before you started for this job on Lyons Avenue, Irvington, had you? A. No.
- Q. You had just left—how long before this bee got in the car had you left Green's Hotel? A. It is only a few minutes. From Green's Hotel to that particular tree is only a few minutes.
- Q. In fact, it was on Cherry Lane in the Reservation in Verona where you had the trouble with the bee? A. Yes. 30
- Q. Now, sir, do you know Mr. Geiger of the Verona Board of Education? A. Yes, I know him. He is the man with whom I spoke before I got the contract.
- Q. Mr. Geiger was the man you dealt with at the Verona Board of Education? A. That's right.
- Q. And do you agree, sir, that you made and your bid was received for the Verona Education job on July 15th. A. You mean it was the day 40

Bernhard Koeppel, Petitioner—Cross.

of the opening of the bids on the evening of July 15th, 8 o'clock.

Q. And you remember that you talked with Mr. Geiger on July 16th, 1942? A. Yes.

Q. And he told you that you could have the job? A. That I have it already; that the County
10 has—the Board of Education of Verona has submitted—I mean has taken my bid as the lowest and I have the contract for the job.

Q. In other words, prior to July 16th, you had made your bid on the job? A. Yes—

Q. And— A. Not on the job.

Q. Well, for that job? A. Yes.

Q. And on July 16, Mr. Geiger of the Verona Board of Education told you that your bid was the low bid and that you could have the job? A.
20 Yes, I can start any time I like to do the cleaning.

Q. Don't you know, sir, that the contract wasn't issued until August 5, 1942? A. That doesn't mean anything because I called him up—I didn't—I called him on the sixteenth and was told that my bid—I have the contract and any time I feel I can come and start the cleaning, and I did not have to wait for the contract because I was doing that job once before already.

Q. When did Mr. Geiger tell you to start on the school job? A. Any time I like to. In fact,
30 they have to be done before the school starts.

Q. Well, school doesn't start until after Labor Day? A. Yes, but it is six buildings to be cleaned. That requires some time.

Q. Well, if I told you, sir, that Mr. Geiger told you that you could not start at any time but that you couldn't start on that job until after the contract had been signed in August, what would you say to that? A. Mr. Geiger didn't tell me anything
40 of the sort, and I had not to sign any con-

Bernhard Koepfel, Petitioner—Cross.

tracts. They had to send me a contract because they had mine already before the fifteenth. Mr. Geiger never told me anything of the kind.

Q. Now, you say on Friday night before you went over to Green's Hotel at Verona Lake you stopped—you went to the Verona School? A. Yes, that's right. 10

Q. Now, you had already made your bid a couple of weeks before, had you not? A. Not a couple of weeks. It is only the fifth of July the bid was given—the contract was given out on the fifteenth of July, and I called up the sixteenth of July so I didn't know only a few days earlier.

Q. On the sixteenth of July you were told you had made the low bid? A. Yes.

Q. On the twenty-seventh of July at what time of the day did you say you went to this school? A. The twenty-fourth. 20

Q. I say, what time of the day did you say you went to this school? A. After the work.

Q. What time? A. In the afternoon around five or so.

Q. Did you see Mr. Geiger? A. I had no business to see him.

Q. Who did you see? A. Nobody. I just had to look. I'll explain to you.

Q. Just answer the question. Who did you see? A. Nobody. I didn't have to see anybody. 30

Q. You say you had done that job before? A. Yes; and on the contract.

Q. Just answer the question. You say you had done the job before? A. Yes.

Q. You had made a bid on the job this time? A. Yes.

Q. You were notified the bid was O. K.? A. I did the job three years ago.

Q. Then you made a bid on this job? A. Yes. 40

*Certificates of Court Reporter and
Deputy Compensation Commissioner.*

Q. And you were told you could have the work?
A. Yes.

Q. And you went up to the school this evening
about five o'clock? A. Yes.

Q. You saw no one? A. Yes.

10 Q. You didn't go up to wash windows, did you?
A. No, not that day.

Q. And after you left this school, rather than
go home or back to your office, which is in your
home, you went over to Verona or you went to
Green's Hotel? A. I stopped in Verona.

Q. And stayed where your wife was staying in
this hotel? A. Yes.

Mr. Hubley: That is all.

Mr. Wald: That is all.

20

(At this point the hearing was adjourned
to a later date.

Certificate of Court Reporter.

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

30

ROBERT A. BIRCHMAN,
Certified Shorthand Reporter.

Certificate of Deputy Compensation Commissioner.

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

40

JOHN C. WEGNER,
Deputy Compensation Commissioner.

Steve Kronicz, for Petitioner—Direct.

April 20, 1943.

[HEARING CONTINUED]

Before HONORABLE JOHN C. WEGNER, Deputy Compensation Commissioner.

Appearances:

10

MORTIMER WALD, Esq., (DAVID ROSKEIN, Esq.)
for the Petitioner.

WALTER W. HUBLEY, JR., Esq., (GEORGE E.
MEREDITH, Esq.) for the Respondent.

STEVE KRONICZ, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows: 20

Direct examination by Mr. Wald:

Q. Where do you live, sir? A. 161 Baltimore Avenue, Hillside.

Q. By whom are you employed? A. Irvington Steel and Iron Works.

Q. In what capacity are you employed there? A. Shipper. 30

Q. How long have you been working for the Irvington Steel and Iron Works? A. A little better than six years.

Q. Have you been working steadily for them in that time? A. That is right.

Q. What are your duties with that company? A. Shipping and taking care of things.

Q. During what hours are you at the plant? A. From eight to eight; I am the first one in and the last one out. 40

Steve Kronicz, for Petitioner—Direct.

10 Mr. Hubley: I am willing to stipulate, your Honor, the testimony insofar as this witness is concerned to the effect that—let me put it this way; your Honor will recall that petitioner testified that he had a job for this company on Saturday morning and that he was on his way to that job from Verona on the Saturday morning when this accident took place.

20 Now, I am willing to stipulate that as far as the respondent is concerned, we have no testimony to disprove such arrangement or such facts, alleged facts. The only thing I would like the witness to state is as to the address of this particular job. In other words, for the record, it is not our contention that this man was not going to work at the time this accident took place, that is, he wasn't going to wherever this job was located. Our contention goes to the other end of the case, not that.

30 Mr. Wald: Without prejudice, I would like this statement, if we can arrive at this stipulation; this witness is to testify that he has known Mr. Koepfel's practice of coming to the plant to clean the windows, that his custom was to come during the week to do part of the job and then there were certain parts of the plant which he had to clean on week-ends when there were no other people working in the plant, and in that very week when Mr. Koepfel had the accident on Saturday he had had a conversation with Mr. Koepfel in which there was an intention expressed that he was coming to finish the job on Saturday, and

40

Steve Kronicz, for Petitioner—Cross.

that Mr. Koepfel had left some of his equipment there; he had locked it up in the tool shed. This gentleman knew it was there. And also one further fact, that at the time on this Saturday morning when Mr. Koepfel met with his accident, that there was another fellow working there waiting for Mr. Koepfel, that is, one of Mr. Koepfel's employees waiting for Mr. Koepfel to come there and work with him. 10

Mr. Hubley: No objection to that stipulation that that would be the testimony of this witness.

Mr. Wald: I did bring this witness down to show that the petitioner's story that he presented on the stand could be corroborated, that he was on his way to this job. If Mr. Hubley is kind enough to so stipulate, I will withdraw the witness. 20

Mr. Hubley: Very well, except I would like to ask these questions:

By Mr. Hubley:

Q. What is the address of this place that is under discussion? A. 487 Lyons Avenue, Irvington. 30

Q. 487 Lyons Avenue, Irvington? A. That is right.

Q. Could you tell me, sir, within a reasonable degree of distance, how far that is from 282 Nesbitt Terrace? A. I wouldn't be able to tell you that because I don't know where Nesbitt Terrace would lay.

Q. You know where Nesbitt Terrace is? A. No, sir. 40

Vincent Geiger, for Respondent—Direct.

Mr. Hubley: That is all.

(Witness was excused.)

Mr. Hubley: Would that complete your case factually?

Mr. Wald: Yes.

10 Mr. Hubley: That is the last witness on your case on the question of liability, is that correct?

Mr. Wald: Yes.

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

20

Direct examination by Mr. Hubley:

Q. Mr. Geiger, where do you reside? A. 19 Wilton Terrace, Verona.

Q. You are associated with the Verona School System; is that correct? A. I am Supervising Principal of Schools.

Q. Where is your office? A. In the F. N. Brown School, Verona, New Jersey.

30 Q. Now, from your position with the school system of Verona, will you tell the Court whether or not you know on what date bids were made for the window cleaning job in question? A. Bids were opened July 15th after advertisement.

Q. And it has been testified—I don't think it is in dispute—that the Irvington Window Cleaning Company submitted a bid and that that bid was the low bid? A. That is correct.

40 Q. Do you recall, within a reasonable degree of time, sir, on what date prior to the issuance of the contract the Irvington Window Cleaning Com-

Vincent Geiger, for Respondent—Direct.

pany, or anyone in its behalf, was notified that theirs was the low bid? A. I can't recall clearly whether they did or did not contact my office to find out when the bid would be let, when the contract would be let.

Q. At any event, the Irvington Window Cleaning Company did submit a bid on or about July 15th; is that correct? A. That is correct. 10

Q. Will you tell the court, sir, when the contract for that job was signed or issued? A. That contract was awarded at a special meeting of the Board of Education August 5, 1942.

Q. And prior to the awarding of that contract, was there to be any work done or would there be any work done—let me put it that way—in other words, until the contract with the people to do the job was issued, would the work be done on the school? A. No, it would be very highly improbable. May I say this: If any contractor were to do a job before the contract was awarded, he may not even get the contract. 20

Q. I think, sir, that is a proper inference. At any event, the contract was issued at the special meeting of August 5, 1942? A. That is right.

Q. Could you tell, sir, on or about July 25, 1942, first, whether the schools were open at that time? When I say "open" I mean in session. A. The schools weren't in session. 30

Q. And at that time, do you recall, sir, whether or not you were in the locality? A. Yes, I was in the locality.

Q. Were you at the school during that period of time? A. Yes, for a considerable part of the entire summer vacation.

Q. To your recollection, subsequent to the date of July 15th, the letting of this contract or the 40

Vincent Geiger, for Respondent—Cross.

bidding, rather, and the issuance of the contract on August 5, 1942, did you ever see Mr. Koepfel or anybody associated with him doing any work on the premises? A. I did not.

10 Q. Do you have any recollection of ever having seen Mr. Koepfel on the premises for any purpose? A. I did not see him during that time.

Q. From your own knowledge, sir, do you know whether or not the Irvington Window Cleaning Company had previously done the work on the schools? A. They had held at least one contract previously.

20 Q. Would you know, sir, any reason, in association with this work, why, on the night of July 25th, that is, the evening of July 25th, around four or five o'clock or thereabouts—24th, rather—that Mr. Koepfel would have been at the school? Would you, of your own knowledge, know of any reason for that? A. I wouldn't know of any. Certainly, we didn't ask him to come there.

Mr. Hubley: You may cross examine.

Cross examination by Mr. Wald:

30 Q. All bids, Mr. Geiger, are submitted to you? A. They are submitted to the Board of Education. They are sealed bids.

Q. Mr. Koepfel has done work for the Verona Schools before; is that right? A. That is right.

Q. You have seen him there on occasion? A. Oh, yes.

Q. And that was within the year prior to this accident on July 25, 1942? A. Yes, that is right. He had the contract for the previous year.

40 Q. And is it correct, Mr. Geiger, that the window cleaning which is done during the summer is done before the schools open? A. That is right.

Vincent Geiger, for Respondent—Cross.

Q. How many schools are there in Verona? A. Six.

Q. When did the schools open in 1942, September? A. September 9th, as I recall.

Q. Now, do you recall when Mr. Koeppel submitted a bid for this job in July, 1942? A. Those bids come through as sealed proposals. I had no direct contact with any of the sealed proposals. 10

Q. When were bids sought, on what date? A. They were authorized by the Board of Education in a meeting, probably the regular meeting in June.

Q. Now, these bids are opened at the regular meetings, aren't they? A. They may be opened at a regular or a special meeting.

Q. In this case, do you recall whether they were opened at the regular meeting or at a special meeting when the contract was signed? A. If July 15th was the second Wednesday of the month which I suspect it was, it was a regular meeting. 20

Q. At that time, do you recall that the bids were opened? A. The bids were opened at that time.

Q. So that, on July 15th, you knew, and so did the Board of Education know, what was the lowest bid? A. That is correct.

Q. And then it just constituted a decision and the formality of signing a contract; is that correct? A. If the Board chose to accept any of the bids, yes. 30

Q. Other contracts were let out for other work done for the city; is that correct? A. For the Board of Education.

Q. That is, for the Board of Education? A. That is right.

Q. And those contracts were signed, I presume, also at the special meeting in August? A. Our contracts are issued as purchase orders over the signature of the District Clerk. 40

Vincent Geiger, for Respondent—Cross.

Mr. Wald: Withdraw that—all right, let it go.

By Mr. Wald:

10 Q. Now, then, you knew on July 15th that Mr. Koeppe's bid was the lowest; is that correct? A. That is right.

Q. Now, do you recall Mr. Koeppe calling you on July 16th and asking you if his bid was the lowest? A. I don't recall it, but it is quite possible that he may have done so.

Q. Do you recall a conversation with him? A. I don't recall a conversation.

20 Q. If Mr. Koeppe states that he did call you and you told him on July 16th that he had submitted the lowest bid, you would not deny that, would you?

Mr. Hubley: Objected to, if it please the Court. There is no such testimony in the case.

Mr. Wald: I think Mr. Koeppe has testified—

Mr. Hubley: Well, withdraw the objection.

(The last question was read.)

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The Witness: I can scarcely say yes or no to that.

By Mr. Wald:

Q. Now, on August 5th, when the special meeting of the Board of Education was held, the contract was awarded to him formally; is that correct? A. That is right.

40 Q. So before that the relations with Mr. Koeppe had been that he had done work before and

Vincent Geiger, for Respondent—Cross.

that he had submitted the lowest bid? A. That is right.

Q. Now, will you deny that you had indicated to Mr. Koepfel on July 16th that, in all probability, the contract would be awarded him? A. I think I would probably say to Mr. Koepfel, "You have submitted the lowest bid," because that was a matter of public record and public information, having been opened in a public meeting. 10

Q. Now, if Mr. Koepfel stated that he had gone up to look at one of the buildings on July 24th in the afternoon to ascertain what equipment he might need for the performance of his work, you wouldn't deny that either, would you? A. No, I couldn't say yes or no to that; he could or he could not. 20

Q. It is not necessary for any inspection of the building, that is, from the outside, for Mr. Koepfel to contact you personally, is it? A. No.

Q. You don't know what building it was that Mr. Koepfel did go to look at on July 24th, do you? A. I don't know whether he was in the buildings, whether he went to any buildings.

Q. You can't deny it?

Can you answer the question yes or no? Do you know what building he did go to inspect? 30

Mr. Hubley: Objected to.

The Witness: I certainly don't know whether he was in town or not.

Mr. Wald: That is all.

Mr. Hubley: That is all.

(Witness was excused.)

Mr. Hubley: Counsel for the petitioner advises me that he has another witness, the man who worked on the car or saw the car 40

Motion for Dismissal of Petition.

10 right after this accident, and if he was called he would testify to the fact that he did find in the car various pieces of window cleaning equipment. I have no reason in the world to question that, and will stipulate that if this witness was called, he would so testify.

Mr. Wald: Yes, that he would testify that he was in the employ of the West Orange Motors.

Mr. Hubley: That is of no importance. It was somebody who worked on the car right after the accident, and in inspecting the car, did find various items of window cleaning equipment in the car.

Mr. Wald: That is sufficient.

20 If your Honor please, on the factual situation, I am resting in this case and submitting to your Honor.

Mr. Hubley: I would like to make a motion, and that is for the dismissal of the petition on the ground that the petitioner did not establish that the accident that took place arose out of and in the course of the employment.

30 The issue in this case is narrow. The facts are not in material dispute. The question resolves itself as to one of credit, and that is within the court's power to decide, and apply that credit to the facts and the law of the case.

40 There is no doubt that what this petitioner, employed by the respondent—in fact, he is the president of the respondent concern—met with the accident that occurred. Now, he testified that this office that he referred to they only went in about once a

Motion for Dismissal of Petition.

week to get their assignments. That was the direct testimony, if your Honor will recall, that that is where he was employed as a window cleaner and salesman. It turns out on cross examination, not only to be his office where he went in once a week to get his orders, but also his home where he went every night of the week, and it also came out on cross examination that he wasn't only a window cleaner and salesman, as he had told your Honor on direct, but he was the president of the concern and his wife, secretary and treasurer, and they are the concern. He testified that the company assumed, more or less, control of the car, insofar as paying the expenses is concerned, and on cross examination, it comes out that the car was garaged at his home. 10 20

His wife spent a week-end at a hotel in Verona—Verona Lakes or whatever the name is; I don't recall at the moment the exact name of the set-up, but it is a well known resort—spent a week-end there, and I submit, if it please the Court, that even had we left out—and I want to argue that in a moment—the question of the stay in Verona, even if we concede that, here is a man who has his place of business at home, 282 Nesbitt Terrace, Irvington. He has a job in Irvington for Friday, he has a job in Irvington for Saturday. He says that he went to Verona that night to look over the school where he had had the job the year before, and he had already submitted his bid, which was the lowest bid, for some unknown reason, as he says, to see what equipment was necessary, and then went 30 40

Motion for Dismissal of Petition.

from there to Verona Lakes to spend the intervening time with his wife where she was staying at this hotel.

10 I submit, if all that is true, your Honor, the case is not compensable. The deviation from the normal course of his life and the normal course of his going to employment was for his sole convenience and pleasure. He saw fit to stay in Verona, not because of business and necessity; it wasn't a case of where it would be more convenient for the petitioner to go to his employment the next morning from Verona. It was more convenient to go back to Irvington, where he had the job Saturday morning, than to stay in Verona that night. The shortest and the
20 quickest way to have served his employer, himself, was to have returned to Irvington that night and gone to work in Irvington the next morning. No, he saw fit, for his own convenience and pleasure, to go off to Verona Lakes, to a resort and stay at the hotel with his wife. And your Honor will recall I asked him what I think was the only pertinent question in this case: Would you have stayed, through business obligations, in Verona that night had your wife not been staying at this hotel? and he said
30 no, he would have gone back to Irvington.

Now, spotting the petitioner all of the case as I say, he left his employment that night, that is, the night before the accident, and then went to a hotel in Verona where he stayed with his wife that night, and the next morning, starting to go back to Irvington and while he was still closer by far to this
40 resort where he had been vacationing for

Motion for Dismissal of Petition.

that evening, he has this accident, and he would have your Honor, under this set of facts, hold that that accident arose out of and in the course of the employment.

But, in addition to that, I say even if we accept the thought, I can't see the compensability. This man saw fit to say that he was making this ambiguous, non-accompanied, non-interviewing stop at the school that evening. Well, the purpose of that was so obvious that your Honor may only look into that through the credit that you can put in this petitioner's testimony, which, I say, is practically nil for a man of his position in business, and what would we expect from a man of that type? I have seldom heard a witness who was more of an outright prevaricator on the stand than this individual, who was clever enough that most of his untruths were silent untruths—"I am employed as a salesman and window cleaner." I don't know whether the petitioner, who appeared fairly intelligent, would assume that the attorney for the defense would let him get away with that when he knew that we insured him.

"I only go into the office the beginning of the week or thereabouts to collect my work for the week." "We salesmen" or "We window cleaners."

I wonder if he thought, having the policy before me, I wouldn't question him as to it. Maybe he thought he would get away with it; maybe he did, and I wouldn't ask him.

Did he give your Honor the impression that his office was in his own home, in an

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Motion for Dismissal of Petition.

apartment 282 Nesbitt Terrace, Irvington? That man's testimony doesn't warrant much consideration, I submit.

10 But the facts in the case, the uncontradicted and uncontradicted facts, do not spell out, to my mind, if it please the court, any accident arising out of and in the course of the employment, and even if we spot the untruthfulness, this stop in Verona that night: he had to place himself in Verona so he saw fit to say that on a job that he had already bid on, that there was no work yet to be done on, that the contract had not been let on, he stopped to look it over. He admitted he had done the same job the year before. Be that as it may, had 20 this man not even stopped at the Verona school, he was going to spend the week-end or the time with his wife at the hotel. The only pertinent question in the case was when I asked him on cross examination "What was your intention other than the fact that your wife was at this hotel?"

30 "I would have gone back to Irvington to my home and place of business."

I submit, if the court please, that the cases supporting the Act do not contemplate that an individual traveling around the country for his pleasure, and leaving such place and starting back to his employment and has an accident, that that accident arises out of and in the course of employment. I say the cases do not hold that. This man wasn't on company business when he went to this hotel, and until he got back 40 to Irvington, he wasn't on company busi-

Motion for Dismissal of Petition.

ness when he left that hotel. Examples of that could be run into legions, of hired men working, and for their own pleasure and convenience have spent evenings or weekends or such time away from their home before they resume their employment. I say in this case there was no resumption of employment: he had a definite personal reason for being in Verona; he saw fit to follow that reason out and on his return from that personal reason or that personal deviation, if we might call it that, from his regular routine of employment, has this accident, wherein, he says, a bee got in his car and while trying to get the bee out, he ran into a tree or had the accident in question.

I submit, if it please the court, the petitioner has not sustained the burden of proving that the accident that took place arose out of and in the course of his employment.

Mr. Wald: If your Honor please, if you will examine the record, I think you will find that certain facts exist in the record and that, I submit, is what your Honor has to decide the case on, that is a factual situation, and then resolve the legal problem.

I don't think that there is any dispute but that at the time the accident occurred was on his way to perform this job at the Irvington Steel and Iron Works in Newark. That stands uncontradicted. The petitioner has testified to that, I have produced a lay witness, a disinterested witness, one who is employed by the Irvington Steel Company. His testimony was stipulated, and the conclusion which would be drawn from that

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Motion for Dismissal of Petition.

testimony is that the petitioner was on his way to the job at that time. I think Mr. Hubley will concede that—at least, he cannot deny it.

10 Well, those facts, that is, if the petitioner left the place where he was staying that night and was on his way to a job, under the cases, constitute an accident arising out of and in the course of his employment with the respondent. Those facts are the only ones which your Honor need consider in resolving that problem of this case. Those are the only facts which must be immediately taken into consideration, and I say that advisedly by reason of the fact that the books are replete with decisions holding that 20 where a person is a salesman or that his duties entail going from place to place and that he did not have a particular place to work, that his job, of necessity, required the use of a car in going from one place to another and, as was testified in this case, all over the State, his employment commences at the moment he leaves his home; his employment doesn't start from the moment he arrives at the job and stop at the 30 moment he stops, but it commences from the moment he leaves his house, because by the very nature of his employment he is submitted to the hazards of the road.

The facts in this case indicate that the petitioner is such an employee, whose employment commences from the moment he leaves his home or place where he is staying, that is, from the moment he leaves his home in the morning or whenever he is supposed to go out on the job. 40

Motion for Dismissal of Petition.

So that on the facts submitted in this case the petitioner was in the course of his employment at the time when he left this hotel in Verona. Now, there is a problem raised about going to Verona the day before and examining the schools. Well, if your Honor please, that is immaterial. I think, at most, it merely colors the testimony in this case. It doesn't go to the essence of the case; it was adduced on the petitioner's testimony, not for building up a factual situation, because I can assure your Honor that I personally feel that it is immaterial if he went up to the schools to look at them or didn't go there at all. I believe that the facts would be just as strong and the case would present itself as strongly if he went up to Verona to look at the windows the day before or not. It is utterly immaterial.

Counsel raised the question, then, well, it goes to the man's credibility. And that is their defense in this case, or possible defense. In one breath Mr. Hubley states that the facts are not in dispute, that it comes down to a very narrow issue; was the man in the course of his employment at the time the accident occurred?

And then, in the next breath he says the main issue is whether he went up to Verona to look at the schools the day before. The petitioner has testified that he did. There has been no affirmative proof to deny it. Mr. Geiger was here and testified that the man had done work for them before and submitted bids. He told Mr. Koeppel that his

Motion for Dismissal of Petition.

bid was the lowest, and the reasonable inference from their experience was that he was to get the contract. Incidentally, I take issue with Mr. Hubley when he states there was no reason for the petitioner to go to that school. He testified on cross examination that the year before when he had done the job he had a great deal of difficulty because of some locks on the windows; they were held up four or five days. And he went up this time to see if the locks were still there and to get them removed before the windows were cleaned. Again I state, it is immaterial what he was doing the day before the issue in this case is narrowed down as to what he was doing at the time the accident occurred. The facts that we have to consider are the facts which occurred between the time he left for work at 7:00 o'clock in the morning to the time of the accident.

Mr. Hubley attempts to attack the petitioner's credibility because he stated that he was a salesman and window cleaner. So far as the respondent is concerned and the petitioner is concerned, also, that is his employment; he is employed by the respondent. The respondent insurance company was willing to accept premiums from this man's employment; they knew he was President of the corporation; we think they also knew he was an employee. Those facts are not unbeknown to the respondent; they issued a policy of insurance to cover this man who was an employee. It seems unreasonable that now a claim is made against the

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Motion for Dismissal of Petition.

corporation they insured that they should attack this man's credibility because he stated that as an employee his job was salesman and window cleaner. At any event, it is not even material because it is a fact that his job did require him to go out and wash windows and so forth. Now, the other question, and the only question which I think is important in this case, is whether he had deviated from his employment to such an extent that he is said to have gone out of the course of his employment. The mere fact that the petitioner went to spend a night up at the hotel where his wife was staying doesn't, in my opinion, take the petitioner out of the employ of the respondent when he leaves that place of employment and is going to his job. It can be contemplated by an employer that a man may not be at his regular home every night of the week, nor is it contemplated that during the summer months, in July and August, when people do take vacations, a man may go to the place where his wife or a member of his family may stay, and spend the night there.

That brings to mind a case which was heard before Commissioner Kerner recently, and which has been reported, where a man whom I believe was working for an automobile credit company had gone up to visit his wife in Newburgh.

The Court: That case is on appeal.

Mr. Wald: The facts there are similar in principle, and I believe in the opinion that was rendered there were cases that were

Motion for Dismissal of Petition.

10 cited—upper court cases. At any event, it is my contention that regardless if he had gone out to Asbury Park or Chicago—I wouldn't say Chicago—but if you hold he was to perform his services, the mere fact that he spent the night with his wife doesn't take him out of his employment.

That is my summation and I will ask your Honor this: if you wish, I will be willing to submit to your Honor cases that I do not have available at the moment, but I will be willing to submit all the cases in New Jersey on that point. I will submit a brief, if it is necessary.

20 The Court: You contention is that all the man had to do was have his wife in the hotel, go there, and be entitled to compensation? Regardless of where he leaves her?

Mr. Wald: It doesn't make any difference, so far as he leaves that place where he slept that night, his employment commences as soon as he starts to go to the job.

The Court: Even if he deviates?

30 I am holding that in this particular case the petitioner deviated and had not returned to his regular course and, under the circumstances, he is not entitled to compensation.

• Petition dismissed.

Certificate of Deputy Compensation Commissioner.

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

JOHN C. WEGNER, 10
Deputy Compensation Commissioner.

Certificate of Court Reporter.

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

HERBERT E. YAUCH, 20
Certified Shorthand Reporter.

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Opinion of Supreme Court.

(Filed January 8, 1945.)

NEW JERSEY SUPREME COURT.

No. 226 OCTOBER TERM, 1944.

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BERNHARD KOEPEL,
Prosecutor,

v.

IRVINGTON WINDOW CLEANING CO.,
INC., and NEW JERSEY MANU-
FACTURERS CASUALTY INSURANCE
Co.,

Respondents.

On Certiorari.
(Not for Print.)

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Submitted October 1944. Decided 1944.

For prosecutor, DAVID ROSKEIN.

For respondents, ARTHUR T. VANDERBILT.

Before Justices CASE, BODINE and PORTER.

BODINE, *J.*

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This is a Workmen's Compensation case. The Bureau dismissed the petition for the following reasons: "Solely for his own convenience and pleasure the petitioner saw fit to go to a resort hotel in Verona to be in the company of his wife. His home and place of business was in Irvington. The job to which he was going at the time of the alleged accident was located in Irvington. This case clearly falls within that line of cases that hold that such deviation from the employment takes the injured out of the scope of the Workmen's Compensation Act. While the petitioner

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Opinion of Supreme Court.

was admittedly on his way to a job at the time of the accident, he had not reached same, nor as a matter of fact was he anywhere near the vicinity of same at the time of the accident. He was on his way to work over a route which he was forced to take because he had spent the night before at the resort hotel mentioned, and with no benefit or value to his employer whatsoever being associated with this venture. The accident occurred outside of the scope of the employment, arising neither out of nor in the course of the employment.” 10

The Court of Common Pleas affirmed the action taken.

This court does not lightly disturb the findings of fact by two concurring tribunals. Indeed we concur in the conclusions reached below and find the fact to be that the prosecutor's injuries did not arise in or out of the course of his employment. 20

The judgment will be affirmed.

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Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">BERNHARD KOEPPEL, Prosecutor, <i>vs.</i> IRVINGTON WINDOW CLEANING CO., INC., <i>et al.</i>, Respondents.</p>	}	<p>On Certiorari. 10 Notice and Grounds of Appeal.</p>
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To Irvington Window Cleaning Co., Inc., and N. J. Manufacturers Casualty Insurance Co., Respondents and Arthur T. Vanderbilt, Esq., Respondents' attorney. 20

PLEASE TAKE NOTICE that Bernhard Koepfel, prosecutor, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above stated cause on the following grounds:

(1) That the New Jersey Supreme Court erred in affirming the judgment entered in the Essex County Court of Common Pleas and in giving judgment in favor of the Irvington Window Cleaning Co., Inc., and the New Jersey Manufacturers Casualty Insurance Co., respondents, and against the said prosecutor, whereas the Supreme Court should have reversed the said judgment of the Essex County Court of Common Pleas. 30

DAVID ROSKEIN,
Attorney for Prosecutor.

NEW JERSEY SUPREME COURT
Notice and Grounds of Appeal

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On Certain Notice and Grounds of Appeal

Plaintiff
 vs.
 Defendant

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To Livingston Window Cleaning Co., Inc., and N. J. Manufacturers Casualty Insurance Co., Respondents and Albert T. Vandenberg, Esq., Respondent's Attorney

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(1) That the New Jersey Supreme Court erred in affirming the judgment entered in the Essex County Court of Common Pleas and in giving judgment in favor of the Livingston Window Cleaning Co., Inc. and the New Jersey Manufacturers Casualty Insurance Co. respondents, and against the said prosecutor, whereas the Supreme Court should have reversed the said judgment of the Essex County Court of Common Pleas...

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DAVID ROSENTHAL
 Attorney for Prosecutor

New Jersey Court of Errors and Appeals

BERNHARD KOEPPEL,
Appellant,

vs.

IRVINGTON WINDOW CLEANING CO.,
INC., and New Jersey Manufac-
turers' Casualty Insurance Co.,
Appellees.

On Appeal
from
New Jersey
Supreme Court.

BRIEF OF APPELLANT.

The Question at Issue.

The factual situation has been set at rest by the decision of the Supreme Court. There remains to be considered a question of law.

Koeppel, petitioner before the New Jersey Department of Labor, was injured while driving his automobile to a job, as was his daily custom. Usually the automobile was garaged at his residence in Nesbitt Terrace, in the Town of Irvington, New Jersey. The night preceding Koeppel's accident, the car was garaged in Verona, New Jersey, where Koeppel had spent the night at Green's Hotel, where his wife was vacationing.

While on his way from Verona, to do a job for the Irvington Window Cleaning Company, of which company he was the President as well as an employee, he was involved in an automobile accident and received serious injuries.

QUERY: Does the fact that Koeppel's car was garaged in Verona for the night instead of Ir-

vington, and that Koeppel was driving to a job from Verona (Verona being within the customary ambit of his employment) instead of from his home in Irvington, take him beyond the coverage of the Workmen's Compensation Act?

Facts.

The Petitioner Koeppel testified before the Bureau that he was employed by the respondent company at "cleaning windows, soliciting, everything" (Case, p. 31, l. 5). His work was performed all over the State of New Jersey (Case, p. 31, l. 10). It appears from his testimony that in this work he used his own car and in this car would carry various items of cleaning equipment, ladders, etc. (Case, p. 31, l. 20), and that the expenses of the operation of the car were paid by the Company (Case, p. 31, l. 25). The car, though registered in Koeppel's individual name, was actually purchased with Company funds (Case, p. 35, l. 20).

Koeppel's testimony was to the effect that he had gone to Verona on Company business and had stayed there overnight because his wife happened to be vacationing there. While there was never actually a finding of fact as to this in the Bureau (See Case, top p. 12) or on appeal, doubts having been expressed on this point, we omit any reference thereto and assume the fact to be that Koeppel went to Verona on the evening of July 24th for the sole purpose of visiting his wife.

The following morning Koeppel left Green's Hotel at approximately 7 A. M., bound for the plant of the Irvington Iron & Steel Company on Lyons Avenue (Case, p. 32, l. 30). In the car at

the time was the equipment needed to do the window cleaning job, as well as Koeppel's working clothes (Case, p. 32, l. 40).

It was stipulated by counsel that at the time of the automobile accident Koeppel was actually on his way with his equipment to the job in Irvington, and that by pre-arrangement he was to meet a fellow-employee, who was to assist him with the work, at the Steel Company's place of business (Case, p. 42).

It also appeared that the automobile involved in the accident was customarily garaged at 282 Nesbitt Terrace, in Irvington, which was the business office of the respondent company, as well as Koeppel's residence (Case, p. 36, l. 1).

Argument on the Law.

We take it that there is no dispute that where an employee customarily goes from place to place in the performance of his duties, by automobile, that he is covered by the Workmen's Compensation Act, while so traveling. This proposition requires no citation of authority. In the instant case, no question of violation of orders arises, in that Koeppel was himself the president of the respondent company and, accordingly, was in a position to grant permission to any one, including himself, to operate the car.

As it seems to us, the question of whether or not Koeppel, on the morning of this accident, had deviated from his employment, so as to be outside the scope of the Workmen's Compensation Act, is controlled by answering the question as to whether or not at the time and place of the accident, he was in and about the respondent's

business, and that this question is susceptible of ready solution by considering whether or not, had Koeppel injured some third person in the accident, that third person could have held the respondent Irvington Window Cleaning Co. responsible for his injuries.

In our judgment, this question is authoritatively answered by the Court of Errors and Appeals decision in *Sanford vs. Chas. H. Totty Co.*, 110 N. J. L. 262, in an opinion by the late Chief Justice. It would seem too clear for dispute, that, if the negligence of Koeppel in driving his automobile on the morning of the accident was attributable to the Irvington Window Cleaning Co., so as to make that company responsible for Koeppel's actions, then obviously Koeppel was acting for the Irvington Window Cleaning Co., and his own injuries *ipso facto* arose out of and in the course of his employment. In the *Sanford* case, one Yoder was employed as a salesman for the Totty Co., and was accustomed to drive its car to various points in New York, Connecticut, Pennsylvania and New Jersey, on company business. Before making the trip out of which the injuries to the plaintiff Sanford arose, he had obtained permission from the Company to use the car on his return journey for certain personal errands of his own, which included a call which he intended to make on a friend, who lived at Rutherford, New Jersey. Yoder drove from New York City to Rutherford, but failed to find his friend there, and according to his testimony was on his way from Rutherford to Madison, New Jersey, where the car was customarily garaged, when he ran Sanford down. The Totty Co. argued that on these proofs a verdict in its favor should have been directed, but the Court of Errors and Appeals unanimously held that on the conflicting

proofs a jury question was presented, the Court using the following significant language:

“for if, at the time it happened, Yoder had ceased the use of the car for his own purposes and was driving it to its destination—that is, to the garage where it was kept while not being used—he was then engaged in the business of his employer, under our cases.”

In the instant case, it is conceded that at the time of the accident Koepfel not only was en route by prearrangement to a job which he was to do for his employer, but that his working clothes, working equipment, ladders, etc. were in the car. Under these circumstances, if Koepfel had run down a pedestrian, can there be any doubt but that, as a matter of law, he would have been held to be engaged in the business of his employer, so as to have made that employer liable? Is it not equally evident that under the admitted facts, being engaged in his employer's business, that his accidental injuries arose out of and in the course of his employment?

The question of when an employee in charge of an automobile operates the car within or without the scope of his employment has been termed by the courts a “troublesome one,” but we believe that no case can be found on facts substantially similar to the facts in the instant case, in which agency has been denied.

In *Clegg vs. Interstate Insurance Co.*, 130 N. J. L. 307, the petitioner, an insurance adjuster, whose duties included collecting payments on and repossessing automobiles, had a task of the latter nature to perform at New City, in the State of New York. He went to New City and being unable to accomplish his purpose drove from there to Newburgh, a distance of some thirty-five miles,

on a mission of his own. Later that same night, he was driving back from Newburgh on a route which might have taken him either to New City or to his own home, and the court found, as a fact, that when Clegg "went approximately thirty-five miles beyond any point where the business of his employer required him to be, in order to keep a previously made personal engagement, that he then abandoned his employment". The basis of this decision, as we think, lies in the fact that when Clegg reached New City he was in and about the master's business, but that when, unknown to the master, and without the master's permission, he went to Newburgh on his personal business, the entire trip to Newburgh and back was properly considered a mission of his own.

The *Clegg* case rested, in part, for its authority upon the case of *Shefts vs. Free*, 105, N. J. L. 577, which is entirely similar on its facts. There, the employee was instructed to take an automobile to a certain garage. He took the car as far as this garage, but did not stop, and continued past the garage on a mission of his own, and on the return trip met with an accident. It was held that the master was not responsible for the driver's negligence. It is to be noted that both of these cases in which it was held that the employee, at the time of the happening of the accident, was not upon the business of his employer, are based upon the fact that at the time of the happening of the accident the car was being used on the employee's personal business, without either the knowledge or the consent of the employer. The instruction in the *Clegg* case was to go to New City. The instruction in the *Shefts* case was to take the car to the garage. In both cases, after reaching the objective designated by the employer, the employee undertook a different mission of his own,

and until that mission was fully complete he did not return to the service of the master. In the *Sanford* case, and in the case at bar, an entirely different situation is presented; for, in the *Sanford* case (and in the case at bar) the employee, *with the consent and permission of the employer*, undertook a mission of his own. In the *Sanford* case, when Yoder, the employee, went to Rutherford, and failed to find his friend, he had completed his personal mission, and it was correctly held that thereafter the operation of the car became an operation again upon the master's business, and this, despite the fact that the accident took place upon a different road and the car was then operated over a different route than it would have been had Yoder not gone to Rutherford. Similarly, under any view of the evidence, Koepfel, with the knowledge and consent of his employer, went to Verona and the following day, when driving the car to Irvington to do the pre-arranged job was clearly operating the car in the interests of the employer.

In the *Clegg* and *Shefts* cases, the relationship of master and servant did not exist, in that the operation of the automobile at the time of the accident was unauthorized by the master. In the *Sanford*, as well as the instant case, the operation was authorized and was in the interest of the master. This, we think, is the distinguishing principle.

Koeppel's trip *from* Verona to a pre-arranged job to be done for the company was purely and distinctly a business trip during which he was acting on behalf of his employer and was accordingly within the scope of his employment.

Suppose that in the absence of his wife, Koeppel had accepted an invitation to spend the night

with a friend of his ten blocks away, whose home, let us suppose, was over the Irvington borderline and in Newark. Suppose on the following morning he had been on his way to the job in Irvington, and was injured in an automobile accident. Could it be successfully maintained that he was not on the business of his employer, simply because the car had been garaged the night before at a place other than 282 Nesbitt Terrace and the route to the job was a different route? We believe that Koeppel had the right to garage the car at any place which he saw fit, and while it may be true that on the way to his friend's house or to Green's Hotel, he was on a mission of his own, and was not acting for his employer, when that mission was completed and he was on the way to the job, he was within the protection of the Workmen's Compensation Act.

We do not claim that had Koeppel driven on business of his own to Chicago, upon completion of that business he would be protected anywhere on the road from Illinois to New Jersey; but this concession does not weaken our position. Here, the place that Koeppel saw fit to garage his car for the night was in Verona, and within the general ambit of his employment. It is admitted that the respondent company had business in Verona and had been accustomed to operate there in the general conduct of its business.

Suppose the job Koeppel was scheduled to do had been in Bloomfield instead of Irvington. The distance from Verona to Bloomfield is far shorter than from Irvington to Bloomfield. Could it possibly be said that the employee having spent the night at Verona with the employer's permission, was obliged to return all the way to Irvington and start from there to Bloomfield in order to be pro-

tected by the Workmen's Compensation Act? Can the destination point be the decisive factor so long as the entire trip be within the general ambit of the employment?

As authority for the doctrine for which we here contend, we would cite the case of *Harby vs. Marwell Bros., Inc.*, 203 A. D. 525, where the court said:

"A traveling man, working upon commission, begins his work when he leaves his home, or the place where he lives, *or passes the night*, to visit directly a customer. If he starts out on some matter for himself, although intending later to see a customer, his work does not begin until he starts for his intended customer. He makes these trips to his customers directly under the employment; his traveling is necessarily contemplated by his employer and by the insurance carrier." (Italics supplied.)

This case was afterwards affirmed on the opinion below by the Court of Appeals (the highest Appellate tribunal in New York State), in 235 N. Y. 504.

In *Theyken v. Diplomat Products, Inc.*, 243 A. D. 822, the deceased, who was a traveling salesman, left the company's office, in New York, to go to his home on Long Island, a distance of some sixty-five miles. On leaving the employer's office, he took with him a fellow-employee, for the purpose of taking that employee to his (the employee's) home, where he visited for half to three-quarters of an hour, and was on his way to his own home when he was involved in a fatal accident. The Court held that the widow was entitled to compensation, under the authority of the *Harby* case, *supra*; and this decision was like-

wise affirmed by the New York Court of Appeals, in 268 N. Y. 658.

We think that a simple illustration will serve to clarify the argument under this heading. Suppose a traveling salesman, whose car is customarily garaged in Newark, has an engagement to call on a customer at New Brunswick on July 25th. On July 24th he obtains permission from his employer to drive to Trenton and to spend the night there on business of his own. The following morning, July 25th, en route from Trenton to New Brunswick, he is involved in an automobile accident as the result of which suit is instituted against his employer by an injured third party. Can there be any question that on such a set of facts the salesman was not upon the business of the master, so as to make the master responsible for his negligent acts; or that the employee was himself within the protection of the Workmen's Compensation Act?

We think that under the most unfavorable view taken of the testimony from the standpoint of the petitioner, namely, that his visit to Verona was for purely personal reasons, there must be a finding that the accident in the instant case is compensable. For other cases discussing the legal principles herein referred to, see: *Demarest vs. Guild*, 114 N. J. L. 417; *Auer vs. Sinclair Refining Co.*, 103 N. J. L. 372; *Bedell vs. Mandel*, 108 N. J. L. 22; *Lewis vs. National Cash Register Co.*, 84 N. J. L. 598; and *Rubeo vs. Arthur McMullen Co.*, 117 N. J. L. 574.

Conclusion.

Assuming as a fact that on the evening before the accident the petitioner had gone to Verona solely to visit his wife, it appears, without dispute, that:

1. The automobile was at all times being used with the permission of the employer.

2. The automobile at all times was being operated within the territory in which the employer's business operations customarily required its use.

3. At the time of the accident it is admitted that Koeppel was on his way to keep a pre-arranged business appointment in the interest of the employer, the car being outfitted for such business use.

Koeppel had a perfect right to garage the car in Verona, and when he left Verona on the morning of the accident, it is conceded that he was upon a business mission.

No question of violation of orders is involved, Koeppel's actions at all times being with the permission of the employer. Of course, the fact that Koeppel was an officer of the respondent company does not prevent him from being also an employee. *Hannaford vs. Central Railroad*, 115 N. J. L. 573. Also: *Strang vs. Strang Electric Co.*, 8 Misc. 873 (not officially reported). No question on this score was raised in the court below and it must be assumed that Koeppel's earnings were shown on the books of the company and went into the calculation of the premium which the respondent insurance carrier charged on its workmen's compensation policy.

This case can not be distinguished from the supposititious case of the salesman stopping overnight in Trenton, while the facts, as well as the legal principle involved, fall clearly within the authority of *Sanford v. Totty*, 110 N. J. L. 262.

The judgment of the court below should be reversed and the case remanded, with instructions to take testimony in order to determine the quantum of the award.

Respectfully submitted,

DAVID ROSKEIN,
Attorney for Appellant.

JOHN A. LAIRD,
who will argue this cause
of Counsel.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">BERNARD KOEPPPEL, Appellant,</p> <p style="text-align: center;"><i>vs.</i></p> <p>IRVINGTON WINDOW CLEANING Co., INC., and NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY,</p> <p style="text-align: right;">Appellees.</p>	}	<p>On Appeal from New Jersey Supreme Court.</p>
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BRIEF OF APPELLEE.

Preliminary Statement.

By this proceeding appellant seeks to set aside the judgment of the New Jersey Supreme Court entered on January 9, 1945, which affirmed the judgment of the Essex County Court of Common Pleas entered February 5, 1944, which judgment affirmed the judgment of the Workmen's Compensation Bureau dismissing the petition of the appellant on the ground that the accident did not arise out of and in the course of his employment.

At the hearing before the Deputy Commissioner the parties stipulated that the testimony would be limited to the question of liability, that is, whether or not the accident arose out of and in the course of appellant's employment (S. C. 32).

Appellant was the president, treasurer, business solicitor and window cleaner of appellee window cleaning company (S. C. 31, 34). He resided at 282 Nesbitt Terrace, Irvington, which address was also that of the office and place of business

of appellee (S. C. 36). On July 24, 1942, the day preceding that on which the accident occurred, appellant had spent the whole day working in Maplewood. At four o'clock in the afternoon on that day he drove in his car to Verona, where his wife had been vacationing at Green's Hotel for several days. He testified, however, that before going to the hotel to see his wife he looked over the Borough school buildings allegedly to determine what ladders would be needed to perform window cleaning work which he expected to commence in the near future (S. C. 33). After completing his alleged survey of the school buildings he proceeded to Green's Hotel on Verona Lake, where he met his wife and stayed over night with her there (S. C. 33, 37).

The next morning he started to drive to Irvington and after having driven a short distance from the hotel and while proceeding through the South Mountain Reservation a bee found its way into his car and in attempting to get the bee out he lost control of the car, which ran into a tree, resulting in injuries to him.

In the Workmen's Compensation Bureau the Deputy Commissioner dismissed the petition because he found as a fact that solely for his own convenience and pleasure the appellant saw fit to go to a resort hotel in Verona to be in the company of his wife and that at the time of the accident he was proceeding over a route which he was forced to take because he had spent the night before at the resort hotel mentioned, with no benefit or value to his employer whatsoever being associated with this venture (S. C. 10-12).

On appeal the Essex County Court of Common Pleas made substantially identical findings of fact and affirmed the action of the Workmen's Compensation Bureau (S. C. 17-19).

On *certiorari* the Supreme Court concurred in the findings of fact by the Workmen's Compensation Bureau and the Essex County Court of Common Pleas and affirmed the judgment of the Essex County Court of Common Pleas (S. C. 62-63).

ARGUMENT.

POINT I.

The findings of fact on Certiorari by the Supreme Court are conclusive and the judgment of the Supreme Court should be affirmed.

It is well settled that this Court will not review the findings of fact of the Supreme Court on *certiorari*. *American Cyanamid Company v. Bortos*, 132 N. J. L. 327 (E. & A. 1945); *Pitchenick v. New York Folding Box Co.*, 129 N. J. L. 399 (E. & A. 1943).

In the *per curiam* opinion of this Court in the *Pitchenick* case, *supra*, it is said that:

“* * * The rule is that on *certiorari* findings of fact on conflicting evidence, or on uncontroverted evidence reasonably susceptible of conflicting inferences, are conclusive in this court. *Ford Motor Co. v. Fernandez*, 114 N. J. L. 202.”

Similarly, Mr. Justice Parker in *American Cyanamid Company v. Bortos*, *supra*, stated the rule to be as follows (132 N. J. L. 328):

“* * * The rule is fundamentally settled, however, that where the judgment of the Supreme Court in *certiorari* is supported, as regards the facts, by a substantial basis of testimony, this court will not review the facts. *Ford Motor Co. v. Fernandez*, 114 N. J. L. 202, 204, and cases cited; *Board of Education v. Shepherd*, 119 Id. 413; *Pitchenick v. New York Folding Box Co.*, 129 Id. 399.”

In the present case Mr. Justice Bodine, in writing the opinion for the Supreme Court, after quoting from the determination of facts entered in the Workmen's Compensation Bureau, said:

“The Court of Common Pleas affirmed the action taken.

“This court does not lightly disturb the findings of fact by two concurring tribunals. Indeed we concur in the conclusions reached below and find the fact to be that the prosecutor's injuries did not arise in or out of the course of his employment.” (S. C. 63).

In view of these findings of fact of the Supreme Court it is submitted, under the authority of the cases above referred to, that the judgment of the Supreme Court should be affirmed.

POINT II.

The accident did not arise out of and in the course of appellant's employment with appellee corporation.

It is well settled that an accident which occurs during the course of a trip which an employee is taking for his own pleasure or when he has deviated from or has abandoned his employment, does not arise out of and in the course of his employment. *Colucci v. Edison Portland Cement Co.*, 94 N. J. L. 542 (E. & A. 1920) *Clegg v. Interstate Insurance Co.*, 130 N. J. L. 307 (Sup. 1943); *Pilkington v. State Highway Dept.*, 124 N. J. L. 11 (Sup. 1940), aff'd 125 N. J. L. 444 (1940); *Hanover v. Pennbrook Golf Club*, 10 N. J. Misc. 378 (Sup. 1932).

Appellant testified that he made the trip to find out what ladders he would need and find out when it would be convenient to start the window cleaning job (S. C. 33) and it was also his purpose

to go to Verona Lake to Green's Hotel to visit his wife and to stay at the hotel overnight (S. C. 36). Upon reviewing the testimony of appellant and the witness, Geiger, supervising principal of the Verona schools, one can discover appellant's motive in making the trip—that is, whether the purpose was for his personal convenience and pleasure or whether it was on business in connection with his employment. Upon completing such a review, the inescapable conclusion is that appellant's motive was to visit his wife at Green's Hotel and sojourn there overnight and only incidental to this motive, if at all, appellant had as a lesser objective a survey of the Verona school buildings.

But for the fact that his wife was staying at Green's Hotel, appellant would not have made the trip to Verona. He testified: (S. C. 37)

“Q. If Mrs. Koeppel hadn't been at Green's Hotel you would have gone back to 282 Nesbitt to sleep in your home, wouldn't you? A. Well, most likely.”

The subsequent discussion will establish that appellant would not have made this journey to Verona if Mrs. Koeppel were living at their home at the time and did not happen to be vacationing at Green's Hotel, Verona.

Appellant testified that Verona is ten or twelve miles from his home in Irvington (S. C. 33) and it is incredible that he would have made a round trip of twenty-four miles to look over the school buildings when he undoubtedly knew with exactitude from previous experience the ladders he would need on the job. Appellant stated (S. C. 39) that he had done the same job three years previously and it was also brought out (S. C. 46) that within the previous twelve months he had performed the same work.

The alleged purpose of the Verona trip to find when it would be convenient to start the job (S. C. 33) lacks probability and appellant's statement to that effect doesn't ring true. He testified that he left Maplewood at about four in the afternoon and looked over the buildings some time between five and six (S. C. 33), a time of day when he must have had little expectation of finding anyone in authority around the schools or municipal offices who could give him any such information. In fact, he testified that he saw nobody on his visit to the school buildings (S. C. 39). Furthermore, if appellant did want to find out when he could start the job, he most certainly would not have started on a round trip of twenty-four miles to have a face-to-face talk with Mr. Geiger for that purpose, for appellant was accustomed to using the telephone when he wished to converse with Mr. Geiger on the subject of the contract on the job. He stated that Mr. Geiger was the man he dealt with at the Verona Board of Education (S. C. 37) and that he had telephoned Mr. Geiger on July 16th to learn what action had been taken by the Board when it opened bids for the work on the evening before (S. C. 38). In the course of this conversation, appellant says he was told he could start work anytime he wished to (S. C. 38). From the testimony, it is clearly evident that appellant's purpose in going to Verona was not to secure information as to when he could start the work.

In the light of the above discussion, the only reasonable conclusion that can be reached is that in making the trip to Verona appellant's paramount purpose was to go to Green's Hotel where his wife was vacationing and there to stay overnight. A secondary purpose, assuming merely for the argument that he had another purpose, was to survey the Verona school buildings to determine what ladders appellant would need to do

the prospective window-cleaning job. This secondary purpose was purely incidental and subsidiary to the primary one and would never have been present in appellant's mind had there not been the existing circumstances of the presence of his wife at the vacation resort in Verona and his desire to visit her as expressed in his testimony quoted above.

In *Mark's Dependents v. Gray*, 251 N. Y. 90, 167 N. E. 181 (1929) the late Justice Cardozo, then Chief Justice of the New York Court of Appeals said (167 N. E. 182):

“* * * A servant in New York informs his master that he is going to spend a holiday in Philadelphia, or perhaps at a distant place, at San Francisco or at Paris. The master asks him while he is there to visit a delinquent debtor and demand payment of a debt. The trip to Philadelphia, the journey to San Francisco or to Paris, is not a part of the employment. A different question would arise if performance of the service were to occasion a detour and in the course of such detour the injuries were suffered.”

The test which was applied by Justice Cardozo in that case was subsequently adopted by our Supreme Court in *Pilkington v. State Highway Dept.*, 124 N. J. L. 11 (Sup. 1940), *aff'd*, 125 N. J. L. 444 (1940), as follows (124 N. J. L. 15):

“We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled.
* * * The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. *Clawson v. Pierce-Arrow Motor Car Co.*, 231 N. Y. 273; 131 N. E. Rep. 914.

If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

The discussion above has clearly demonstrated that the primary purpose of appellant's journey was to visit with his wife and he would have embarked on that journey even if for some reason he found it inconvenient to travel the additional mile or two beyond the hotel on the alleged business errand to the Verona Schools. It is likewise clear that a change in plan to visit his wife would have caused appellant to cancel his journey entirely, its business as well as its personal aspects.

Applying the test which is the rule of law in New Jersey by virtue of the decision in the *Pilkington* case, *supra*, it is clear that appellant was not placed upon the highway by force of any duty owing to appellee corporation, and that the risk of traveling was his own. See also *Atlantic Refining Co. v. Forrester*, 180 Md. 517, 25 A. (2d) 667, (1942) and *Barragar v. Industrial Comm.*, 205 Wis. 550, 238 N. W. 368 (1931).

In *Clegg v. Interstate Insurance Co.*, 130 N. J. L. 307 (Sup. 1943), a case almost identical with the present one, the Supreme Court on certiorari reversed the judgment of the lower Court awarding compensation. In that case the employee had journeyed in his car from a point in Bergen County to Nanuet, New York, where he was to make a business call. Not finding the person he wished to see, his intention then was to drive on to Newburgh, New York, where his wife was visiting friends, and then to return to his home in Bergen County, stopping on the return trip to

make his business call. It was in the course of this venture that the accident occurred, resulting in injuries to the employee. On these facts, this Court held that the accident which occurred in the course of this venture did not arise out of and in the course of the employee's employment. See also *Rainess v. Grant Finishing Co., Inc.*, 132 N. J. L. 422 (Sup. Ct. 1945.)

Appellant seeks to distinguish *Clegg v. Interstate Insurance Co.*, *supra*, on the point of authorized use of the automobile in question, which point is completely lacking in substance. The reported opinion in the *Clegg* case contains no indication whatsoever that the Court considered the question of whether the prosecutor was or was not authorized to take the car to Newburgh. The question of the authorized use of a car owned by an employer is of importance in a case, such as the one at bar, only when reduced to two sub-questions: (1) Was authority given to use the car on the employer's business or (2) was the use to be for the personal convenience or pleasure of the employee. The discussion throughout this brief has amply demonstrated that the use of the car involved in this case from four o'clock in the afternoon of July 25, 1942, up to and including the moment of the accident was primarily for appellant's own pleasure and convenience.

Furthermore, the automobile was owned by appellant, being registered in his name. Although he testified that the car was really owned by appellee as its funds had been used to pay for it, his testimony was not substantiated or corroborated. Conceding, for purpose of argument only, that the car was actually owned by appellee, there is a unique situation presented by the circumstances. Appellant is president, principal owner, general manager, and chief employee of

appellee and he could authorize the use of appellee's automobile by anybody, for any purpose, and in any geographical limits. In such a situation it is perfectly apparent that at no time, except when it suits the interest of appellant, is any distinction made or thought given by him as an officer of appellee or as an individual employee, as to business use or appellant's personal use of the automobile allegedly owned by appellee. Under such circumstances, any statement or argument as to the authorized use of the automobile must be taken to be without probative or argumentative value.

As to the argument commencing on page 7 of appellant's brief, it is sufficient to say that although the territory within which appellee does business extends to Verona, nevertheless, appellant can be as completely on his personal business, or there can be as complete a deviation from the employment within that territory as though appellant were using the car on a journey extending far beyond the limits of appellee's business territory.

Appellant argues that the decision in this case should be controlled by *Sanford v. Charles H. Totty Co.*, 110 N. J. L. 262 (E. & A. 1932). That case involved an action by a third party against an employee and his employer for negligence in the operation of the employer's automobile. The appellant, employer, argued that the proofs showed that the accident causing injuries to the third party, plaintiff, occurred while the employee was using the car for his own purposes. The Court commented (110 N. J. L. 264) that that was not the fact as there was considerable evidence to show that the employee had finished his personal business and the deviation from his employment had ceased. In the present case, appel-

lant's personal journey, or deviation from or abandonment of appellee's business, was commenced the day before the accident when appellant left Maplewood to travel to Verona on his personal affairs. This personal journey or deviation certainly was continuing when he met with his accident at a point only a mile or two from the hotel in Verona where he had visited his wife.

The argument throughout this brief to this point has assumed that appellant did go to Verona to look over the school buildings. Although the question of liability for payment of compensation for appellant's injuries has been disposed of in the foregoing discussion, which establishes that the accident did not arise out of and in the course of his employment, nevertheless, the testimony raises grave doubts as to whether appellant visited the Verona schools at all on the trip in question. Obviously, if he did not visit the Verona schools, his trip was then strictly one for his own pleasure and had no relation whatsoever to appellee's business.

There is cause to give little credence to appellant's testimony that he went to Verona to look over the school buildings. His testimony is not at all convincing that he had any reason to look over the buildings. The fact that he had done the same work on two previous occasions has been mentioned above as being a reason why, if he did look over the buildings, that purpose of his trip was secondary to his principal purpose of visiting his wife at the vacation resort in Verona. This fact is equally strong in leading to the conclusion that he had no reason to go to Verona schools and that he did not do so.

On the day that appellant made his alleged visit to the school buildings, the contract had not yet

been awarded to him. The bids for the work had been opened July 15 and his bid was accepted and the contract was awarded on August 5th. It was in this interim that he supposedly surveyed the buildings but his bid had not yet been accepted and, of course, he had no authority from the Board of Education to commence work. Appellant testified that in a telephone conversation with Mr. Geiger, he was told that his company submitted the lowest bid and that it had the job, and that appellant could start anytime to do the cleaning (S. C. 38). However, Mr. Geiger testified that he could not recall any telephone conversation with appellant (S. C. 44, 45), and furthermore, it would be highly improbable that any contractor would commence the work before the contract was let (S. C. 45).

The Deputy Commissioner who conducted the hearing had an opportunity to observe appellant on the witness stand and to note his demeanor in giving his testimony. He didn't believe appellant's story of going to the Verona schools to be deserving of credit but decided the case on the grounds previously discussed herein. As has been shown under Point I herein, these findings of fact were concurred in by the Court of Common Pleas and on *certiorari* by the Supreme Court.

For the reasons set forth under this point, it is submitted that the accident did not arise out of and in the course of appellant's employment. The judgment of the Supreme Court therefore should be affirmed.

Conclusion.

For the reasons urged under Point I and Point II herein, it is submitted that the judgment of the Supreme Court affirming the judgment of the Essex County Court of Common Pleas, which in turn affirmed the judgment of the New Jersey Department of Labor, Workmen's Compensation Bureau, in dismissing the petition, should be affirmed.

Respectfully submitted,

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To to argued orally by
G. DIXON SPEAKMAN,
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