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**Employee's Claim Petition for Compensation.**

Form No. 20a

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

FRANK DI MIERI,	}	10 Received at Tren- ton May 24, 1940. Claim Petition No.
<i>Petitioner,</i>		
vs.		
METALFIELD, INC.,	}	..... Date of Accident April 22, 1940.
<i>Respondent.</i>		

If known, state name of insurance company  
Liberty Mutual Insurance Co.

Attorney for Petitioner (Name) Fleming & Pot- 20  
ter, (Address) 390 George St., New Brunswick,  
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, respect-  
fully states:

1. What is your name? Frank Di Mieri
2. Where do you live? (Street Address) 24 30  
Exton Street (City or Town) South River
3. Sex Male
4. Age 29
5. Marital Status Married
6. By whom were you employed at the time of  
the accident? (Name) Metalfield Inc. (Busi-  
ness Address) 40 Washington Avenue (City  
or Town) Milltown, N. J.
7. What was the business of your employer? 40  
Manufacturing Metal Novelties

*Employee's Claim Petition for Compensation.*

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? April 22, 1940
12. Did you notify your employer of your injury? Yes
13. If so, on what date? April 22, 1940
14. What was your regular occupation? Polisher
- 20 15. What kind of work were you doing at the time of the accident? Lifting a box of metal
16. When did the accident happen? (State month, day, year and hour) April 22, 1940
17. Where did the accident happen? Factory of respondent at above address
18. What was the nature of the accident, and how did it happen? Lifting box of metal and received sharp pain in right side of abdomen and had to drop box and stop work
- 30 19. On what date were you compelled to stop work because of the injury? April 22, 1940
20. On what date were you well enough to work again? Not yet
21. If still disabled, on what date do you think you will be able to work? Unable to state
22. Give nature of any injury from which you will recover Operation for hernia
- 40 23. Has any permanent injury resulted? If there has been amputation or loss of useful-

*Employee's Claim Petition for Compensation.*

- ness of any member, or impairment of any physical organ, explain fully Unable to state
24. Were your wages fixed by piece-work? Yes
25. If so, what was your average weekly wage? \$30.00
26. If wages were fixed by the hour, state rate per hour — 10
27. Give number of hours in an ordinary working day —
28. Give number of days in an ordinary working week —
29. State the amount of weekly wages —
30. Have you been paid compensation? No
31. If so, how much? — Compensation Rate —  
Temporary Disability — Permanent Disability — 20
32. Has your employer promised to pay you any compensation? No
33. If so, how much? —
34. Was medical aid required? Yes
35. Did you receive any medical, surgical or hospital service? Yes
36. Did you request your employer to furnish these services? Yes 30
37. Were they furnished? Yes
38. If so, between what dates? April 22nd, 1940 to date
39. If not, what sum did you expend for medical, surgical or hospital services? —
40. Give name and address of physician and hospital Dr. N. Nes Forney, Milltown, N. J. St. Peter's Hospital, New Brunswick, N. J.
41. What other facts are there which you believe important? — 40
42. Have you made claim to your employer for compensation? Yes

*Employee's Claim Petition for Compensation.*

10 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.

FRANK DI MIERI,  
*Petitioner.*

20 State of New Jersey, }  
County of Middlesex. } ss.:

30 FRANK DI MIERI, 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 matters and things therein set forth are true according to the best of his knowledge and belief.

FRANK DI MIERI,  
*Petitioner.*

Subscribed and sworn to before me,  
this 23rd day of May, 1940,  
at New Brunswick, N. J.

Ethel M. Tomney,  
(Seal.) Notary Public of New Jersey.

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

*Employee's Claim Petition for Compensation.**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.

10

WORKMEN'S COMPENSATION  
BUREAU,  
DANIEL A. SPAIR,  
*Secretary.*

20

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

DANIEL A. SPAIR.

30

40

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

Form No. 23a

## NEW JERSEY DEPARTMENT OF LABOR

## WORKMEN'S COMPENSATION BUREAU.

10

FRANK DI MIERI,

*Petitioner,*

vs.

METALFIELD, INC.,

*Respondent.*

Received at  
Trenton Jun.  
13, 1940.  
Claim Petition  
No. 49540

20

Attorney for Respondent: (Name) John W. Taylor, (Address) 24 Commerce Street, Newark, N. J.

In answer to Claim Petition filed in this cause Respondent states:

30

1. Name of Respondent: Metalfield Inc. (correct name Metafield, Inc.); (Street Address): 40 Washington Avenue; (City or Town): Milltown, New Jersey.
2. Was the petitioner in your employ at the time of the alleged accident? Yes.
3. State your business: Metal Novelties.
4. Did you receive written notice from the Petitioner at the time of hiring, or later, that Article 2 of the Workmen's Compensation Law of New Jersey was not to apply to him? No.
5. Did you give such written notice to him? No.
6. Did you have knowledge of an injury occurring at the time alleged in the petition? No.

40

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

7. If so, on what date? .....
8. Did you receive notice of an injury occurring at the time alleged in the petition? No.
9. If so, on what date?..... 10
10. What was the Petitioner's regular occupation? Polisher.
11. What kind of work was he doing at the time an accident is alleged to have occurred? No accident.
12. Did the Petitioner sustain an accident arising out of the Petitioner's employment with the Respondent at the time alleged in the petition? No. 20
13. Did the Petitioner sustain an accident in the course of his employment with the respondent at the time alleged in the petition? No.
14. If the accident occurred on a date other than the one alleged in the petition, state the correct date: Petitioner's alleged condition arose on or prior to April 8, 1940.
15. What was the nature of such accident, and how did it happen? No accident.
16. On what date was the Petitioner compelled to stop work because of injury? Not at all. 30
17. On what date was the Petitioner well enough to work again? .....
18. If still disabled, on what date do you estimate he will be able to work? .....
19. Give your understanding of the nature of any injury from which he should recover Right inguinal hernia—not by accident.
20. Give your understanding of any permanent injury which has resulted. If there has been 40

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

- amputation or loss of usefulness of any member or impairment of any physical organ, explain fully None.
- 10 21. Were the wages fixed by piece-work? . . . . .
22. If so, what was the average weekly wage of the Petitioner? . . . . .
23. If wages were fixed by the hour, state rate per hour 55¢.
24. Give number of hours in an ordinary working day 8½.
25. Give number of days in an ordinary working week 5.
26. State the amount of weekly wages \$23.37.
- 20 27. How much money have you paid the Petitioner as compensation (not including medical aid) since the accident? None.
- Temporary Disability . . . . .
- Permanent Disability . . . . .
- Compensation Rate . . . . .
28. Have you promised to pay compensation? No.
29. If so, how much? . . . . .
- 30 30. Was medical aid required? See #37.
31. Were you requested to supply the necessary medical services required by law? . . . . .
32. Did you furnish this service? . . . . .
33. If so, between what dates? . . . . .
34. If not, give reasons for failure to do so. . . . .
35. Give name of physician and hospital rendering service at your direction . . . . .
36. What other facts are there which you believe important? Respondent is informed Peti-
- 40

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

tioner has been operated on for a right inguinal hernia.

37. If you deny that compensation is payable in this case explain your reasons for this conclusion 1. Respondent had no notice or knowledge of the alleged injury on April 22, 1940 prior to the service of this petition on June 3, 1940, wherefore no compensation is due, in any case, for the period from April 22, 1940 to June 3, 1940. 2. Petitioner's alleged hernia was not caused by accident within the meaning and limitations of the statutes relating to compensation for inguinal hernia. 3. Petitioner's alleged hernia had its origin and cause from congenital defects or from causes and conditions that existed prior to April 22, 1940.

correct name  
METALFIELD INC. (Metafield, Inc.)  
(Respondent)

By: EVERITT RHINEHART

Agent

24 Commerce Street  
Newark, New Jersey.

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

EVERITT RHINEHART of full age, being duly sworn according to law, on his oath deposes and says: That he is the Agent for the respondent named in the foregoing answer to claim petition;

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

10 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.

correct name  
METALFIELD INC. (Metafield, Inc.)  
(Respondent)

By: EVERITT RHINEHART  
Agent

20 Subscribed and sworn to before me this  
12th day of June, 1940 at Newark, N. J.  
Helen G. Verian (Seal)  
A Notary Public of New Jersey.

(This affidavit may be sworn to before any per-  
son authorized to administer an oath.)

30 I, DANIEL A. SPAIR, Secretary of the Work-  
men's Compensation Bureau, hereby certify the  
foregoing to be a true copy of the Answer filed in  
this cause.

DANIEL A. SPAIR.

*A. Cullari for Petitioner, Direct.*

TRANSCRIPT OF TESTIMONY.

NEW BRUNSWICK COMPENSATION  
COURT.

FRANK DE MIERI,

*Petitioner,*

against

METALFIELD, INC.,

*Respondent.*

10

July 19th, 1940.

Before: Deputy Commissioner John J. Stahl. 20

Appearances:

Russell Fleming, Esq., appearing on behalf of the petitioner.

Everett Rhinehart, Esq., appearing on behalf of the respondent.

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

30

Direct Examination by Mr. Fleming:

Q. Mr. Cullari, where do you work? A. I work for the Metalfield, Incorporated.

Q. Did you work with Mr. Frank DeMieri, the petitioner in this case? A. I worked right alongside of him.

Q. What kind of work is that? A. Polishing brass.

Q. How does this metal come to you, how is 40

*A. Cullari for Petitioner, Direct.*

it made, just what is involved in the work? A. The work comes in boxes and comes sometimes, this particular job, it comes four hundred or four hundred and fifty pieces in a box. We get it from the stock room, pick it up and take it to your  
10 machines.

The Court: Weighing how much, four hundred and fifty pounds?

The Witness: No, pieces.

Q. What do these pieces consist of? A. We have one we can show you. Here it is, right  
there.

Q. Showing a piece of metal of a vanity case.

A. That is right.  
20

The Court: It looks like gold.

The Witness: That is because it is polished. Before it is polished it looks like  
junk.

Q. And did you see, on April 25th, 1940, what did you see; just tell the court what you saw with reference to Mr. DeMieri. A. At this time we were pretty busy and all the machines were taken up. When we are not busy we set our work along-  
30 side there, but this time we could not do it. It was a little after lunch time and I seen him going to get his work. As I was watching him, and as he put his work down, he had to reach over four feet to set the box down.

Q. What kind of a box was it he had? A. Two and a half feet long and one and a half feet wide and maybe ten inches deep. To put it down he had to grab it by the end, he could only grab  
40 one end and as he leaned over he must have lost

*A. Cullari for Petitioner, Direct.*

his balance and he dropped his work and held his side.

The Court: Where, dropped where?

The Witness: Three inches, on the bench, and grabbed his side. I asked him, "What is the matter, Frank," and he said, "I just got a sharp pain." He sat down and took a piece and tried to work that day and he said, "It hurts too much, I can't work," and I said, "You had better go to a doctor because, after all there is one rupture case—"

Mr. Rhinehart: I object.

Q. You say that he had a box with his hands on either end of the box? A. Not that way; the box is this long. He had to reach over.

Q. In other words, he was holding the box at one end? A. Yes.

Q. How far was the stretch, or reach, from where he was to where he had to put the box on the bench? A. Four feet I would say off hand.

Q. What would you say the weight of these boxes was? A. That is something else again. I can't tell you. Roughly, forty or fifty. To tell you the truth, I don't know how much they weigh. They are pretty heavy.

Q. A heavy box? A. A very heavy box. That type of work is heavy.

Q. After he sat down, how long did he sit there before he moved again? A. He sat there just enough time to take a piece of work and put it on the chuck and tried to push it and he said he could not push it, it hurt him, and I told him to go to the doctor right away, which he did.

*A. Cullari for Petitioner, Cross.*

Q. Did you notice the expression on his face when you saw him put his hand to his right side?

A. That is why I knew something bad happened to him. He didn't faint, but he turned white.

10 Q. He wasn't pale? A. He looked like he was sea sick.

Q. You are here today under subpoena? A. I have it here.

Q. You are still working in the plant? A. That is right.

## CROSS EXAMINATION by Mr. Rhinehart:

Q. You said this happened right after lunch? A. About a half hour.

20 Q. What did he do from then on, what did DeMieri do? A. After that happened?

Q. Yes. A. After I told him to go see the doctor he got up from his machine and he told me he was going to see the nurse. From there on I can't tell you nothing. He left the machine and didn't come back.

30 Q. Do you recall what day of the week it was? A. No, that I could not tell you. I remember he went to the hospital that day. That is why I know so much.

Q. You are friendly with Frank DeMieri? A. Outside of work?

Q. How long do you know him altogether? A. As long as he has been working there, that is a year and a half, as a worker.

40 Q. You didn't know anything about his condition before that day? A. No. I come from Newark and he lives here. I have nothing to do with him outside of the shop.

*A. Cullari for Petitioner, Cross.*

Q. You don't know of any similar occurrence that happened to him? A. No, he never told me what happened to him.

Q. Where was the box that he was attempting to lift? A. Well, he had the box— 10

Q. Where? A. He went to the stockroom to get it.

Q. Did you see him there? A. No.

Q. How are they piled there? A. On shelves.

Q. How far do you have to carry them from the stockroom to the work bench? A. Fifty feet.

Q. This is a full box of metal objects? A. He brought it from the stock room and brought it on his shoulder and took it down like this, and then reached over to set it down. 20

Q. He set the box on a bench from his shoulder? A. He takes the box down.

Q. What does he do? A. You have two benches. On the first bench you keep the stuff you work with and the next bench you put the box on. He sets it down like this, and then he has to turn the box around and reach over and set it down, and as he reached over something happened with him that made me notice. 30

The Court: Did something slip?

The Witness: The box, out of his hands. It seemed to me he lost his balance.

Q. And following that he picked up one of the metal pieces and started to polish it? A. Yes.

Q. Is that the only thing he did? A. That is all. After that he went to see the nurse, and I don't know.

Q. He left the place? A. Yes, he left the place. 40

*A. Cullari for Petitioner, Cross.*

Q. Did you have any conversation with him prior to that date, or that morning, did he tell you that morning when he came in to work that he was feeling bad? A. He didn't say anything to me.

10 Q. Or any previous day? A. No. He always looked good to me.

Q. It wasn't on the floor that he attempted to lift this box from? A. No, from the stock room to the bench.

Q. He had got to the bench when you noticed anything unusual? A. When he went to set the box down, that is when I noticed something happened, that is the way it looked to me.

20 Q. You said when he picked the box up he got it up three inches and he dropped it? A. No, I said when he laid the box down, about three inches before it touched the bench, he dropped it, which we are not supposed to do.

Q. He took it off his shoulder? A. Yes, and put it on the bench.

Q. How high is the bench? A. Like this here, two and a half or three feet.

30 Q. And he set it down from his shoulder? A. Yes. The long part here and then he turned it around, to reach over from this bench; you can see. He had to reach over that to put his work on this bench.

Q. Did he drop it as soon as he picked it up? A. He dropped it three inches from this bench. You are not supposed to drop these boxes. You are supposed to lay them down because the work is delicate.

40

*A. Cullari, for Petitioner, Re-direct, Re-cross.  
Certificates.*

By Mr. Fleming:

Q. In other words, he dropped it three inches from the bench on which he was going to put the box? A. Yes.

Q. Any difference in the height of the two benches? A. No, they are even. Most of them benches are made the same.

Q. And the distance is what? A. Three or four feet from the floor.

By Mr. Rhinehart:

Q. The two benches are set right next to each other? A. Yes, in line.

Q. Why isn't the box pushed over there instead of lifted? A. If you do that you are going to knock everything off. You have the stuff you work with there. We work piece work and our time is our money and we cannot be laying things on the side just for that.

Mr. Rhinehart: That is all.

Mr. Fleming: That is all.

Mr. Rhinehart: August 2nd?

The Court: Yes.

Mr. Rhinehart: Nine-thirty?

The Court: Yes.

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

JOHN J. STAHL,

*Deputy Compensation Commissioner.*

*Proceedings of August 2nd, 1940.*

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

10

SAMUEL WINALD,  
*Court Reporter.*

---

NEW JERSEY DEPARTMENT OF LABOR  
WORKMEN'S COMPENSATION BUREAU  
NEW BRUNSWICK—MIDDLESEX COUNTY  
DISTRICT.

20

FRANK DI MIERI,	<i>Petitioner,</i>	}
vs.		
METALFIELD, INC.,	<i>Respondent.</i>	

August 2nd, 1940.

Before:

30 Honorable John J. Stahl, Deputy Compensation  
Commissioner.

Appearances:

Russell Flemming (Flemming & Potter) Esq.,  
for the petitioner.

Everett Rhinehart, Esq., (John W. Taylor,  
Esq.) for the respondent.

40

William C. O'Brien & Staff,  
By H. Yauch, *Reporter.*

*E. Brousseau for Petitioner, Direct.*

ELEUSIPPE BROUSSEAU, called as a witness on behalf of the petitioner, was sworn and testified as follows:

Direct Examination by Mr. Flemming:

Q. You are employed at the Metalfield, Inc. in South River? A. Yes. 10

Mr. Flemming: If your Honor please, the correct name should be Metafield.

The Court: No "L" you say?

Mr. Flemming: That is right, May we have it amended accordingly?

The Court: Yes.

By Mr. Flemming:

Q. Were you employed there also in the month of April, 1940? A. Yes, I was. 20

Q. What job do you hold there? A. Polish-ing.

Q. Do you know Frank Di Mieri? A. Yes.

Q. The petitioner. Did you see anything happen unusual about him in April of this year? A. Yes.

Q. What day was that? A. April 22.

Q. Do you remember the day of the week that was? A. On Monday. 30

Q. How near do you work to Mr. DiMieri?

A. There is one fellow between him and I.

Q. How many feet would that be? A. About seven, I should say.

Q. What time of day was it you saw this unusual occurrence? A. Around one o'clock.

Q. Was that before or after lunch? A. After lunch. 40

*E. Brousseau for Petitioner, Direct.*

Q. Will you tell his Honor just what you saw?

A. Well I happened to turn around and I seen Frank; he had a box, he was reaching over and all of a sudden he dropped that box, and he grabbed hold of his side.

10 Q. Which side? A. He got the pain on it.

Q. Which side? A. This side here, right side (indicating).

Q. In the region of the groin was that? A. Yes, down below here (indicating).

Q. Now, this box that he had—what kind of a box was it, what was it made of? A. It is 3300, the name of the work that he had in that box.

20 Q. How big was the box? A. Two feet long, about ten inches wide, and six inches deep.

The Court: What is that?

(The last answer was read.)

By Mr. Flemming:

Q. What is the box itself made of? A. Wood.

Q. What are in these boxes, if you know? A. Pardon?

Q. What are in these boxes, if you know? A. That is metal parts—

30 Q. How much would you say these boxes weigh when they are filled? A. Fifty to fifty-five, around there—

Q. Pounds? A. Yes.

The Court: Weighing about how many pounds?

The Witness: About fifty or fifty-five.

By Mr. Flemming:

40 Q. Where was this box, just where was it, in

*E. Brousseau for Petitioner, Direct.*

his hands when you saw it fall from his hands?

A. Well, he was reaching, he was almost on top of the other box where he was going to put it, and all of a sudden the box dropped, and he grabbed hold of his side, and his face got white as a sheet. 10

Q. What did he do after that? A. Well, he waited about a minute or so and he sit down on the machine, and he grabs hold of a piece of work and he put it on the chuck, and he went to touch the wheel and he pulled back again, so I looked at him and I told him, "You had better go in to see a doctor," so he went up.

Q. This man was working in the same kind of work that you do as a polisher? A. Yes. 20

Q. How many benches are around Mr. Di Mieri? A. Well, there are two on one side and one on the other; there is one over here, alongside of him and then there is another one alongside of his machine (indicating).

Q. Which was the bench that he was placing the box towards or on before it dropped? A. The one next to his machine. He had to stretch from one box, about two feet, and he had to stretch to put the box on the other one next to his machine. 30

Q. When you saw him, was he stretching, was his position that of being stretched with the box in his hands? A. Oh, yes, he had to stretch; he had to stretch two feet.

Q. How high would you say this bench was that he was putting the box on? A. About three feet.

Q. How much of a stretch was he making from 40

*E. Brousseau for Petitioner, Direct.*

where his feet were to the nearest edge of the bench on which he was about to place the box? A. It is a two feet stretch; there are two benches and each one is two feet long, and he was on the end of one and he had to put the box on the other.

10 Q. In other words, do I understand it that he was on the edge—he was beyond one of the benches and he was putting it over on the other bench when he slipped? A. He was like this (indicating); there is one bench over here and there is the one over there (indicating), so he had to come over here with the box on his hands. I didn't see that part, but he was over here (indicating).

20 The Court: When you saw him he was extending himself forward with the box?

The Witness: Yes, and all of a sudden the box dropped down.

The Court: And the next minute what did you notice?

The Witness: His face got white and he held his hands here (indicating).

30 The Court: His both hands holding his groin and his face turned white?

The Witness: Yes.

By Mr. Flemming:

Q. And then he stopped work? A. Yes, he stopped work and he sit down.

Q. Did he work— A. No, he didn't.

Q. Did he work any more that day? A. No.

Mr. Flemming: That is all.

*E. Brousseau, for Petitioner, Cross.*

CROSS EXAMINATION by Mr. Rhinehart:

Q. Was there some reason why you were watching Mr. Di Mieri on that day? A. Well, I never watch nobody, but every once in a while, you know, you can't keep your nose on the grindstone very closely, and every once in a while I turn and look, and I just happened to be looking. 10

Q. Did you have any particular reason to be watching him that day? A. No.

Q. You didn't know anything about this trouble he had been having for a couple of weeks before that? A. No.

Q. Is that what you mean? A. No.

Q. That is not why you were watching him, because he had been having trouble in his side for two weeks or more? A. I didn't know nothing then; that is all I ever seen. 20

Q. You say you didn't know it then? A. I didn't know what?

Q. That he had been having trouble before. A. No.

The Court: Trouble with whom?

Mr. Rhinehart: Before.

The Court: You mean trouble with his groin? 30

Mr. Rhinehart: Yes.

By Mr. Rhinehart:

Q. You did learn about it since, is that what you mean when you say you didn't know it then?

A. No, I didn't know nothing; I just know what I told you now, on the 22nd.

Q. That is the day he stopped work; is that so? A. Yes. 40

*E. Brousseau, for Petitioner, Cross.*

Q. And on this occasion you mentioned it happened about one o'clock in the afternoon? A. Around that.

Q. What time do you go out for lunch? A. Twelve o'clock we go for lunch.

10 Q. You go out to lunch from twelve o'clock? A. Twelve fifteen.

Q. Twelve to twelve fifteen? A. Twelve forty-five; we have three-quarters of an hour.

Q. You say this bench he was reaching over was about two feet wide? A. The bench, no, it is two feet long.

Q. Was he reaching over the length of it? A. Pardon?

20 Q. Was he reaching over the length of the bench? A. Yes, the length of it, both—one on each end, see?

Q. In other words, he was holding the box out about two feet in front of him; is that what you mean? A. Yes.

Q. He would not have to bend his body over to do that, would he? A. You know, you have to make a slight bend.

30 Q. A slight bend? A. Because it is about three feet high. You can't—suppose this is the bench and you have to—you know (indicating).

Q. You mean you have to stretch, but to get down and reach the comparatively low bench; is that what you mean? A. I don't understand you.

Q. You say the bench he was reaching across was about two feet? A. Yes.

Q. In length? A. Yes.

40 Q. And he was sitting? A. He was setting

*E. Brousseau, for Petitioner, Cross.*

chuck on the other bench; the other is two feet also.

Q. And that was right up against the one bench he was reaching over, wasn't it? A. No, there was another one between him and the other one. 10

Q. How many benches were there altogether? A. Two, one on each end; one is over here (indicating), and the other is over there (indicating); he was reaching against this one, to put the box on the second one (indicating).

Q. But the tops of the benches were right together and sort of made all one top, didn't it? There wasn't any space between them? A. Between the two of them? 20

Q. Yes. A. No.

Q. No space between them? A. They are both stuck together just like there was one bench, that is four feet altogether.

Q. Yes. A. There is no space over here (indicating); the bench is kind of stuck together and you put them together; in other words, if you leave a space something drops in between them.

Q. You say it is two feet long? A. Yes. 30

Q. How wide is it? A. Maybe a foot.

Q. A foot wide. Who else was there at the time? A. Where?

Q. I mean, at the time this accident happened in the plant, anyone else right there? A. Everybody was working.

Mr. Rhinehart: That is all.

*E. Brousseau, for Petitioner, Re-direct.*

RE-DIRECT EXAMINATION by Mr. Flemming:

10 Q. What was on the floor, what kind of floor was it and how was it that day? A. On the floor there is lime sometimes; there is always lime on the floor sometimes.

The Court: You mean lime?

The Witness: Yes, we polish with lime, it has a grease soap, and once in a while you drop some on the floor, and sometimes it is kind of slippery.

By Mr. Flemming:

20 Q. And that is the way it was that day? A. Yes, once in a while there is oil that drops down, you know, like I grease the machine, and there is oil on the floor.

Q. The floor is what, concrete or wood? A. I think it is concrete, because there is so much lime on the floor, I don't pay much attention to it.

Mr. Flemming: That is all.

(Witness excused.)

30 Mr. Rhinehart: If your Honor please, I dislike to make this sort of objection, but I feel this is the type of case where it would be unfortunate and difficult to have the doctor testify before the petitioner.

Mr. Flemming: I will come to the petitioner.

The Court: It is his case; he can try it as he sees fit.

Mr. Flemming: I have had the doctor on call since 9:30 this morning.

40 Mr. Rhinehart: A lot of the doctor's tes-

*E. Brousseau, for Petitioner, Re-direct.*

timony is going to depend upon the petitioner's testimony.

The Court: What prevents counsel, if he wants to try his case, if he doesn't even want to put the petitioner on, from doing so? Of course, I suggest that counsel put the witnesses in their logical order, but if he finds he wants to put his doctor on now instead of the petitioner, I can't comply with your thought. 10

Mr. Flemming: I can assure you that we will connect it up.

The Court: After all, you don't have the advantage of the petitioner's testimony. Is he the treating doctor? 20

Mr. Flemming: Yes.

Mr. Rhinehart: Not only doesn't he have the advantage of it, but I don't know what the petitioner is going to testify to as to what happened to him or how it happened to him, and I feel I am prejudiced, too, in attempting to examine the doctor on something that I don't know what is going to be.

I assure you that the testimony of the two lay witnesses that you have heard so far is not the full story. Now, what the petitioner is going to say when he gets on the stand, I don't know, but I feel I should have the advantage of it, and, of course, there is a proper turn in which he calls witnesses, in the proper order of proof, and I do think that this is one of those cases where the rule should be applied. 30 40

*Dr. N. N. Forney, for Petitioner, Direct.*

The Court: Do you want to put the doctor on now?

Mr. Flemming: I will connect it up, yes, Judge.

10

DR. NORMAN N. FORNEY, called as a witness on behalf of the petitioner, was sworn and testified as follows:

Direct Examination by Mr. Flemming:

Q. Doctor, you are a licensed physician of the State of New Jersey? A. 33 years.

20 Q. You are practising in Milltown, New Jersey? A. That is right.

Q. You are a surgeon as well? A. I am a Fellow in the American College of Surgeons, yes.

Q. Now, Doctor, on April 22nd, 1940, did you have occasion to examine Frank Di Mieri, the petitioner in this matter? A. Yes.

Q. Where was the examination made? A. At my clinic.

30 Q. At what time of day, Doctor? A. Well, I should say approximately two o'clock in the afternoon.

The Court: What time, Doctor?

The Witness: Two o'clock, approximately; I don't remember the exact time.

By Mr. Flemming:

40 Q. What did the examination consist of and what were your findings? A. Well, the patient's history—the history was that two weeks ago while he was lifting a box, he developed a pain in

*Dr. N. N. Forney, for Petitioner, Direct.*

the right lower groin. While he was working to-day he developed a severe pain and at the same time he noticed a lump. I examined him for this lump and when I examined him he had a right incomplete hernia, incarcerated, that is, it was down. 10

The Court: Right?

The Witness: Right incomplete. It didn't go into the scrotum. It was incarcerated. That means it was down and I had difficulty to put it back.

The Court: To reduce it?

The Witness: That is right. He was in pain and I told him that the only thing he could do was go in the hospital and have it operated on, so he went in the hospital, and the following day I operated on him, on the 23d of April, and he was there approximately two weeks and a half, and then I saw him after that time at my clinic. 20

The Court: He was in the hospital two and a half weeks?

The Witness: Yes, about that.

The Court: What hospital, Doctor? 30

The Witness: St. Peter's. And then I saw him subsequently at my clinic on three or four occasions. I don't have the exact data.

By Mr. Flemming:

Q. Doctor, would you say that the hernia as you observed it was an old hernia or of recent origin? A. I think it was recent origin.

Q. And, Doctor, do you think that if this man 40

*Dr. N. N. Forney, for Petitioner, Direct.*

had it, as you saw it, that it had existed from April 8th? A. I beg your pardon?

10 Q. I say, as you saw the hernia on April 22nd, do you think that that man could have had that hernia for two weeks before that? A. It is possible he could have had it, but I don't believe he did.

Q. In your opinion. A. In my opinion he had it that afternoon, because the history was that he had a very sharp pain, and he ceased work and came to see me immediately, and he said he had never noticed the lump before.

20 Q. And from your physical examination, would it seem to be true, Doctor, if you can tell? A. Yes, I would think that would be so, that he had it on that day.

Q. You are basing it on the physical findings, too, as well as on what he told you? A. Yes.

Q. Now, Doctor, what was your bill for treatment? A. I think it was \$110 altogether.

Q. Has that been paid? A. I really don't know; I don't think it has.

30 Q. Now, Doctor, I will show you a bill of the St. Peter's General Hospital to Frank DiMieri, to hospital room and care, April 22nd to May 7th, 1940, 15 days at \$4.50, \$67.50. Is that a reasonable charge? A. That is a reasonable charge.

The Court: \$67.50.

Mr. Flemming: \$67.50.

By Mr. Flemming:

Q. And operating room fee of \$10. Is that reasonable? A. That is the usual charge.

40 Q. Anesthetic \$10? A. That is the usual charge.

*Dr. N. N. Formzy, for Petitioner, Direct.*

Q. Medicine 38 cents. Laboratory fee \$5? A. That is the usual charge.

Q. And dressing \$1, and binder 75 cents. A. That is right.

Q. Are they reasonable charges? A. They are all reasonable charges. 10

Mr. Rhinehart: What is the total?

Mr. Flemming: \$94.63.

The Court: They are from April 23d to May?

Mr. Flemming: April 22nd to May 7th.

The Witness: The 22nd he went into the hospital. He was operated the next day after. 20

By Mr. Flemming:

Q. 15 days? A. 15 days.

Q. Doctor, you ordered him in the hospital that very day? A. I did and he went in directly from my clinic.

Q. Before doing this, Doctor, did you communicate with the employer? A. I don't remember whether I did or not. The man had a lot of pain and he had to have his hernia fixed up, whether the concern was responsible for it or not, because he couldn't work, that is all. He was in severe pain. He said, "I have to have it fixed up no matter who pays for it." 30

Q. Doctor, in your opinion, was it a case that had to be treated immediately? A. I think it had to be operated on immediately. That is the reason I sent him in.

Mr. Flemming: Take the witness. 40

*Dr. N. N. Forney, for Petitioner, Cross.*

CROSS EXAMINATION by Mr. Rhinehart:

Q. Doctor, when you saw the hernia—you think he had the hernia on April 22nd. You mean you think that is when the descent of the hernia took place? A. I think that is when he developed the  
10 hernia.

Q. What part in the picture, if any, does this history of pain in his right lower groin two weeks before play, if any? A. I don't know that it has any—I don't know that it plays any part in the picture at all.

Q. Why not? A. Well, he didn't complain of any lump at that time and he went on working just the same. Evidently it didn't pain him very  
20 much or he would have discontinued work and he didn't notice any lump at that time.

Q. Do you feel that the cause of a hernia and its descent must necessarily be coincidental, at the same time? A. No, it doesn't necessarily have to be at the same time, but it very often is.

Q. What is the cause of a hernia? A. Well, the direct cause of a hernia is some injury, usually lifting or straining. That is the direct cause  
30 of a hernia. The indirect cause of a hernia is the weakness of the muscles.

Q. Didn't he give you a history that he was lifting and straining about two weeks before, when he suffered the pain? A. Yes, he said two weeks ago while he was lifting a box he developed a pain in the right lower groin.

The Court: Right lower groin?

The Witness: Yes.

*Dr. N. N. Forney, for Petitioner, Cross.*

By Mr. Rhinehart:

Q. Why do you feel that this is different from the ordinary case in that that had nothing to do with the descent of the hernia that subsequently descended, let's assume, on April 22nd A. Well, I don't know that it had anything to do with it. The reason I don't think it had anything to do with it is because he didn't complain of a lump at that time, because I questioned him carefully when he was in to see me, and also he went on working just the same.

10

When I saw him he wasn't able to work and he decided he would have to have something done with it, because he couldn't work, and I thought—he said to me, “I will have to have it fixed up no matter who pays for it.”

20

Q. Doctor, the lump is indicative of a descent?  
A. That is right.

Q. You agree that the descent need not immediately follow the cause? A. That is right.

Q. So we can't use the fact that there was no lump there two weeks before as any logical argument against an assumption that the hernia might nevertheless have been caused then? A. It is a pretty logical argument, because you don't have a hernia unless you see a lump. That is when patients come in, they say, “I have a lump in my groin.” That is the first they know they have a hernia. I never have a patient come in and say they have pain, and you examine them and you find a hernia without its coming down. The fact that directs the patient's attention is the fact that they have a lump associated with some dis-

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*Dr. N. N. Forney, for Petitioner, Cross.*

comfort, but I never see a patient with some discomfort and who doesn't have a lump there that is a hernia. You might have weakness of the ring; he had probably a weakness, which is a pre-

10 Q. Doctor, before a hernia can descend, there must be some opening through which it may descend; isn't that so? A. Not necessarily. You can have the opening simultaneously with the hernia coming down.

Q. You may? A. Yes.

Q. But that is not necessarily so? A. Not necessarily, but that usually is so.

Q. That usually is so? A. That usually is so.

20 Q. You mean that the mere fact that there is no lump is conclusive indication that the hernia was not caused until the lump appeared, and therefore, automatically, all hernias are compensable? A. Well, I don't know anything about it being compensable, because I am not up on compensabilities.

30 Q. Do you agree with the theory of our law that the cause of a hernia and the descent of a hernia do not necessarily and do not usually occur simultaneously? A. No, I think they usually occur simultaneously.

Q. What is the cause of a hernia anatomically, I mean, aside from the answer that you have already given? A. Well, it is a weakness of the muscles or the tissues at that particular location where the hernia occurs.

40 Q. Would you say it was a separation, perhaps—we are speaking, of course, of inguinal hernias exclusively, is that so? A. Yes.

*Dr. N. N. Forney, for Petitioner, Cross.*

Q. Would you say it was an opening, that the cause of a hernia is an opening in the internal ring through which part of the intestines might then or subsequently descend? A. Well, yes, but we can have a direct hernia that doesn't come through the internal ring. 10

Q. Well, I, of course, want to keep to the facts in this case. What sort of hernia was this? A. I don't know. Do you have the hospital records there? I am sorry I didn't look the hospital records up to see whether it was a direct or indirect hernia.

Q. Well, I don't know. Do you have any records of your own? A. No, I have to refer to the hospital records. I think this was a direct hernia. The hospital records—we can easily get them; I can look them up. 20

The Court: The difference between a direct and indirect hernia is merely the particular—

The Witness: Location.

The Court: Location, and the route it took.

The Witness: Yes, that is right. 30

The Court: In other words, if it bulges right out—

The Witness: That is right, you have the inguinal ring, through which the spermatic cord lies, the internal ring and the external ring.

The Court: But either one of which may be due to accident of any other cause.

The Witness: That is right; it doesn't 40

*Dr. N. N. Forney, for Petitioner, Cross.*

make any difference because you can have a direct hernia as a result of injury, or you can have the indirect hernia as a result of injury.

10 By Mr. Rhinehart:

Q. Conversely, you can have both of these as a result of diseases of the wall? A. That is right, the predisposing factor is usually some weakness of the muscles or of the ring; that is the predisposing factor, but you might have that and I might have that and we not know it.

Q. Would it be true to say that whether the hernia is direct or indirect, it must first come through the internal ring? A. Well, no, not necessarily; it doesn't have to first come through the internal ring.

20

Q. It would not? A. No, not necessarily.

Q. What sort of hernia would come through the internal ring? A. An indirect hernia.

Q. An indirect hernia would be one which first came through the internal ring? A. That is right.

Q. And a direct hernia would be— A. Anywhere through the muscle. You can have a direct hernia here (indicating) or here (indicating)—any place where the muscle separates and the tissue comes out, the peritoneum plus the tissue behind it, whatever it is, comes out.

30

Q. Are you speaking now of what we sometimes have heard called ventral hernia? A. Any kind of hernia is the same thing; that is, you can have a direct hernia in this location (indicating) in which it would not have to come through the internal ring; the muscles will separate.

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*Dr. N. N. Forney, for Petitioner, Cross.*

Q. Is that what we commonly call an inguinal hernia? A. They are both inguinal hernias; they are only different types of inguinal hernias; one comes through the ring and the other comes through the muscle break. You can understand from the phraseology, one is direct and the other is indirect, because indirect comes through the inguinal canal; the direct comes directly through the muscle. 10

Q. And you say you don't know? A. No, I am not positively sure about that. It is pretty hard to diagnose when you see a patient first, whether it is a direct or indirect hernia. You can usually only tell that at operation. Sometimes you can. 20

Q. In either case then, what I want to know is this: The cause of the hernia, that is, the direct cause, not the contributing cause or the predisposing factor; the direct cause of all inguinal hernias is, in the case of an indirect hernia, an opening in the internal ring? A. That is right.

Q. Which permits the descent of the intestines either at that time or at some subsequent time? A. That is right. 30

Q. Or in the case of a direct hernia, an opening in the muscles through which the intestines may then or subsequently descend? A. That is right.

Q. So that, of course, either definition of our terms demonstrates that the hernia is caused when that hernia is created; is that right? A. That is right, when it is created.

Q. And following the cause, of course, most every action of life may be a contributing factor 40

*Dr. N. N. Forney, for Petitioner, Cross.*

tending to push the intestines through that opening and causing or resulting in what we call a descent of the hernia; is that so? A. Well, you can—any overexertion might force it through.

10 Q. Yes, or it might come down just without apparent force? A. Yes, you might strain at stool; you might fall on your back.

Q. But, considering the cause as distinguished from the result, we have now reached the point, have we not, Doctor, that we can agree that the fact that there was no descent is no indication—no reliable indication—as to whether a hernia has been caused or not; is that so? A. That is true, but I don't believe that this man had a hernia two  
20 weeks before, because he didn't have any severe pain. The pain passed by and he worked and today, on the 22nd, he had severe pain and noticed the lump, and I questioned him carefully if he had ever had a lump there before and he said no.

Q. Well, Doctor, when you say that in your opinion he didn't have a hernia two weeks before, all that you mean is that he didn't have any descent of the hernia two weeks before. I am not  
30 interested in that. We are agreed that the descent need not occur when the hernia is caused. A. It is not necessarily so, but I think it usually does.

Q. Doctor, I will ask you for the moment, the fact that the hernia didn't descend two weeks before the 22nd; I want you to disregard that just for the purpose of my examination. A. Yes.

Q. As being no indication that it was—that the hernia was not then caused. What, if anything  
40 else, is there in this case that leads you to believe

*Dr. N. N. Forney, for Petitioner, Cross.*

that the hernia was not caused two weeks prior to April 22nd, and when I say, "Not caused" I mean that there was no violation or opening through either the muscle or the inguinal ring, through which a hernia might descend by accident or just plain habit? A. Well, I think this man had pain, and that is the reason, plus the lump, as I said before, made me think that the hernia came down at that time.

10

Q. We are conceding for the moment that the hernia did descend at that time? A. Yes.

Q. That is on April 22nd. A. Yes.

Q. But, what caused this opening on April 8th? A. Well, I don't know what did that, because I didn't see him at that time. He just said he had pain on April 8th, but I didn't see him at that time, so I don't know what caused his pain at that time.

20

Q. In the absence of anything else to explain it, and in consideration of the fact that a hernia had developed two weeks later, and in consideration of the fact that the pain was in the right inguinal region, as I said before, in the absence of anything else to indicate the cause of that pain, would not your conclusion necessarily be that that pain came from a violation of either the muscle tissue or the internal ring, whereby an opening was caused through which a hernia might have then descended? A. Well, I would sooner believe that he may have strained the muscles at that time, but the hernia didn't come down at that time.

30

Q. We are agreed, Doctor, that it didn't come

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*Dr. N. N. Forney, for Petitioner, Cross.*

down at that time. A. Assume it was the same type of pain—

10 Q. I understand your answer to be that in your opinion and under the circumstances of this case that the pain that occurred two weeks before the 22nd was the pain incident to—I forget the words you used—but let's call it a violation of the muscle tissue or the internal ring; is that so? A. No, I don't think so. I think he probably had a strain of the muscles at that time, but I don't believe he had any hernia at that time.

Q. When you say, "Hernia" you mean a descent; that is the language you are employing? A. That is the only thing we can base our diagnosis on, the descent. We don't base our diagnosis of hernia on anything but descent. A hernia is a descent of tissue through an opening. That is what a hernia is. You may have an opening, but you don't have a hernia through it. You have your mouth and nasal opening, but you don't have a hernia through it.

20

Q. Might you not have a sac, as it is called? A. You always have a sac with a hernia because whatever is pushed down in front of it is called the sac.

30

Q. The peritoneum doesn't come down until the actual descent of the rest of the abdominal contents? A. That is right.

Q. Doctor, I understand you now to have imparted—I thought, perhaps, we were agreed that the descent and the cause need not occur. A. No, I don't think so; I think the cause—the hernia occurred on the 22nd. I don't think it occurred on the 8th. That is my frank opinion.

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*Dr. N. N. Forney, for Petitioner, Cross.*

Q. Doctor, assuming that the evidence of the facts was that on April 8th the petitioner, the patient, was lifting a box of work from the floor and suffered a severe pain in his right groin, and assuming that that pain continued intermittently during the period of from April 8th to April 22nd, and became worse over that period of time, would that in any way affect you opinion? A. Yes, but it didn't, because he said he had no pain from April 8th until that afternoon, when he developed a severe pain and noticed the lump. If he had told me he had pain from April 8th until the 22nd, that would have been different, but he said he didn't have any pain. He went right on working just the same, and he didn't notice the pain again until April 22nd.

Q. I understand that, Doctor, but I am asking you to assume what I feel I can establish by evidence, that that is the fact. Now, what would be your opinion in that case? A. If he had pain without a mass there, I still don't feel that he necessarily would have any hernia.

Q. Then you were wrong before when you said that would be different—

Mr. Flemming: Let the Doctor finish.

The Witness: Hernia has to be a lump; it has to be descended. You can have an opening without having a hernia. He might have an opening there, but he doesn't have a hernia until he has a descent. He can have an opening of his muscles. I might have an opening in any of my muscles here, but I might not have a hernia, because noth-

*Dr. N. N. Forney, for Petitioner, Cross.*

ing protrudes through it. A hernia is the protrusion through muscle tissue or through tissue.

By Mr. Rhinehart:

10 Q. I agree with you on that, but what I am trying to distinguish between is not the fact that the man may not actually have the hernia until the thing descends; what I am trying to point out is that there is a difference and usually an interval of time between the cause of the hernia and its descent. A. Well, what you mean is that he might have an accident on the 8th of April which would weaken the muscles down so that the hernia didn't  
20 come until April 22nd. Is that what you mean? I think that is perfectly possible.

Q. Isn't that most likely what happened in this case? A. Well, I think it is perfectly—

Q. That the opening came— A. I think it is perfectly possible. I don't think he developed any opening; I think he developed a weakness at that time. He may have strained the muscles and caused the weakness, but I don't believe he had the opening, and I don't believe he had the hernia  
30 until the 22nd. That is my frank opinion.

Q. Of course, again, when you say he didn't have the hernia, you mean the descent didn't occur? A. A hernia is that descent. You can't have a hernia without having a descent. You can have an opening but you don't have a hernia until you have that descent.

Q. Regardless of that, you say that the history of continuous pain and pain becoming progressively worse over the period, space of time bet-  
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*Dr. N. N. Forney, for Petitioner, Cross.*

ween April 8th and October 22nd, would not change your opinion in any regard? A. No, I don't think so unless it might be that he had injured the muscles there severely, would give him more pain—would give him pain. I think it is perfectly possible that the man lifted or had some accident on April 8th which weakened the muscles, I think that is perfectly possible, but the hernia didn't occur until April 22nd. 10

Q. You mean it didn't descend? A. You can't have a hernia without the descent. That is your hernia.

Q. Of course, in examining you, I am trying to have your testimony bear some relation with the provisions of the law. A. I am trying to give you my opinion and trying to be as explicit about it as I can. 20

Q. Is it not possible that there might be a descent—an actual descent—that had perhaps reduced itself, or such a slight descent of the intestines that it was not demonstrable, that is, not observable, by the petitioner himself as a lump? A. Well, anything is possible, but it is not probable. That is perfectly possible, but it is not probable. 30

Q. It is not probable? A. No; it is possible.

Q. Do you feel that any descent regardless of its degree would necessarily be noticed by the person who was developing an inguinal hernia? A. No, because patients come in and they have hernias and they have never even noticed it. They have this lump; they never even noticed it, and if they have, they haven't paid any attention to it. 40

*Dr. N. N. Forney, for Petitioner, Cross.*

10 Q. Is it possible to have any partial descent of hernia without any lump, that is, a lump observable on the layman on the outside of the body in the inguinal region? A. Yes, it is possible and that very often happens; a person doesn't always notice the lump.

Q. I say, a lump that could not be noticed. A. Yes, it is possible, but I don't believe it is probable with him.

Q. You say as a matter of fact that frequently or usually happens—I don't know. A. Yes.

20 Q. What reason do you suppose that it didn't happen in this case? A. I think that he had pain in that location; he is an intelligent man. I think he would examine himself very carefully to see if he had something of that sort. The same as if you had a pain there, you would examine yourself to find out, or you would probably think you had appendicitis, unless your appendix was out.

Q. How do you explain that these people so frequently come into your office and don't notice the lump. I don't think they come frequently; they do come.

30 Q. It is a usual experience in hernia cases? A. I beg your pardon?

Q. That is the usual experience in hernia cases? A. What?

40 Q. That patients come in to you and don't know? A. Oh, no, they come in and they say they have a lump. That is ninety-nine cases out of one hundred, but probably one case out of one hundred they come in and tell you that they have some distress or discomfort there, and you examine them and find they have a hernia.

*Dr. N. N. Forney, for Petitioner, Cross.*

Q. I thought you said that frequently happens? A. No, no.

Q. Would you say it is a common occurrence?

A. No, I wouldn't say it is particularly common, but you do see it occasionally, that you examine a man and find he has a hernia, and who doesn't even know he has it.

10

Q. One further thing: Is it possible to have a partial or slight descent which will not show as a lump on the outside of the body? A. Yes, that is perfectly possible.

Q. Isn't that the way an inguinal hernia starts, usually? A. No, I don't think an inguinal hernia starts that way; an inguinal hernia starts usually with a descent and the descent is so marked that the patients notice it.

20

Q. In other words, you don't subscribe to the theory of our law that inguinal hernias are usually a gradual development is that so? A. No, I think they develop more or less suddenly. Patients come in and you can usually trace it to some overexertion that they have had that has brought the hernia down. They never noticed it before.

Q. Doctor, the fact that the hernia comes down, of course, demonstrates the existence of a hernia, but it doesn't show the cause? A. No, it doesn't show the cause, never.

30

Q. It doesn't show the cause? A. No.

Mr. Rhinehart: That is all.

The Court: That is all.

(Witness excused.)

(Hearing adjourned.)

40

*Certificates.*  
*Proceedings of August 7, 1940.*

CERTIFICATES.

10 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 J. STAHL,  
*Deputy Compensation Commissioner.*

20 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,  
*Court Reporter.*

NEW JERSEY DEPARTMENT OF LABOR.  
WORKMEN'S COMPENSATION BUREAU.  
Somerville, Somerset County District.

30

FRANK DI MIERI,	<i>Petitioner,</i>
vs.	
METAFIELD, INC.,	Respondent.

August 7, 1940.

Before: Honorable John J. Stahl,  
*Deputy Compensation Commissioner.*

40 Appearances:

Russell Fleming, Esq., (Fleming & Potter,  
Esqs.) for the petitioner.

*F. Di Mieri, for Petitioner, Direct.*

Everett Rhinehart, Esq., for the respondent.  
 William C. O'Brien & Staff, by H. Schreiber,  
 Reporter.

FRANK DI MERI, the petitioner, called as a witness on his own behalf, was sworn and testified as follows: 10

Direct Examination by Mr. Fleming:

Q. You are the petitioner in this case? A. I am.

Q. And where do you live? A. 24 Exton Street, South River.

Q. And how old are you? A. Thirty.

Q. And you are married? A. Yes, sir. 20

Q. And in April, 1940, where were you employed? A. Metafield, Incorporated, Middletown.

Q. And what were your duties there? A. Polisher.

Q. Do you recall whether anything happened on April 8th, 1940? A. Well, April 8th, 1940, as I was lifting a box in a cage—

The Court: April 8th?

The Witness: April 8th—I was lifting a box in a cage where we receive our work. 30

The Court: Lifting a box in a cage?

The Witness: Lifting a box of metal, that's right, and in doing so I experienced a slight pain below the belt.

By Mr. Fleming:

Q. And did you stop work that day? A. No, I continued on working.

Q. And did you see a doctor? A. No, sir. 40

*F. Di Mieri, for Petitioner, Direct.*

The Court: You felt a pain where?

The Witness: Below the belt, somewhere around the abdomen.

The Court: All right.

10 By Mr. Fleming:

Q. Now, after that did you engage in any form of exercise and, if so, what? A. Well, I am an ardent bowler and I bowl a few times each day but on April 8th in the evening I mentioned the fact to Mr. Gorsline that I had a slight pain.

Q. And who is Mr. Gorsline? A. Mr. Gorsline is the placement manager of the Metafield.

20 Q. Now, I call your attention to April 22nd—oh, by the way, going back to April 8th, what did you have to eat for lunch? A. Well, I usually drink milk every day but this particular day I had pickles together with the milk and it seems as though they didn't agree with me. Now, I attribute that cause of the pain on April 8th to the—

Q. (Interrupting) Well, never mind that; never mind that. Now, did you lose any time from work as a result of any pains you had on April 8th? A. No, I did not.

30 Q. Now, I call your attention to April 22nd, 1940, and ask you what, if anything, occurred?

The Court: What date is that?

Mr. Fleming: April 22.

By Mr. Fleming:

Q. What happened then? A. Well, I lifted a box up from the cage—

The Court: April 22nd?

40 The Witness: April 22nd, and—

*F. Di Mieri, for Petitioner, Direct.*

The Court: You lifted a box where—in the cage?

The Witness: In the cage where we get our unfinished work, and walked about 60 feet to my workbench and in reaching from one bench to the other to lay my work down my foot slipped out and I dropped the box and I experienced a tearing of the tissues down in the groin. 10

By Mr. Fleming:

Q. On which side? A. On my right side.

Q. How did you feel after that? A. Well, I felt prostrate right away.

Q. What do you mean by that? A. I felt nauseous and I dropped the box and I couldn't do anything and I held my side there for fully a minute and a half and two of my colleagues seen my predicament there and advised me to see a doctor. 20

Q. And these gentlemen that were with you were who? A. Mr. Calluri is one, and Brousseau is the other.

Q. Were these the gentlemen who testified— 30

The Court: Mr. who? Who was that?

The Witness: Tony Brousseau.

The Court: How do you spell that?

The Witness: That is Calluri (spelling); and Brousseau.

The Court: Brousseau?

The Witness: Brousseau (spelling).

By Mr. Fleming:

Q. Were these the gentlemen who testified in 40

*F. Di Mieri, for Petitioner, Direct.*

your behalf at the previous hearings? A. They are.

10 Q. How long had you worked for Metafield, Incorporated, before? A. Well, I mean, when did you go to work for them? A. Well, I went to work for them, I believe, sometime in August, 1937.

Q. And did you ever have any trouble in the region of the groin, any pains or anything there before these two times you mentioned now? A. No, sir.

Q. And when you stopped working on April 22nd, about what time of the day was that? A. Well, that was around one o'clock.

20 Q. Was it before or after lunch? A. It was after lunch.

Q. Now, after you stopped working, what did you do after that? A. Well, my fellow workers advised me to see a doctor immediately.

The Court: Who did? Who advised you?

The Witness: My fellow workers advised me to see a doctor.

30 By Mr. Fleming:

Q. How did you feel? A. Well, I felt very prostrated, I couldn't do a thing, but I attempted to work and could not do so.

Q. And how long was that after the accident that you attempted to work? A. That was about a minute and a half.

40 Q. What happened then? A. Then I went into the men's room and examined myself and found on examination, I seen a ball hanging down below the groin.

*F. Di Mieri, for Petitioner, Direct.*

Q. And how big was that? A. Oh, that was about the shape of an egg.

Q. Had that been there before? A. It had never been there before.

Q. What did you do after that? A. I went back to the department and I wanted to report it to the foreman but he wasn't there so I reported it to the assistant foreman, Mr. Rabinowitz. 10

The Court: Who?

The Witness: Mr. Rabinowitz; and he advised me to see Mr. Gorsline.

By Mr. Fleming:

Q. And Mr. Gorsline is the superior of your department? A. Yes. 20

Q. Did you do that? A. He is not the superior of our department but he is the general manager of the shop.

Q. Then when did you see Mr. Gorsline? A. Immediately after.

Q. How long would you say that was after the accident? A. I would say about five minutes.

Q. And what was your conversation with Mr. Gorsline? A. I told him what had happened and he advised me to go right over to the doctor. 30

Q. And what doctor did he advise you to go to? A. To Doctor Forney.

Q. And did you go right over? A. I went over immediately.

Q. And what time did you get to Doctor Forney's office? A. Oh, I got there I guess about a quarter after one.

Q. And did Doctor Forney make an examination? A. Well, he wasn't there at the time. He 40

*F. Di Mieri, for Petitioner, Direct.*

was down at the hospital on an operation but I waited about a half hour and he rushed over from the hospital to the office.

10 Q. And what treatment did he administer or what advice did he give you? A. Well, he gave me an examination and advised an immediate operation.

Q. And what time did you go to the hospital? A. Well, I went to the hospital around six o'clock.

Q. What hospital did you go to? A. St. Peter's General Hospital.

Q. In New Brunswick? A. In New Brunswick.

20 Q. And were you operated on that day?

The Court: What day are you talking about? Fix the day, will you?

The Witness: That was the 22nd I went to the hospital.

By Mr. Fleming:

Q. That is, you went there in the afternoon of the day that you say you received this injury? A. That's right.

30 Q. And do you know what time you got to the hospital about? A. I got to the hospital about six o'clock.

Q. Were you operated on that day or the following day? A. I was operated on the following morning about eleven o'clock.

Q. And Doctor Forney performed the operation? A. He did.

40 Q. I show a bill from the St. Peter's Hospital and ask you what this bill represents (handing to

*F. Di Mieri, for Petitioner, Direct.*

witness). A. That represents my bill of the hospital.

Mr. Fleming: I offer this in evidence.

The Court: What is the amount of it?

Mr. Fleming: There is no objection.

The Court: \$94.63. Has it been paid? 10

The Witness: No, sir.

(The bill of St. Peter's Hospital was received and marked "P-1" in evidence.)

By Mr. Fleming:

Q. Now, what was the condition of the floor at the time of the accident that you related occurred on April 22nd? A. Well, at that particular time the floor was quite slippery. Of course, they usually grease the machines on a Saturday and there is quite a bit of oil that leaks from the motors overhead which leaks on to the floor. 20

Q. And what day of the week was April 22nd?

A. That was on a Monday.

Q. And how did it come that your foot slipped when you had this box? A. Well, there is lime on the floor and it accumulates from time to time and it is quite lumpy in spots and the only way that lime can be removed is to be scraped off and that is done every once in a while. : 0

Q. And was there lime and oil on the floor? A. It is lime with the oil on top of it and it made it quite slippery.

Q. Now, you say you worked there as a buffer or polisher, is that right? A. That's right; polisher.

Q. And that involves polishing metal vanity cases? A. That's right. 40

*F. Di Mieri, for Petitioner, Direct.*

Q. And other small objects? A. That's right.

Q. And you say that you get these articles to be polished from the stock room or store room?

A. That's right.

10 Q. And you say that is about fifty feet away from where you work at a machine? A. That's right.

Q. You do work at a machine, do you not? A. That's right.

Q. Now, when you brought the box from the store room what did you attempt to do with it?

A. I attempted to bring it over to my work bench.

20 Q. And just tell his Honor just the set-up and the arrangements of these benches around your polishing machine. A. Well, this is where I sat (indicating). Now, there is a lathe, there is a double lathe, one man works on one side and another man works on the other side. Now, my finished work was on my right, and on my left there is a bench here about two feet long and there is another bench right in front of it, two  
30 foot long and in reaching to put the work over the first bench my right foot slipped out from under me and in doing so I lost my balance and the box slipped out of my hands and I grabbed my side and I felt a tearing of the tissues in my right groin and I was prostrate, I felt blood rushing to my head, you know, and I couldn't do a thing there for a minute and a half.

Q. Well, now, how big was this box? A. I  
40 would say about two foot long and ten inches wide and say about six inches deep.

*F. Di Mieri, for Petitioner, Direct.*

The Court: Just let me have those dimensions. Two what?

The Witness: Two foot long, ten inches wide and about six inches deep.

By Mr. Fleming: 10

Q. And how or what was the weight of this box as best as you can judge? A. Well, the weights varied. Say they run between forty-five and fifty pounds.

Q. And was that about the weight that you say this box was? A. I would say that is about as close as you can get to it at that particular time.

Q. And how long were you in the hospital? 20  
A. I was in the hospital fifteen days.

Q. So that that would be— A. That would be—

Q. You came out—you were in the hospital fifteen days? A. Yes.

Q. And after that what did you do? A. Well, I had to stay home to recuperate for five weeks.

Q. Do you recall the day that you returned to work? A. Well, let's see. Sometime in June, I believe. I don't know the exact day. 30

Mr. Fleming: Can we agree it was June 11th?

The Court: June 11th?

Mr. Rhinehart: No.

The Witness: It was seven weeks from the time of the accident to the time I returned to work, seven weeks and one day, I believe, because I returned on a Tuesday so it was seven weeks. 40

*F. Di Mieri, for Petitioner, Direct.*

By Mr. Fleming:

Q. That would be June 11th? A. June 11th, yes.

Q. And have you paid Doctor Forney's bill?

A. No, I haven't.

10 Q. And Doctor Forney testified his bill is \$110. Did you receive treatment from Doctor Forney after leaving the hospital? A. I did.

Q. And how are you now? A. Well, I am all right as far as working is concerned, but I can't seem to work as good as I used to. I seem to tire very easily. You see, I work as piece work and you are always on the go.

20 Mr. Fleming: Were we able to straighten out the wages?

Your Honor, we are trying to agree on the wages in this case. It seems that we have a little disagreement as to just exactly what the wages were. I will try to straighten that out.

The Court: Let the witness testify.

Mr. Fleming: All right.

By Mr. Fleming:

30 Q. Mr. Di Mieri, what was the amount of your wages? A. Well, our wages there were mostly on a piece work basis and as close as I can account to it I can truthfully say that my average weekly wage was around \$30 a week.

Q. Some weeks you didn't get that, is that right? A. Naturally some weeks I got less than \$30 but there were weeks I got more than \$30, considerably more, which I imagine brought it  
40 down to \$30.

*F. Di Mieri, for Petitioner, Cross.*

Q. And how many days of the week did you work? A. Five days.

Q. You didn't work on Saturdays? A. Not unless it was overtime.

Q. And how many hours a day? A. Eight and a half hours for four days and the remaining Friday we worked eight hours. That brings it up to forty-two hours a week. 10

Mr. Fleming: That is all.

CROSS EXAMINATION by Mr. Rhinehart:

Q. You had a transcript of your wages at the last hearing that was at New Bruswick. Do you have that with you, Mr. Di Mieri? A. You mean that single slip or one of those slips I had? 20

Q. Well, either, either. A. Well, I think my counsel has the other slip, I believe.

Mr. Fleming: No, I don't seem to see it.

The Witness: I have the other slips in my car. I figured to bring them along. It is right outside the door here.

Mr. Fleming: Can you produce those in a couple of minutes? 30

The Witness: I can.

By Mr. Rhinehart:

Q. What period do they cover? A. Well, I made a practice at one time to save these slips from time to time but they accumulated so much that I stopped, but they vary from different months. They run say '38, '39 and some in '40, but they do not run in rotation. There are a few weeks in between that is not there, but they 40

*F. Di Mieri, for Petitioner, Cross.*

can give you a definite idea of the approximate salary.

10 Q. Well, weren't you paid, wasn't the base of your pay in part an hourly rate of 55 cents an hour? A. Well, the hourly rate is only put on a man, so you see a man is only allowed to make a certain percentage over his hourly rate. Now, we do not work full hourly rates. We are on a piece work basis at all times except on a new job where we work say three or four hours on an hourly rate to get used to the job and then we are put on a piece work basis.

20 Q. When you say a man is not permitted to make more than a certain amount over his hourly rate— A. (Interrupting) Well, usually the job is timed for that so you can't make only so much over your time rate.

30 Q. (Continuing)—do you indicate the hourly rate is supposed to represent what the average earnings would be on a piece work basis for an hour? A. Well, in the polishers there is a variation in work. Now, there are some men make forty cents an hour, some fifty-five cents. Now, their work I can't work on because those jobs are just timed for those fellows. I get a job that would be more particular in the polishing end of it and naturally my time rate is more and I am allowed to make around seventy-five cents an hour. You can't make very much more because the job is timed for that rate and you can't make over that.

40 Q. You can't make anymore than seventy-five cents an hour on the basis— A. (Interrupting)

*F. Di Mieri, for Petitioner, Cross.*

That's right, on the basis of the job that is done. Every job is timed and it is timed according to my time rate.

Q. Now, at the time of this occurrence in April, wasn't the rate fixed at fifty-five cents an hour and then subsequently was raised since that time?

10

A. No, it hasn't been raised since then.

Q. It hasn't been raised? A. No.

Q. Well, was it fifty-five cents? A. That's right.

Q. That was the base rate? A. That was the base rate.

Q. For forty-four hours a week? A. No, forty-two hours.

Q. Forty-two hours a week? A. That's right.

20

Q. And that rate is calculated so that it is just about what you could make on a piece work basis? A. No, that is only the basis, but we go over that. We are allowed say around fifteen cents over our assigned rate which brings it up to seventy or seventy-five cents an hour.

Q. And so that the maximum you make then is seventy-five cents an hour and, of course, it might be less depending upon the job? A. Depending upon the job but usually it is at the average around between seventy and seventy-five cents.

30

Q. Now, of course, for the months immediately—several months immediately—prior to April 22nd your employment was not full time at the plant, is that so? A. No, I wouldn't say it was so. You see, I am an old hand at the shop and I am kept always working.

40

*F. Di Mieri, for Petitioner, Cross.*

Q. Well, didn't the transcript you had indicate that there had been a lot of days and times when you would—a lot of weeks when you would only go to work two or three days perhaps? A. Well, there was only one week there and that was around  
 10 January 2nd, that was during inventory week, they usually close down for a week or close to it, around four or five days, and I did receive a few days off while they were taking inventory, and there was a couple of weeks in between that from January, to the time when I was hurt, where I had only two or three days, but—

Q. Well, that— A. (Continuing)—that was because I had taken time off myself.

20 Q. Well, in any case your maximum earnings were seventy-five cents an hour? A. I would say that.

Q. For forty-two hours a week? A. That's right.

Q. The average you think would probably run something less than that in consideration of the fact that— A. (Interrupting) In consideration I don't think the average would run less than  
 30 seventy cents an hour.

Q. It wouldn't run less than seventy cents an hour? A. No, I don't think it would.

Q. Now, Mr. Di Mieri, when you went to Doctor Forney's office on April 22nd, don't you recall telling him that you had suffered a severe pain in your right lower groin about two weeks before that date? A. Yes, I had. I do remember saying something like that.

40 Q. You told him that? A. Yes.

*F. Di Mieri, for Petitioner, Cross.*

Q. And the reason you told him that was because at that time, at the time you went to him, you associated the pain with your work rather than with the pickles and milk that you had for dinner on the eighth, isn't that so: I mean, you wouldn't have told him about that if it were just for pickles and milk? A. I didn't think it was of any importance then, but I do now. 10

Q. Well, you thought it of such importance to tell him? A. Well, I don't know, it was the first time I ever had a rupture so I don't know the symptoms.

Q. I understand that. In any event you did tell him you had a pain? A. I told him I had a slight pain and he asked me if I noticed any lump protruding previous to April 22 and I told him I did not. 20

Q. Are you acquainted with Mr. Pickleseimer here, the investigator for the insurance company? A. That's right.

Q. And don't you recall that he came to see you on the 23d before you were operated on? A. That's right.

Q. In the hospital? A. Yes. 30

Q. And he went over the whole incident with you? A. Well, we went over it as close as we could.

Q. And, as a matter of fact, he wrote down a statement and you read it over and signed it, did you not? A. That's right.

Q. And what he was interested in and what you told him about was what had happened to you and what was wrong with you, isn't that so? A. Yes. 40

*F. Di Mieri, for Petitioner, Cross.*

Q. And this was just the morning of April 23d, was it not? A. That's right.

Q. And that was a Tuesday morning? A. That's right.

10 Q. Now, I show you what purports to be a statement from you, sir, a statement signed on that occasion, Mr. Di Mieri, and I ask you if you recognize your signature on each of the four pages of the statement (hands to witness). A. I do.

Q. And this, do you recognize this as being the statement that he took on April 22 or 23 in the hospital? A. I do.

The Court: What date was that, Mr. Rhinehart?

20 Mr. Rhinehart: April 23d.

By Mr. Rhinehart:

Q. And it says here, Mr. Di Mieri, that, after introductory remarks, it says that, "On Monday, April 8th, about two p. m. I was about my regular work as a polisher. I had to go over to the cage to get a box of work filled with brass metal." That is true, of course? A. That's right.

30 Q. It is already what you testified to? A. Yes.

Q. "The box of metal weighed about 60 to 100 pounds and was an unusually large box" A. That's right.

Q. Is that so? A. Yes.

40 Q. "It was setting flat on the floor and I bent or stopped down to pick it up without bending my knees and, of course, it was a tight squeeze in the cage and I didn't have room to move about much." A. That's right.

*F. Di Mieri, for Petitioner, Cross.*

Q. Is that so? A. Yes.

Q. I am just reading from the statement. "Just as I lifted the box about a foot up I felt a sudden sharp pain in my right groin and I dropped the box back on the floor for a second to get my breath and I caught my right groin with my hands," is that so? A. That's right. 10

Q. "In a second or so I took the box up and took it fifty feet to my place of work." A. That's right.

Q. "I had to lift the box along in an oblong fashion as I had been sitting in tight quarters," is that so? A. That's right.

Q. And when you say, "That's right" you mean that is the truth? A. Well, that is what I testified to. 20

Q. Yes. "I went on"—oh, the statement continues to say on page two, "I didn't hit or strike my side in any way with the box. It was just a severe lift causing me a strain." Is that so? A. Well, that is what I thought at the time.

Q. That is what you thought and that is what you told Mr. Pickleseimer? A. That's right. 30

Q. "I went on with my regular polishing work that afternoon." That is what you have already testified to? A. That's right.

Q. "The pain kept on increasing and I was working at my polishing wheel," is that so? A. That is so.

Q. "My work is of a heavy nature at the wheel." I gather that you have to press the metal objects against the wheel to polish them? A. That's right. 40

*F. Di Mieri, for Petitioner, Cross.*

Q. "The foreman wasn't about that day so I told the assistant foreman, Sam Rabinowitz, the same day. The same day I told Mr. Gorsline, the employment manager, about an hour after I hurt myself." Is that so? A. Well, I believe I told  
 10 him. I told him around four o'clock, between four and four-thirty.

Q. In other words, he wasn't there right at the minute? A. No, no, he is not around.

Q. When you did see him during the course of the afternoon— A. (Interrupting) I just mentioned the fact to him that I had that pain.

Q. The statement continues to say, "I heard"—no, "I did my regular work up until yesterday,  
 20 April 22nd—" A. That's right.

Q. (Continuing)—"until about 2:00 p. m. but I had increasing pain each day." Is that so? A. That's right.

Q. When you say, "That's right" you mean what I am reading from this statement is what you told Mr. Pickleseimer is the truth? A. That is what I told him, what you have there.

Q. I mean, it is the truth? A. It is the truth  
 30 up to a certain extent.

Q. I continue to read from the statement: "On the morning of April 22nd"—that is the day before this statement was taken—"the pain was very severe so I went to the men's room and looked at my side and found a lump about the shape of an egg." A. That was after the accident.

Q. You say that is not so? A. That is not so.

40 Q. But except for the one statement that you

*F. Di Mieri, for Petitioner, Cross.*

saw the lump in the morning— A. I did not see the lump in the morning at all.

Q. (Continuing)—the statement so far is entirely correct, isn't it? A. Not that part isn't.

Q. Well, I mean with that exception. The rest of it you have already testified is the truth, isn't that so? A. Yes. 10

Q. I continue to read from the statement. "On April 22, 1940, was the first time I noticed a lump. I think it had been tearing down since April 8th." A. No.

Q. Isn't that what you told him at the time? A. No, that isn't what I said and that isn't what I told him to say. I had told him that after I had hurt myself I went to the men's room and examined myself—if you read it you will see it is down there—I examined myself and found on examination I noticed this lump hanging there. 20

Q. You read this statement, didn't you, Mr. Di Mieri? A. Well, I may have read it but I may have didn't think it was of any importance at the time and I found, I see it is.

Q. Yes, I understand that. You mean, at the time you signed this statement— A. (Interrupting) I was in a state where I was going to undergo an operation and it was at such a time where a thing like that put before a man, a man could say sign anything and I would sign it. It was because probably I didn't understand and I didn't read it close enough, but that is a mistake there. If he says I had told him that I had the lump before in the morning it is a falsehood because I didn't notice any lump until after I had dropped this box when I went to the men's room. 30 40

*F. Di Mieri, for Petitioner, Cross.*

Q. Well, what you mean is, Mr. Di Mieri, is that at the time you gave this statement you did not know what was necessary to have a compensable hernia, that is what you mean, isn't it? A. I don't mean that. I do not mean that at all.

10

Q. Well, regardless of the circumstances under which this statement was taken we are already agreed that up to this point it is all the truth; I mean up to the point where it says that you saw the lump in the morning, you disagree with that, but the rest of it is all the truth, that is so, isn't it? A. It is.

Q. When you went to Mr. Gorsline on the afternoon of April 22nd, what did you say to him?

20

A. Well, I just told what had happened.

Q. Well, now, what did you say to him? Did you say to him—you tell me in your own words what you said to him. A. Well, I told him just exactly what I told you, which is what has happened.

The Court: Well, tell us.

The Witness: I told him I lifted a box of work and carried it over to the machine and in doing so, in lifting it off, my foot slipped and I grabbed my side and I went and examined myself and found a ball hanging there and naturally I didn't know what it was.

30

By Mr. Rhinehart:

Q. It wasn't true you just told Mr. Gorsline you felt so sick you couldn't continue at work and felt as though something had given way? A. That was on the 22nd?

40

*F. Di Mieri, for Petitioner, Cross.*

Q. On the 22nd. A. Yes, sir.

Q. Isn't that all that you told him on the 22nd? A. I told him that I had a ball there hanging there and he said, "Go over there and see Doctor Forney."

Q. You showed him the lump you had? A. I didn't show him the lump. I told him what I had seen. 10

Q. Well, you told him you had a lump in your groin? A. Yes.

Q. But you did not at that time, Mr. Di Mieri, say anything to Mr. Gorsline about having lifted a box, did you? A. I certainly did.

Q. You told him about lifting a box on April 8th, did you not? A. That's right. 20

Q. But isn't it true that you just went to him on the 22nd in the afternoon and said that you were feeling so badly that you couldn't continue at work, that you had a lump in your side and it felt as though something had given way? A. That was after the accident.

Q. After the accident? A. That's right.

Q. Now, did you tell him anything else at that time? A. No, I don't believe I did. 30

Q. Well, that is what I wanted to know. You didn't tell him anything about lifting any new box or having had any new condition? A. It was in the course of our work and I told him that I had received this lump after I had lifted this box and I couldn't continue working.

Q. Are you sure you said something about lifting a box or did you just say you felt so bad and you had a lump and it felt as though some- 40

*F. Di Mieri, for Petitioner, Cross.*

thing had given way and you couldn't just work anymore and following which he sent you to the doctor; isn't that just about what happened, Mr. Di Mieri? A. No, sir. I told him I had lifted a box and I told him what happened after I lifted the box and how I had noticed a lump and I told him that I went back and told Mr. Rabinowitz and he advised me to see Mr. Gorsline, which I did, and he referred me to the doctor.

10 Q. By the way, if this pain that you suffered on April 8th came on while you were lifting a box as is described in this statement and in your testimony, why do you now talk about pickles and milk if it happened to you while you were lifting a box? A. Well, I still suffer those pains even today because I drink a lot of soda water and I find that when I stop drinking the soda water I do not experience any gas pains. Now, I attributed that gas pain, that pain I had on April 8th and thereafter, to this soda water.

20 Q. In spite of the fact that it came upon you while you were lifting this box and you felt you had to drop the box? A. It happens even while I work, sometimes I get a gas pain.

30 Q. Well, at that time, at the time this statement was taken, you associated all these conditions together rather than to soda water and pickles and milk? A. No, because I didn't think it had any bearing on the case.

40 Q. What I mean is, you felt it came from lifting rather than that? A. Well, following an examination by the doctor he claims I had a fresh rupture.

*F. Di Mieri, for Petitioner, Cross.*

Q. In other words, you are taking as the basis for what you think about the case from what some doctors told you? A. Well, I take his testimony to be true.

Q. Well, all right. A. I have lifted any number of boxes from April 8th to April 22 and never experienced any very severe pains. 10

Q. But you did have pain— A. I have had an occasional pain.

Q. (Continuing)—all during that time? A. But I attributed it to the cause that it was a gas pain.

Q. And it got worse, as a matter of fact? A. I was able to continue on working doing my regular routine but I just mentioned the fact to Mr. Gorsline so as to cover everything. See, we have to mention every little thing that happens in the plant, whether it is a cut or a pain or anything. 20

Q. By the way, I call your attention to the last page of this statement that says right above your signature, "I read the four pages and they are correct. Frank Di Mieri." Is that in your handwriting? A. It is.

Q. And that is the truth, isn't it; I mean as you conceived it at the time? A. Well, at the time I thought it was as close to the truth as possible. 30

Q. And on page three it continues, where I left off before, "I am positive that the lifting act on April 8th caused my trouble," and you were positive at that time? A. That was only my opinion.

Q. I mean, that is what you thought at the time or you wouldn't have said it, isn't that so? 40  
A. That is what I thought.

*F. Di Mieri, for Petitioner, Cross.*

Q. "I never had any hernia or such trouble before," that is correct? A. That's right.

10 Q. "On April 22, 1940"—I continue to read from the statement—"about 2:00 p. m. I told Mr. Gorsline I couldn't work any longer and he sent me to Doctor Forney, Senior—" A. Yes.

Q. (Continuing)—"who told me I had a hernia on the right side," is that correct? A. Well, I may have left out the part where I was lifting this box. Of course, I was in such a way that I didn't bother to mention that. Of course, I had all to do to drag myself up to the office. I was near prostrate. I could barely walk and when I went up to Mr. Gorsline he seen my condition and advised me to go over to Doctor Forney immediately, which I did, but I attributed the cause of that there ball, which I never seen before, to the cause of lifting that box on April 22nd.

Mr. Rhinehart: May I have this statement marked for identification, four pages?

(The statement comprising four pages was received and marked "R-1-A, B. C. and D for identification".)

30 By Mr. Rhinehart:

Q. Now, Mr. Di Mieri, isn't the story that is told in this statement, or so much of it as you admit is true—

Mr. Fleming: Your Honor, I think that question has been answered a good many times.

The Court: Read the question.

40 (The Court Reporter read the question as follows: "Q. Now, Mr. Di Mieri, isn't

*F. Di Mieri, for Petitioner, Cross.*

the story that is told in this statement, or so much of it as you admit is true—”)

Mr. Rhinehart: I will finish that.

By Mr. Rhinehart:

Q. Isn't so much of this statement that you admit is the truth, isn't that exactly the same story that you told on the occasion of an informal hearing held in New Brunswick on May 21; I mean, isn't that the same story that you told at the informal hearing, that you had had this pain in your side while lifting a box of metal on April 8th and had to drop the box, and so forth? A. Well, I told you I emphasized April 8th because I attributed the cause from that date, but upon not noticing any lump previous to April 22, but upon examination of April 2nd—

The Court: April 2nd or 22nd?

The Witness: April 22nd—upon examination, I attributed the cause, because it was after I noticed that the lump was there, and I attributed the cause of the rupture to that day because it was never there before.

By Mr. Rhinehart:

Q. Well, at the time of the informal hearing you attributed it back to the 8th, didn't you? A. Well, at the time of the informal hearing I didn't have much to say. All the Referee had told me, or the Judge had told me, that April 8th that I had reported to the doctor too late and you had emphasized the fact that I was ruptured on April 8th which I wasn't, I was ruptured on April 22nd.

Q. Now, “His Honor told me that I reported

*F. Di Mieri, for Petitioner, Cross.*

to the doctor two weeks too late but on April 8th I was not ruptured." Well, all I am asking you, Mr. Di Mieri, is that at that time— A. At that time, yes.

10 Q. (Continuing)—the testimony that you gave was that you had been caused, you felt this pain on the 8th and that is when you felt it had been caused? A. Well, I thought it had been.

Q. Well, I mean that is what you felt at that time? A. It is what I felt at that time; yes, sir.

Q. And then after perhaps as a result of the outcome of the informal hearing you then decided that this incident of April 8th had nothing to do with it, isn't that so?

20 Mr. Fleming: Oh, I object, your Honor. I think that is a conclusion of law and fact. It is immaterial as to what the witness thought. I think the question is before the Court what the fact is, not what he thought later on, and I object to it on that ground.

The Court: I will sustain the objection. I think the question is rather misleading. If you want to ask him if he changed to any different viewpoint later on, all right.

30

By Mr. Rhinehart:

Q. Well, wasn't it as a result of the informal hearing that you changed your mind about the connection of the incident of April 8th with your subsequent hernia? A. No, sir.

Q. Well, at that time you did feel it was connected and you so testified, we are agreed upon that, are we not? A. Well, I thought it did at that time.

40

*F. Di Mieri, for Petitioner, Cross.*

Q. And that sometime subsequently you changed your opinion? A. Well, I come down to the conclusion, upon reviewing the case, that it was not on April 8th, it was April 22nd.

Q. Now, wasn't that change of your opinion the result of the outcome of the informal hearing where your case was disallowed; isn't that why you changed your mind? A. I didn't change my mind on the outcome of the hearing. I only just brought out some facts that I had left out previously which I know has a good bearing on the case. 10

Q. And what facts are you referring to now? A. Well, the facts that I—

Q. (Interrupting) The pickles and the milk? A. What? 20

Q. I say the pickles and the milk? A. Yes. That is an important factor in the case. I do occasionally drink milk and pickles and I do have to suffer for it afterwards.

Q. Now, when was it after the informal hearing on May 22 that you recall that it had been, your difficulty on the 8th, had been from pickles and milk? A. Well, I had that in mind right along. 30

Q. Now, in April, did you examine your groin, did you look at yourself or feel yourself? A. Well, we usually take showers pretty near every day or every second day and I am in a position to notice my body and at no time did I notice any lump previous to April 22nd.

Q. Well, what I want to know is, did you look particularly in your groin to see if there was 40

*F. Di Mieri, for Petitioner, Cross.*

anything there that you can see? A. Well, I usually rub myself down with alcohol and if there was anything there I could have felt it.

10 Q. Well, did you particularly feel to see if there was any lump on the 8th? A. There was no cause to look for any lump at that time.

Q. The statement says—I don't recall whether I read this to you before—the statement says on page three, "On the morning of April 22nd the pain was very severe." Is that so? A. That's right.

Q. On the morning of April 22nd? A. That's right; but there was no lump protruding.

20 Q. Now, did you go into the men's room? A. I certainly did.

Q. On the morning of April 22nd? A. That's right.

Q. And did you look at your groin? A. I certainly did.

Q. I mean, that is why you went into the men's room. A. No, sir.

30 Q. Well, all right, it wasn't. Anyhow, you did go into the men's room and you did look at your groin? A. I didn't have cause to examine myself that morning but I did go into the men's room in the course of nature and upon dressing myself I noticed—I didn't notice anything peculiar—but after the accident, after I did examine myself after this accident, I noticed a lump there.

40 Q. Did you go into the men's room on the morning of April 22nd because the pain, as you say, was severe that morning? A. Well, I did in a way to see if there was anything wrong, if that there pain was caused by a rupture, and upon examination I didn't see anything there.

*F. Di Mieri, for Petitioner, Cross.*

Q. You mean, you were thinking of the possibility of rupture at the time? A. After all, when a man gets pain like that he can be thinking of a lot of things.

Q. You mean to indicate the pain was quite severe? A. Well, I thought the pain could cause a rupture at the time but upon examination I noticed no lump. 10

Q. And you mean, as I understand it, that you did particularly examine yourself? A. I wouldn't say particularly but innocently I went to see if there was a lump there.

Q. Well, innocently or otherwise or particularly or not, in any event you did go into the men's room and for whatever reason or whatever motives you might have had, the fact is you did look to see if you had any rupture in your right groin where you were having this severe pain? A. Well, I never had a rupture before so I don't really know the symptoms, but I did look for something that I thought that shouldn't be there from my standpoint and I didn't see anything at all. 20

Q. You didn't see anything at all? A. No, 30  
sir.

Q. So that at least if the statement is incorrect in so far as it says that you found a lump that morning, it is incorrect in that regard, at least it is correct in saying you had a severe pain that morning and you did go into the men's room and examine yourself, the statement is true that far? A. That was after the accident.

Q. What? A. That was after the accident. 40

Q. We have been all along here about the

*F. Di Mieri, for Petitioner, Re-direct.*

morning of April 22nd. In the morning I say we have been talking about, there is no misunderstanding about that? A. There is quite a misunderstanding. The misunderstanding is you claim I noticed a lump in the morning, which I didn't.

10 Q. No, I mean as far as going into the men's room and examining yourself; that happened in the morning? A. Yes, that happened in the morning both in the morning and in the afternoon.

Mr. Rhinehart: I think that is all.

RE-DIRECT EXAMINATION by Mr. Fleming:

20 Q. Mr. Di Mieri, will you compare the severity of the pains that you had between April 8th and April 22nd with the pain that you had after the second accident which you have just advised us occurred on the afternoon of April 22nd? A. I wouldn't say the pains are the same. The first pain I had was more of a cramp, it was a sharp pain but it disappeared as fast as it came, but on the 22nd I experienced a tearing of the tissues, something tearing, and in doing so I had to grab my side and I had to hold myself for about a minute and a half.

30 Q. And how was the pain after that as compared with before? A. Well, it was very severe. I was very prostrated. I couldn't continue working at all and I had to go to the doctor right away.

40 Q. And this statement that has been shown in evidence was taken while you were in the hospital? A. That's right; while I was in this condition.

*F. Di Mieri, for Petitioner, Re-cross.*

Q. And before the operation? A. Just about, I would say about an hour before the operation.

Q. And were you in bed in the hospital? A. I beg your pardon?

Q. Where were you when it was taken; were you in bed? A. I was in bed. I was all ready to go up to the operating room and I was all prepared, all set to go up, when he come in and took my statement. 10

Q. But you were lying down? A. I was lying down thinking about the coming operation and I may have said something that I shouldn't have said; probably I didn't explain it in the right way.

Q. Did you have the last rites of Church administered? A. I had the last rites of Church administered and I had my Communion before I went to the operation. 20

Q. Before you went up? A. Before I went up, and upon having that I was kind of nervous in a way because after all it is a thing that it depends on your life and I must admit I was kind of nervous and he came right after all of this had happened and I probably wasn't myself at the time. 30

Q. Did you tell Mr. Gorsline or did you not when you reported the accident on April 22nd of the exact accident? A. That's right.

Mr. Fleming: That is all.

RE-CROSS EXAMINATION by Mr. Rhinehart:

Q. Well, Mr. Di Mieri, regardless of how nervous you were, the fact is that there is only one 40

*F. Di Mieri, for Petitioner, Re-direct, Re-cross.*

10 thing in this statement that you say is incorrect and that is the part about your seeing the lump in the morning, all the rest of it or at least all that I have read to you has been correct, hasn't it? A. Well, from what I know of the statement.

Q. Well, you saw, I have read it over to you sentence by sentence and you said it was so? A. I believe there are one or two statements there that is not correct; one statement about finding of the lump, that wasn't found in the morning, that was found after the accident, and I did go to examine myself in the morning because I had a slight pain and from what I have heard around  
20 I probably knew what to expect but upon looking for that certain thing, I didn't notice anything.

Mr. Rhinehart: That is all.

By Mr. Fleming:

Q. Do you mean to say that you made the examination of that and you would have seen it if it were there? A. That's right.

Mr. Fleming: Petitioner rests.

The Court: That is all?

30 Mr. Rhinehart: Oh, just one further question.

By Mr. Rhinehart:

Q. Mr. Di Mieri, I am sorry to make this take so long but while I haven't read all of this statement I have read most of it except for some incidental parts— A. Yes.

40 Q. (Continuing)—and take my word for it there is nothing in there about your lifting any box on April 22nd. You didn't tell Mr. Pickle-

*F. Di Mieri, for Petitioner, Re-cross.*

seimer about that, did you? A. Well, I may not have told him about it because I may not have thought about it at that particular time, and probably if I thought for a minute that a thing like that would be so important I would have mentioned it, but I gave it no importance at the time, but now I see it is of great importance that I should have mentioned that fact, but I mention it now. 10

Q. You didn't say anything to him about it at that time? A. Well, he was only asking me the questions.

Q. He was asking you what had happened. A. He asked me what had happened. He was asking me questions from time to time and I answered it as close as I could do it. I may have left out very important facts what I should have put in but only because he may not have asked me that question whether I was lifting a box. Had he asked me whether I was lifting a box on the 22nd I probably would have told him that. 20

Q. Well, you lifted boxes every day? A. I lifted boxes every day, that's why I didn't put much importance in it, but I experienced the tearing of the tissues when I lifted this box and my foot slipped out. I never experienced that before. Now, I am not so dumb as to know when I experience a thing like that. I know right away what happened. If it probably happened to you, you would know what happened although you never had no rupture before in your life. 30

Q. You knew right away you had a rupture for you had been expecting it two weeks? A. I experienced that tearing of the tissues. Natural- 40

*R. B. M. Gorsline, for Respondent, Direct.*

ly I am not a medical man. Perhaps I did think right there and then that I had a rupture and I went examined myself and I seen the ball hanging there which was never hanging there before.

10 Mr. Rhinehart: That is all.

Mr. Fleming: That is all.

(Witness was excused.)

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RALPH B. M. GORSLINE, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct Examination by Mr. Rhinehart:

20 Q. What is your position with Metafield, Incorporated, Mr. Gorsline? A. Personnel manager.

Q. And you were so connected in April of 1940? A. That's right.

Q. You know Mr. Di Mieri, the gentleman just on the witness stand? A. I do.

30 Q. Will you tell us whether he came to you and what he said to you on April 8th, or approximately April 8th, about two weeks before he eventually stopped work, or stopped work and went to the hospital? A. As I recall it, I was passing through the polishing room and Frank beckoned me to come over and I said, "What can I do for you," or words to that effect, and he said, "I don't feel so hot." He says, "You know, I don't feel so good," and he put his hand down here (indicating).

40 Q. Indicating the— A. In his stomach. And I says, "Well, Frank, if you hurt yourself in

*R. B. M. Gorsline, for Respondent, Direct.*

any way, don't forget there is the sign, make a report of it, go and see the nurse." He said, "Well, if it gets any worse, I will."

Q. Did he tell you how he had got this pain?

A. At that time, no. I don't recall that except that he had distress and I said to him, "If there is anything, any injury, there is the sign and you let me know right away because that is what we have a registered nurse for." 10

Q. And what did he do after that? A. Well, I didn't hear anything further from Frank. I asked him how he was the next day. I think I said, "Well, Frank, how about it? Did you make a report about it?" He said, "No, it isn't necessary. I feel all right this morning." So I didn't bother. I had other things to do and I passed right on. 20

Q. And subsequently, on April 22, the last day he worked, that is, prior to his operation, what happened that you know of or what did you learn of and how did you find out about it? A. What I have learned was principally from Frank. I was busy up in the office and I should judge shortly after one o'clock he came up looking as white as a sheet and he said,— 30

The Court: What day is this, the 22nd?

The Witness: The 22nd, yes, the 22nd. He said, "I certainly hurt myself. Oh," he says, "I can't go on, I can't work anymore." I said, "What did you do?" He says, "Well, I got a lump here about the size of an egg." I said, "Well, man, you got to go right up to the doctor's. I will 40

*R. B. M. Gorsline, for Respondent, Direct.*

10 give you a slip. Go right on over to Doctor Forney." I said, "You beat it right over there now and if necessary I will get somebody to take you over." He said, "No, I can get over all right." So I gave him a slip and he went over to Doctor Forney.

By Mr. Rhinehart:

Q. Is that the extent of his conversation with you at the time, that he had a lump in his side?

A. Yes. I don't recall at the moment that he said anything further than that at that particular time.

20 Q. In other words, you are sure, are you, that he didn't tell you that he had slipped while he was carrying this box? A. No. The only thing I remember that something gave loose here (indicating).

Q. Something gave loose? A. Yes.

30 Q. And at that time I suppose it was associated in your mind perhaps with the other condition, with the previous occurrence, is that so? A. Well, no, that isn't so. I did it because I forgot about the April 8th incident because I don't know whether he realized it, I didn't realize it myself, I didn't know what it was at the time and the most peculiar part I was bowling with him just several nights afterwards. I said to Frank, "How about that?" He didn't say anything. "Everything is all right, I can bowl." So I didn't give any more attention to that April 8th at that time.

40 Q. While we don't seem to have the exact records available, would your best information and

*R. B. M. Gorsline, for Respondent, Cross.*

recollection indicate that the piece workers would average about seventy cents an hour? A. Yes. Frank was a very good worker and there were about, we have about three or four that average seventy or seventy-five cents an hour. I would say seventy cents is a fair in and out regular wage. 10

Q. You would say about seventy-five would be the maximum average? A. Yes.

Q. And since Frank you say is good, he probably being a fast worker— A. He is a fast worker, yes.

Q. (Continuing)—he probably averages at least seventy cents? A. Oh, I have known him to get as high as \$40 a week. 20

Q. As I understand, the working week is eight and a half hours for four days and eight hours on the fifth day? A. That's right.

Mr. Rhinehart: That is all.

CROSS EXAMINATION by Mr. Fleming:

Q. Mr. Gorsline, you say when Mr. Di Mieri came up to you that he looked as white as a sheet? A. He certainly did. He was all in. 30

Q. And he mentioned an accident, isn't that what you said? A. Yes, He said; "I was just"—well, he says, "I just felt something give away and I can't go on." I says, "I will say you can't. Go on over and see the doctor."

Mr. Fleming: That is all.

Mr. Rhinehart: That is all.

(Witness was excused.)

*A. A. Pickleseimer, for Respondent, Direct.*

ADDISON A. PICKLESEIMER, called as a witness on behalf of the respondent, was sworn and testified as follows:

Direct Examination by Mr. Rhinehart:

10 Q. By whom are you employed? A. The Liberty Mutual Insurance Company.

Q. And you have been so employed for how long? A. For about three years.

Q. And in the course of your duties were you assigned to investigate the claim of Frank Di Mieri arising or that is involved in this case? A. I was.

20 Q. And do you recall interviewing Mr. Di Mieri in the hospital? A. I do.

Q. And what was his condition at the time? A. Well, he seemed to be resting comfortably at the time.

Q. Was he rational and intelligent? A. I would say he was, yes.

30 Q. I show you a paper with writing thereon for identification, R-1, A, B, C and D for identification. Do you recognize that? A. I do; yes, sir.

Q. What is it? A. It is the statement that I took from him on April 23d.

Q. How did you take this statement? A. I took the statement by asking him questions and discussing the occurrence of the case with him.

Q. And what did you do after you got the answers to your questions? A. Well, I asked him to read it over.

40 Q. Well, you haven't written it down yet.

*A. A. Pickleseimer, for Respondent, Direct.*

What did you do after you got the information from him? A. I wrote it down as he discussed the case with me.

Q. In narrative form? A. That's right.

Q. And whose language did you use? Was it your own language or where did the language come from? A. Well, part of my own, I guess, and part of his language. 10

Q. And after you had written it down, what did you do? A. I asked him to read it over and he read it over and said it was correct and I asked him to sign it.

Q. And did he sign it? A. He did.

Q. On each of the four pages? A. Yes.

Q. And who wrote on that last page, "I have read it and it is true?" Who wrote that down? A. Mr. Di Mieri did. 20

Q. He wrote that at your request, I presume? A. Yes.

Q. And did you see him read the statement? A. I did.

Q. Now, you have referred to the statement yourself while you have taken the stand today, to refresh your recollection? A. Yes. 30

Q. Do you have a recollection of the taking of that statement? A. I certainly do.

Q. And are the things that are in that statement that I have read to Mr. Di Mieri the information that you secured from Mr. Di Mieri at that time? A. That is what he told me at the time.

Q. And is anything that he told you omitted from the statement? A. Not a thing in the world that I remember. 40

*A. A. Pickleseimer, for Respondent, Direct.*

10 Q. Can you tell us whether anything was said to you at the time about a slip or strain while lifting a box at work on April 22nd? A. Well, I asked him at that time whether there was anything else that could have caused this trouble other than this incident on April 8th and he told me there wasn't. He was satisfied that that had caused it and it had been coming down all the time or had been tearing down. I believe that is the language he used.

20 Q. What did he tell you about how the pain had come on at first and what about its severity, if any? A. He told me he went into a cage where the work was kept to get a box of work and he picked—

Q. What date are you talking of now? A. On the date of April 8th.

30 Q. Yes. A. And he got this rather large box that was larger than usual, weighing about 60 or 100 pounds and the case was small and he had to pick it up in an oblong fashion and he couldn't bend his knees to pick it up. When he raised it a few inches off the floor he felt this sudden sharp pain in his groin and he dropped the box and caught his side and after hesitating for a few seconds he picked the box up and carried it to his work bench about fifty feet away.

40 Q. And what, if anything, did he tell you regarding the course of his condition and his pain following that time? A. Well, he told me he continued with his work but he had increasing pain all the time until the morning of April 22nd the pain seemed to be much worse.

*A. A. Pickleseimer, for Respondent, Direct.*

Q. Do you have a recollection of exactly what he told you? A. About the morning of April—

Q. (Interrupting) 22nd? A. Well, he told me on April 22nd the pain was much worse and apparently during the day it was increasingly worse and during the morning he went to the toilet and noticed a lump on his groin and it continued worse in the afternoon. He was unable to work any-  
more and he went and told Mr. Gorsline that he was unable to work and Mr. Gorsline sent him to the doctor.

10

Q. Now, are you sure that he told you that he had observed a lump on the morning of April 22nd? A. Well, I certainly wouldn't have written it down in the statement if he hadn't.

20

Q. Well, as I say, you have a definite recollection of that as a fact that he told you that at the time? A. Yes, sir.

Q. Was anything said or suggested during your interview about a strain of lifting on April 22nd? A. There was no mention whatsoever made about it. In fact, I asked him if anything else could have caused the trouble other than this lift on the date of April 8th and he told me no.

30

Q. Was there anything said about him having had pickles and milk for lunch on April 8th? A. There was no mention of such.

Mr. Rhinehart: Cross examine.

Mr. Fleming: Do you offer the statement in evidence?

Mr. Rhinehart: Yes, excuse me, I would like to offer the statement in evidence, if the Court please.

40

*A. A. Pickleseimer, for Respondent, Cross.*

Mr. Fleming: All right, no objection.

Mr. Rhinehart: Thank you for calling it to my attention.

10 (The statement previously marked "R-1-A, B, C, and D for identification" was received and marked in evidence.)

Mr. Fleming: Now, pardon me, this is the first time I saw this (referring to and reading the statement.)

(There was a brief recess.)

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CROSS EXAMINATION by Mr. Fleming:

20 Q. Now, Mr. Pickleseimer, you didn't ask him whether anything unusual had occurred on April 22nd, did you? A. I asked him if any other—he had any other lift or trouble that could have caused this trouble.

Q. And what did he say? A. He said no. He said he hadn't any. He was satisfied that the one on the 8th had been the cause of it. He said the pain had been increasingly severe and he was satisfied that his groin had been tearing down ever  
30 since.

Q. Why was it, if he told you that, that you didn't put down a few words that nothing unusual happened on April 22nd? A. I believe you will find in this statement there a sentence that I am satisfied that the incident on April 8th was the only thing that caused it.

Mr. Rhinehart: The statement says, "positively."

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*A. A. Pickleseimer, for Respondent, Cross.*

By Mr. Fleming:

Q. You asked him whether he thought that the strain of April 8th caused his condition, is that what you asked him? A. No. I asked him if there had been anything else that could have caused it. 10

Q. And why didn't you put that down in so many words if he told you that? A. I believe you will find a sentence in there to that effect.

Q. Where do you find that, that nothing else occurred on April 22nd, those words? A. You won't find those words.

Q. No, you won't find it. Go ahead. A. He said on April 22, 1940, was the first time that he noticed the lump. "I think it had been tearing down since April 8th, 1940, so the lump came on April 22. I am positive that the lift back on April 8th, 1940 caused my trouble." 20

Q. But he doesn't say there that he received another accident on April 22nd, nor did you ask him, did you, specifically? A. Well, I specifically asked him if anything, if there was anything else that could have caused his trouble before or after.

Q. But you didn't put that down in the statement? A. No. That, I thought, was near enough. 30

Q. And, of course, it is a fact that you found from your investigation that he did have another accident on April 22nd, isn't that so? A. I never did. I never heard any claim of it until the petition was filed.

Q. And did you ever talk with the two witnesses who worked alongside of him, Mr. Brousseau (spelling), and Mr. Calluri? A. No, for he 40

*Statement by Mr. Rhinehart.*

told me at the time there were no witnesses to this incident on April 8th, 1940.

10 Q. Well, that is true. I mean, you didn't find any witnesses, did you? A. No witnesses to that. He told me there were none.

Q. And you spoke to Mr. Gorsline about this case, didn't you? A. Yes.

Q. And Mr. Gorsline told you that he looked as white as a sheet on the afternoon of April 22nd? A. I think that is correct; yes, sir.

Q. And did you talk to him about how he felt on April 22nd in the hospital? A. What was that?

20 Q. I said, did he mention how he felt on April 22nd before he reported this accident to Mr. Rabinowitz and later to Mr. Gorsline? A. Yes, sir; he told me his pain became so severe he just couldn't work.

Q. And he told you he was very sick, did he? A. Well, I don't know the exact words. He said the pain had become so much he couldn't work and he told Mr. Gorsline and Mr. Gorsline sent him to the doctor.

30 Mr. Fleming: That is all.

Mr. Rhinehart: That is all Mr. Pickleseimer.

(Witness was excused.)

Mr. Rhinehart: I think that is the respondent's case.

40 Your Honor probably has decided many more hernia cases than I have had anything to do with and unfortunately the law is such as it is but it

*Statement by Mr. Rhinehart.*

seems to me that there are some things that cannot be controverted, that the theory and the provision of the law is that inguinal hernia is a disease which is either congenital or develops gradually and is not to be considered compensable unless conclusive proof is offered that the hernia was immediately caused by such sudden or severe strain that the descent of the hernia immediately followed the cause. The petitioner's physician, and the only medical testimony offered on behalf of the petitioner's case, proceeds on the theory that all inguinal hernias descend and immediately follow the cause because if they don't then there is no hernia. 10

Now, it is clearly beyond and outside the contemplation of the Act because if that theory is correct then every hernia, every inguinal hernia, that descends while at work is compensable in this state and I am sure that is not the law. In other words, the petitioner's physician says that well, there was no descent, therefore—there was no descent by April 22nd, therefore, there was no hernia or no hernia caused, and as I say, if the Court is going to adopt that theory every inguinal hernia that occurs while at work is compensable and I would say I am not sure that is so because the Act specifically says that it shall not be compensable unless the descent follows the cause within twenty-four hours. 20 30

Now, if it is a fact that the descent always followed the cause there is no sense or no object to such legislation as we have here. Now, I don't pretend that the hernia provision in our Act is 40

*Statement by Mr. Rhinehart.*

the most intelligent or the most sensible or perhaps the most understandable thing in the world, but I do think that that conclusion is very clear, that we can't say that if there is no descent then there is no hernia because if we do we are rendering the language of the legislature nugatory.

Now, there is no pretense, no evidence in the case, of an aggravation although there was some talk about it on the prior occasion of the trial, this case must rest alone on the evidence as a hernia which comes within the five points of the Act, and that it does not. First, there is competent and believable evidence in the cause that the petitioner had his descent prior to the alleged occurrence of the afternoon of April 22nd. There is evidence of Mr. Pickleseimer. There is evidence in the statement that he had the descent that morning and that is an admission which certainly is pertinent in so far as the matter of conclusive proof is concerned. Aside from that we have here, aside from that and independent of it we have here, a case that fits into the concept of a noncompensable hernia, that the hernia he has has been inartistically woven in the hernia provision of the Act. We have here a case of a hernia which has been partly due to a congenital weakness, and in any case one of gradual development, when that did not descend and was not caused and didn't develop and didn't prostrate the petitioner until more than two weeks after the onset of his symptoms and after the cause of the hernia. It is distressing to see anyone on the witness stand, the petitioner and his doctor, attempt-

*Statement by Mr. Fleming.*

ing to evade what I think are the undenied facts in the case in order to bring it compensable under the statute, I mean this talk of pickles and milk that he had on the eighth, and the statement of the doctor, "well, that must have been something else," and that situation is no doubt caused by the stringent and perhaps in some respects unfair provision of the Act, but the statute is the law and the case is clearly beyond it. 10

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Mr. Fleming: Your Honor, I think that this case illustrates just the opposite from what my good friend interprets as the meaning of the statute. The statute, as I contemplate it, and, of course, who am I to say it, but the statute seems to have been written for the purpose of making a hernia noncompensable where the rescent is gradual and if this man had received a strain as he undoubtedly did on April 8th in spite of the pickles and milk theory, I think the facts are, as your Honor will determine, that on April 8th this man received some sort of a strain, but the undenied and the undisputed fact remains that that strain was not a hernia and, therefore, the descent of the hernia did not occur until April 22nd. 20 30

Now, I think that if this man had received a strain on April 8th and the hernia without any further strain suddenly descended or gradually descended on April 22nd, I wouldn't be here to argue that this was a compensable hernia, but I think that the legislature clearly had in mind irrespective of what the cause was because it seems to me that it must have been in the minds of the legislature because it says that generally or 40

*Statement by Mr. Fleming.*

gradually, or whatever the word is there, and it is a congenital condition, and there is no other trauma, is a disease "which ordinarily," "which ordinarily"—it doesn't say in all cases, it says, "which ordinarily develops gradually." All right.

Now, this man had received a strain say on April 22nd but we say that there is absolutely no evidence in this case to show that there was a hernia as contemplated within the Act until April 22nd at which time it was not a case of whether or not this hernia descended on that day, but with it the other elements of prostration and the other elements required by the statute. But here we have a condition where, for some reason or other, as the doctor says, the muscles were probably weakened on April 8th which might come from 101 things that don't concern us.

Now, the fact remains that on April 22nd this man received a severe strain of such severity that he had to cease work immediately. The fact is it was noticed by fellow employees, that it was communicated to the superior, that he was told to go to a doctor, and on this point the doctor was not his own doctor but Doctor Forney was the physician of the company to whom the man had been sent and his testimony while before this Court was that the man had truthfully stated that he had received some sort of a strain on April 8th, that there was no descent, and that on April 22 he received an independent strain, he had no other accident, which resulted in, I respectfully submit, a compensable hernia within the statute.

*Statement by Mr. Fleming.*

Now, this isn't the case where the hernia gradually came down. This man met with an independent accident on April 22nd and independent of anything else that occurred before that time. If that be so then I say he is entitled to an award. 10

Now, as to whether it happened or not we have these facts. We have the testimony of the petitioner himself as to how it happened and in addition to that we have what is most unusual, we have the testimony of two fellow workers that they saw the very accident occur, they saw the fellow slip, why, they saw the box drop out of his hands, they saw him put his hand to his groin, they saw him white as a sheet, pale, he was prostrated, he stopped work, then came over to him and said, "Here, you are sick, go to the boss," and he went to the boss and the boss sent him to the superior boss and they called a doctor. Now, I certainly say that anything else, apart from what the doctor said, apart from anything else, the testimony is undisputed that the man had been working before this, that on April 22nd in the afternoon he received the accident as described not only by himself but by the other two men, and they haven't disputed the accident at all, they haven't produced a worker that was beside him to say that it did not happen, the undisputed testimony is these two men saw him receive the accident as he did. They saw him slip putting the box over, they saw him put his hand to his side, they saw him pale, prostrate, and stop work immediately. Then we have the company's own doctor's testimony that when petitioner went there in his opinion, and perhaps I didn't bring 20  
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*Statement by Mr. Fleming.*

10 it out as clearly as I might, but he said over and over again that in his opinion this was a fresh hernia, that it was a hernia that was just loosed and it was incarcerated, it was an incarcerated hernia, and that he advised an immediate operation. He advised an immediate operation to save the man's life.

20 Now, certainly the weak testimony that the respondent gives that when this man, after receiving the last rites of the Church and about to go in on the operating table signed the statement in which he admits a whole lot of things that happened on April 8th, which we don't say is not so, we don't dispute those facts, and then they say, "You think it was the accident of April 8th that was the cause of it," and he said, "Yes, yes, yes, yes,"—he says that. They don't say in the statement anything at all that happened, they don't say, "I didn't receive any other accident on April 22nd." They have a pretty slick worded statement. It is to be expected in a matter of this kind. This man was in the hospital in New Brunswick, the insurance company adjuster goes  
30 down from Newark or wherever he lives and he doesn't go there to get a statement that is any too helpful to the petitioner. He goes there, why? Why does he go there? He goes there to get a statement that is as favorable as he can to the respondent's cause and that statement, I say, does not say, certainly it doesn't say that the man didn't receive an accident on April 22nd, which has been conclusively proved, and whether the  
40 man thought this accident occurred from the strain on April 8th or not, that is not the point.

*Findings of the Deputy Commissioner.*

The evidence, the fact is, that he did receive the accident on April 22nd, and the fact is it caused prostration, the descent which he saw at that time for the first time, and the medical testimony that this was a fresh hernia on that day, and I respectfully submit that this is a compensable case. 10

Mr. Rhinehart: There is one thought that came to me in reply and that is this, that Doctor Forney was examined on the history, on a history that it appears now does not conform to the true situation as pictured by the petitioner on the witness stand so that his testimony must be considered in that light. In other words, Doctor Forney testified on the theory that the petitioner came to him and said, "Well, I had a little pain on the 8th and I didn't have anything again to the 22nd." We see now that is not so and, of course, that must have a very great effect on the weight to be given to his testimony. 20

The Court: All right.

It seems to me that in this case the rather recurring anomalous situation arising during the trial of an issue is demonstrated quite clearly in this case and that is the difference between the testimony of the witness, or the petitioner in this particular instance, under oath and the variance of a written statement given prior to the trial. That happens very often and it becomes a question to determine which of the factual situations is the correct or true one. Certainly if we believe the petitioner's statement, or rather accept it for its full face value, that is, the statement he has given on the 23d of April to Mr. Pickleseimer, 40

*Findings of the Deputy Commissioner.*

the representative of the Liberty Mutual Insurance Company, there would be little left for me to determine in so far as the compensability of the case would be concerned because I think the statement would speak for itself and would show clearly the petitioner has failed to meet every one of the requirements that are incumbent upon him to establish, therefore, it becomes a choice of taking the petitioner's sworn testimony with witnesses corroborating it also by sworn testimony and then comparing it with a signed statement, not under oath, given at a time when he was under an impending operation according to the petitioner, as indicated here, even impending death, you might say. He even found it necessary to engage a clergyman to administer the last rites of the Church. Now, I say, in that state of mind, is it reasonable to suppose that his mind was clear and alert to give all these various details as to what occurred or was he just merely in a more or less of a receptive mind and giving answers to a questioner who was asking questions and saying, "What about this and what about that," and then that statement, not given in the question and answer form but then reduced into the form of a narration and then asked to be read over and signed. Now, there is a similar situation touching on a very similar case where the Court had that to determine and right now I am handicapped without my book of citations but the Court in that case decided that when a situation like that arises it is more reasonable to accept the sworn testimony particularly where it is corroborated

*Findings of the Deputy Commissioner.*

by other witnesses who are under oath than to take an isolated statement, particularly when the statement has been reduced to writing by one skilled in the niceties and technicalities of the law. Now, that is not casting any aspersions on Mr. Pickleseimer because I believe he was there to get a statement as he could elicit from the petitioner but he likewise knew what the law was and I assume was familiar with the requirements of this particular section of the hernia Act.

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Mr. Rhinehart: I shouldn't interrupt, Judge. Of course, it is my understanding, and I may be wrong if it is not so, but it is my understanding that the petitioner admitted the truth of the statement.

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The Court: I don't doubt that at all, I have no question of that, but the question or rather the phase of the case that can't be reconciled is the one with respect to what took place on the 22nd of April. According to this statement, and according to what the petitioner is alleged to have given there, is merely that a lump took place on that day but aside from that nothing else took place. Now, as against that statement we have the petitioner on the stand who testifies that on April 22nd he was lifting a box and carrying it from the material room where he had obtained it over to his bench, that his bench consisted of two benches not very deep but one in front of another and he was trying to lift that box over the second bench and place it on the first bench and in doing so he slipped or his foot slipped and in that fashion he lost his whole complete sense of balance.

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*Findings of the Deputy Commissioner.*

10 The box slipped away from him and he was seized with a pain in his groin, a similar pain that took place on the 8th, there is no question about that but on this particular occasion he was more or less in a state of physical collapse, if I might use that expression. He had to bend over and hold himself and then later on was able to sit down or rest on a bench and the fellow employees who came to his assistance or attempted to give him assistance noticed he was pale and in physical distress. There is no mention of that made in this statement whatsoever. Now, if that took place certainly it was a separate and distinct occurrence on that day, not merely on April 8th while lifting  
20 a box he sustained a pain in his groin, that the pain was continuous thereafter and on such and such a day without any intervening cause he noticed a lump. Now, that testimony according to the petitioner in my opinion bespeaks of a separate and distinct happening.

30 Furthermore, Mr. Gorsline adds some credence to the petitioner's testimony in that when he came on the 22nd he was pale, I think he described it as "pale as a sheet," that on that occasion the petitioner told Mr. Gorsline he had this lump about the size of an egg in his right groin and that he could no longer work and when this thing happened he just felt something give away. Well, that again, as I say, gives some credence to the fact that something took place on that morning, while working something gave way. Now, of course, the other two witnesses whose testimony  
40 is corroborative of the occurrence are the two fellow workers whose benches were near the peti-

*Findings of the Deputy Commissioner.*

tioner's work bench, that is, Calluri and Brouseau and their testimony is certainly corroborative in every detail of the petitioner's testimony; in fact, they saw him when he slipped. They also described the fact on this particular occasion that on this particular time of the week on the Monday, since they oil and lubricate the machines on Saturday, it is not uncommon for oil to be present on the floor and that lime or some other chemical substance is used in the process of polishing and when that gets on the floor that also adds to the slippery condition of the floor in general which shows that there is indication of a perfect set-up for him to slip, particularly one carrying a heavy object.

Now, it seems to me that if the petitioner, and there is no question about it, on April 8th, while lifting a box of material felt a pain in his groin that he had something which took place, I don't think there is any question about that, that some anatomical, physiological condition took place in his groin but there is certainly a world of difference between a full-fledged hernia and something short of a hernia such as a strain of a muscle down there or even the point of causing the wall to become weakened, and I think the particular section of the statute was inserted to sort of cover the situation. Now, certainly on April 8th had he stopped there and then and said to his employer, "Here, I think something is wrong with me and I am not working any longer, I am going to take this matter up, I want my rights determined," he wouldn't have gotten to first

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*Findings of the Deputy Commissioner.*

base. What do you find outside of pain? Outside of pain he had nothing. At best he had an inguinal strain or a relaxed ring, but certainly nothing short of hernia. If that took place, and I am willing to find as a fact that took place, does that mean the petitioner at some future time, in doing some physical overwork in a position that would cause the whole muscle to come out, does that mean in the future the man is stopped from collecting on a hernia because that took place a week or two before? That is the respondent's contention, anyway.

I think Doctor Forney's testimony is also very corroborative and gives considerable force to the petitioner's case and that is the history taken. If we are going to assume that this petitioner became compensation wise after the operation and he found out what he had to meet and they were going to give him a different story, how do you explain them when Doctor Forney took a history from him, even before your Mr. Pickleseimer—or, at least on the same day he told Doctor Forney, "Yes, on April 8th I was lifting something and I got a pain but that pain seemed to go away, it didn't seem to last for long, I looked at myself, I didn't have a lump and, as a matter of fact, I continued to work, I lifted, I did my regular work but on the 22nd I was injured and I was absolutely in a situation or in a physical status that I couldn't do anything."

Now, that seems to be the history he gave to Doctor Forney and if that was to be a concocted story of some direction, why then was he able to

*Findings of the Deputy Commissioner.*

give such a history even before he had any opportunity to determine or test the compensability of his case?

It seems to me that this is a case where the statement situation is in such a state that it can't be reconciled, that is, the petitioner's entire testimony and that of the respondent, and since the respondent's entire case is in the form of a written statement taken at a time when I am satisfied was one where the petitioner was not mentally alert such as you would find a person who is under circumstances where he can think and not be under that impending fear of an operation, then I don't feel that that statement, while, as I say, is absolutely irreconcilable with the facts in the case, I don't think it should be given credence over the sworn testimony of the petitioner and his several witnesses and I feel by disregarding it and accepting the petitioner's testimony as the more credible narration of the true facts, to take his version since I am satisfied from his testimony that he has made out and sustained the burden of proof in establishing a compensable case.

I feel that on the 22nd day of April, 1940, while he was predisposed, and I so find, that something on the 8th had caused a weakness either in the abdominal wall or the entire structure there, that upon that particular day on the 22nd of April, 1940, by an over physical act lifting this box and slipping at the same time he caused a descent of a hernia and by that I mean a coming down of part of the omentum and the cutting through an unnatural opening of the fascia that it descended into the scrotum the

*Findings of the Deputy Commissioner.*

10 size of an egg, and I feel that the petitioner's testimony must be taken conclusively on this particular point that prior to the 22nd there was no descent, and that the descent first manifested itself when he examined himself in the men's room shortly after the occurrence and just a few minutes before he spoke to Mr. Gorsline, the personnel manager.

I further find that the cause of that descent of this particular hernia was the lifting effort and or the slipping effort which was concomitant to it, in other words he slipped at the same time that the box was falling from his reach.

20 I further find he had immediate pain, severe pain, in the hernial region and I further find he stopped work within the meaning of the statute immediately and after resting for some time attempted just on one occasion to operate this machine but just the mere fact of pushing a piece of metal object against a polishing wheel he was unable to do it and quit. I feel, however, that is a stopping of work within the meaning of the statute.

30 I further find that he notified his employer within the twenty-four hour period first by speaking to his assistant foreman, Mr. Rabinowitz, and then later conveyed the same notice to Mr. Gorsline when he came up on the second floor and spoke to him.

40 I further am satisfied with the fifth requirement which is the one requiring medical attention within twenty-four hours when he was examined by Doctor Forney on the very day of the occurrence and at that time Doctor Forney, whose tes-

*Findings of the Deputy Commissioner.*

timony has been taken on that point, indicated that the petitioner was suffering from a hernia, that the hernia was, in all probability, a fresh one, and that the nature of the hernia required immediate operation which was performed on the following day.

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That in substance is my findings on the various requirements as the statute prescribes.

Now, I find as a fact that the petitioner entered the hospital on the 22nd, that is, went upon the 22nd and was operated on the 23d, and that he remained in the hospital, at St. Peter's Hospital in New Brunswick, until May 3d; that thereafter he was removed to his home and remained at home or convalescing until June 11 when he returned to work. I find as a fact that a period of disability, temporary disability, is equivalent to seven and 1/7 weeks.

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I find that his wages, while there has been some testimony which would indicate he was paid on a piece work basis, I am satisfied he was paid on an hourly basis and that his hourly base pay fluctuated, that is, fluctuated in this sense, that the flat pay was fifty-five cents, but men of equivalent skill were paid at a higher rate and that his average hourly rate was seventy cents an hour and that his week consisted of—his customary week consisted of—forty-two hours so that I find as a fact that his wages were equivalent to \$29.40 and that his compensation rate is \$19.80, a period of 7 and 1/7 weeks at that rate makes a total of \$140 temporary disability.

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I further find as a fact that the operation, the herniotomy, which was performed, cured and cor-

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*Findings of the Deputy Commissioner.*

10 rected the defect, that is, the hernia, and that there is no permanent disability. On the question of medical, hospital, and surgical services, the act prescribes a limit of \$150, that is \$150 including those three items, the hospital, the doctor and also medicines and drugs and so forth. In connection with the testimony adduced touching on the medical fees of the case it appears that the bill of St. Peter's Hospital is \$94 and—

Mr. Fleming: 63 cents.

The Court: Yes, and 63 cents, wasn't it?

Mr. Fleming: Yes, sir.

20 The Court: And that Doctor Forney's bill is \$110, so that the total of the two bills is approximately \$204. The limit, however, that the statute inflicts upon the respondent for the services is \$150 so that I have taken the respective bills of Doctor Forney and the St. Peter's Hospital and pro rated them on the \$150 maximum and find that they are entitled to the following amounts: Doctor Forney will be allowed \$81 which represents approximately 54 percent of the limit of \$150 and the St. Peter's Hospital will be allowed  
30 the sum of \$69, instead of the true amounts that they have testified to.

Doctor Forney, for his court appearance and giving expert medical testimony, will be allowed a fee of \$25, that I will assess against the respondent, and there will be a counsel fee of \$55 and that will be paid one-half by each of the parties; and the stenographic fees by the respondent.

*Certificates.**Exhibit (Signed Statement of Frank Di Mieri).*

## CERTIFICATES.

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. 10

JOHN J. STAHL,

*Deputy Compensation Commissioner.*

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. 20

HENRY J. SCHREIBER,

*Court Reporter.***Exhibit (Signed Statement of Frank DiMieri).**

New Brunswick, N. J.

April 23, 1940

8-7-40

R-1 (a) 30

I am Frank DiMieri, age 29, married, no children, but have a niece, age 9 years that lives with me at 24 Exton Street, South River, New Jersey. My wife and child are my only dependents. I have been employed by Metafield Inc. for about three years as a polisher. Before working for Metafield Inc. I was with Austin N. Nickolas Co. of Brooklyn for 10 years. I work 42 hrs. per week 40

*Exhibit (Signed Statement of Frank Di Mieri).*

at Metafield Inc. for five days per week and was doing piece work at the time I got hurt. On Monday April 8, 1940 at about 2:00 P. M.—I was about my regular work as a polisher. I had to go over to the cage to get a box of work filled with brass metal to be polished. The box of metal weighed about 60—100 pounds and was an unusual large box. It was sitting flat on the floor and I bent or stooped down to pick it up without bending my knees because it was a tight squeeze in

(Signed) FRANK DiMIERI

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8-7-40

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R-1 (b)

the cage and I didn't have room to move about much. Just as I lifted the box about a foot up from the floor I felt a sudden sharp pain in my right groin and I dropped the box back on the floor for a second to get my breath and I caught my right groin with my hands. In a second or so I picked the box up and carried it about 50 feet to my place of work. I had to lift the box in an oblong fashion as it had been sitting in tight quarters—I didn't hit or strike my side in any way with the box—it was just the severe lift causing me a strain, I went on with my regular polishing work that afternoon. The pains kept on increasing as I was working at my polishing wheel. My work is of a heavy nature at the wheel. The foreman wasn't about that day so I told the assistant foreman, Sam.

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(Signed) FRANK DiMIERI

*Exhibit (Signed Statement of Frank Di Mieri).*

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8-7-40

R-1 (c)

Raboniwitz, the same day I told Mr. Gorsline, the employment manager, about an hour after I hurt my side, I did my regular work up until yesterday, April 22, 1940, until about 2 P. M. but I had increasing pain each day. On the morning of April 22 and the pain was very severe and so I went in the men's room and looked at my side and found a lump about the shape of an egg. On April 22, 1940 was the first time I noticed the lump. I think it had been tearing down since April 8, 1940 so that the lump come on April 22, 1940. I am positive that the lift back on April 8, 1940 caused my trouble. I have never had any hernia or side trouble before. On April 22, 1940 at about 2:00 A. M. I told Mr. Gorsline I couldn't work longer and he sent me to Dr. N. N. Forney, Sr. who told me I had

(Signed) FRANK DiMIERI

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8-7-40

R-1 (d)

a hernia on the right side. On April 22, 1940 at about 3:00 P. M. was the first time I saw a doctor about my side. He is the only doctor that I have seen. He sent me right to St. Peter's Hospital. I have no hernia on the left side or groin and have no lump on the left side. Dr. Forney said I was all right on the left side. My left side is just a little numb. I have never had an accident before

*Exhibit (Signed Statement of Frank Di Mieri).  
Certificates.*

except with my left knee while while working for  
Austin Nickolas Co. I have never had any sickness  
to amount to anything and have no heart trouble.

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I read the (4) four Pages  
and they are correct

(Signed) FRANK DIMIERI.

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CERTIFICATES.

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I hereby certify that the attached papers were  
introduced into evidence during the trial of this  
cause and are Exhibits R-1 (a), R-1 (b), R-1 (c),  
R-1 (d), in evidence.

JOHN J. STAHL,

*Deputy Commissioner of Compensation.*

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I, DANIEL A. SPAIR, Secretary of the Work-  
men's Compensation Bureau, hereby attest the  
authenticity of the signature of John J. Stahl  
and certify that he, as the Deputy Commissioner  
who heard the case, is the proper one to certify  
as to the transcript of the testimony and the ex-  
hibits attached thereto.

DANIEL A. SPAIR.

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*Determination of Facts and Rule for Judgment.*

I do find and determine from the evidence and said stipulation as follows:

10 First: That the petitioner was on the 22nd day of April, 1940 in the employ of respondent as a buffer or polisher, which employment is subject to compensation under the foregoing statutes.

Second: That on the aforesaid date the petitioner met with an accident arising out of and in the course of his employment with respondent.

Third: That the respondent had knowledge of the said accident within the time prescribed by law.

20 Fourth: That the said accident consisted of petitioner sustaining a hernia on the right side when while lifting a heavy box his foot slipped resulting in a sudden effort or severe strain in the hernial region, proof of all requirements under 11 (x) having been fully established.

Fifth: That the wages were \$29.40 a week so that the compensation rate amounts to \$16.40 per week.

30 Sixth: That petitioner is entitled to no permanent disability.

Seventh: That petitioner is entitled to temporary disability from April 22nd, 1940 to June 11th, 1940 being a period of 7 and 1/7 weeks, which at the weekly rate of \$16.40 amounts to \$140.00 for temporary disability.

40 Eighth: That in lieu of the bill of \$110.00 submitted by Dr. N. N. Forney for an operation and

*Determination of Facts and Rule for Judgment.*

post operative care and a bill of \$94.63 submitted by St. Peter's Hospital the said Dr. N. N. Forney is entitled to the sum of \$81.00 and the said St. Peter's Hospital to \$69.00, making a total of \$150.00 which shall be paid by the respondent.

10

Ninth: That Dr. N. N. Forney is entitled to the sum of \$25.00 for testimony given before this Bureau on behalf of petitioner, which sum shall be paid by respondent.

Tenth: That Fleming & Potter, attorneys for petitioner are entitled to the sum of \$55.00 for services rendered the petitioner, of which sum \$27.50 shall be paid by petitioner and \$27.50 by respondent.

20

Eleventh: That all stenographic fees shall be paid by the respondent.

It is, therefore, on this 3rd day of September, 1940, Ordered that judgment be entered in favor of Frank Di Mieri, petitioner and against Metafield Inc., respondent, and that the respondent make payments to the petitioner as follows:

First: That petitioner is entitled to temporary disability from April 22nd, 1940 to June 11, 1940, being a period of 7 and 1/7 weeks which at the weekly compensation rate of \$16.40 amounts to \$140.00 for temporary disability.

30

Second: That in lieu of the bill of \$110.00 submitted by Dr. N. N. Forney for an operation and post operative care and bill of \$94.63 submitted by St. Peter's Hospital, said Dr. N. N. Forney is entitled to the sum of \$81.00 and the said St.

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*Determination of Facts and Rule for Judgment.*

Peter's Hospital to \$69.00, making a total of \$150.00, which said sums shall be paid by the respondent.

10 Third: That Dr. N. N. Forney is entitled to the sum of \$25.00 for testimony given before this Bureau on behalf of petitioner which sum shall be paid by respondent.

Fourth: That Fleming & Potter, attorneys for petitioner are entitled to the sum of \$55.00 for services rendered the petitioner, of which sum \$27.50 shall be paid by petitioner and \$27.50 by respondent.

20 Fifth: That all stenographic fees shall be paid by the respondent.

(Signed) JOHN J. STAHL,  
*Deputy Commissioner.*

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

30 DANIEL A. SPAIR.

40

## Notice of Appeal.

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

FRANK DI MIERI,

*Petitioner,*

vs.

METAFIELD, INC.,

*Respondent.*

C. P. #4950.  
On Appeal for  
Compensation.  
Notice of  
Appeal.

10

To:

Frank Di Mieri, petitioner and Messrs. Fleming  
& Potter, his attorneys.

The Secretary of the Workmen's Compensation  
Bureau

20

and

The Clerk of the County of Middlesex.

PLEASE TAKE NOTICE that the respondent, Metafield, Inc. intends to appeal, and does hereby appeal, from the whole of the Determination and Judgment entered in this matter on September 3, 1940 by the Hon. John J. Stahl, Deputy Commissioner of Compensation, wherein it was adjudged, determined and ordered, that judgment final be entered in favor or the petitioner and against the respondent, in the sum of \$16.40 per week for 7-1/7 weeks compensation amounting to the sum of \$140.00, besides the following costs: \$81.00 to Dr. N. N. Forney for medical treatment; \$69.00 to St. Peter's Hospital for hospital services; \$25.00 to Dr. N. N. Forney for his testimony given before the Bureau; \$27.50 to Messrs. Fleming & Potter, respondent's share of the counsel fee; and

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*Notice of Appeal.*

the fees for stenographic attendance covering three trial day attendances.

Dated: September 19, 1940.

10

JOHN W. TAYLOR,  
*Attorney for Respondent.*

---

Service of a copy of the within Notice of Appeal is hereby acknowledged by me this 19th day of September, 1940.

20

FLEMING & POTTER,  
*Attorneys for Petitioner.*

JOHN W. TAYLOR, Esq.,  
#24 Commerce St.,  
Newark, N. J.  
*Attorney for Respondent.*

30

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

DANIEL A. SPAIR.

40

## Order Fixing Time and Place of Hearing.

### MIDDLESEX COUNTY COMMON PLEAS COURT.

FRANK DIMIERI,  
*Petitioner-Appellee,*

vs.

METAFIELD, INC.,  
*Respondent-Appellant.*

Claim Petition #49540. 10  
On Appeal from  
the New Jersey  
Department of  
Labor; Work-  
men's Compens-  
ation Bureau.  
Order Fixing  
Time and Place  
of Hearing.

This matter being opened to the Court by John 20  
W. Taylor, Esq., attorney for respondent-appel-  
lant, and application having been made for an  
Order Fixing Time and Place for the Hearing of  
the appeal pending herein, it is hereby on this 7th  
day of October, 1940,

ORDERED, that the appeal be heard on the  
25th day of October, 1940, at ten o'clock in the  
forenoon or as soon thereafter as counsel may be  
heard, before such Judge of this Court, as may 30  
on the aforesaid day, be available for the hear-  
ing of such appeal at the Middlesex County Court  
House, New Brunswick, New Jersey.

KLEMMER KALTHEISSEN,  
*Judge.*

*Opinion.*

Service of a copy of the within Order Fixing Time and Place of Hearing is hereby acknowledged by us this 7th day of October, 1940.

10

FLEMING & POTTER ESQS.,  
390 George Street,  
New Brunswick, N. J.  
*Attorneys for Petitioner-Appellee.*

**Opinion.**

MIDDLESEX COUNTY COURT OF  
COMMON PLEAS.

20

FRANK DIMIERI,  
*Petitioner-Appellee,*  
and  
METAFIELD, INC.,  
*Respondent-Appellant.*

On Appeal from  
Workmen's  
Compensation  
Bureau.  
Opinion.  
Filed Novem-  
ber 12, 1940.

For the petitioner-Appellee, Russell Fleming,  
30 Esq.

For the respondent-appellant, Everett Rhinehart, Esq.

Kalteissen, C. P. J.

This is a Compensation Case. The petitioner-appellee alleges that he was injured as the result of an accident arising out of and in the course of his employment. The particular injury claimed is a hernia.

40

*Opinion.*

The petitioner-appellee was an employee of the respondent-appellant's company and at the time of the injury was in the act of moving a box from one part of the plant to another. In lifting or carrying the box he experienced a severe pain and dropped the box and immediately discontinued working any further and, after a very short space of time, was taken to Dr. Forney who operated on him the following day for hernia. 10

I feel that all five requirements of the Compensation Act in connection therewith are present. While petitioner-appellee may have experienced a weakening of tissues while employed on April 8th, 1940 there definitely in my opinion was an accident that caused a hernia on April 22nd, 1940. 20

I find that the petitioner-appellee has carried the burden of proof and has established his claim by conclusive proof as required by the statute.

Under the circumstances I conclude that the finding of the Commissioner was proper and it will be sustained.

KLEMMER KALTEISSEN,  
*Judge.* 30

**Determination and Rule for Judgment.**

MIDDLESEX COUNTY COURT OF  
COMMON PLEAS.

10	<p style="text-align: center;">FRANK DiMIERI, <i>Petitioner-Appellee,</i> <b>and</b> METAFIELD, INC., <i>Respondent-Appellant.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p>On Appeal from Workmen's Compensation Bureau. Determination and Rule for Judgment.</p>
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26 Judgment having been made by the New Jersey Department of Labor, Workmen's Compensation Bureau, on September 3rd, 1940, in favor of the petitioner, Frank DiMieri and against the respondent, Metafield, Inc., and the respondent having appealed to this Court from the said Judgment and award, and the appeal having been heard and briefs submitted by the respective parties, and the testimony taken before the Workmen's Compensation Bureau having been duly filed and considered by this Court on the said appeal, I do find as facts and determine from the transcript of the evidence as follows:

30 First—That the petitioner was on the 22nd day of April, 1940 in the employ of respondent as a buffer or polisher, which employment is subject to compensation under 34:15-27 of the Revised Statutes.

Second—That on the aforesaid date the petitioner met with an accident arising out of and in the course of his employment with respondent.

40 Third—That the respondent had knowledge of the said accident within the time prescribed by law.

*Determination and Rule for Judgment.*

- Fourth—That the said accident consisted of petitioner sustaining a hernia on the right side when while lifting a heavy box his foot slipped resulting in a sudden effort or severe strain in the hernial region; proof of all requirements under 11 (x) of said Statutes have been fully established. 10
- Fifth—That the wages were \$29.40 a week so that the compensation rate amounts to \$19.60 per week.
- Sixth—That petitioner is entitled to no permanent disability.
- Seventh—That petitioner is entitled to temporary disability from April 22nd, 1940 to June 11th, 1940 being a period of 7 and 1/7 weeks, which at the weekly rate of \$19.60 amounts to \$140.00 for temporary disability. 20
- Eighth—That in lieu of the bill of \$110.00 submitted by Dr. N. N. Forney for an operation and post operative care and a bill of \$94.63, submitted by St. Peter's Hospital the said Dr. N. N. Forney is entitled to the sum of \$81.00 and the said St. Peter's Hospital to \$69.00, making a total of \$150.00 which shall be paid by the respondent. 30
- Ninth—That Dr. N. N. Forney is entitled to the sum of \$25.00 for testimony given before the Bureau on behalf of petitioner, which sum shall be paid by respondent.
- Tenth—That Fleming & Potter, attorneys for petitioner, are entitled to the sum of \$55.00 for services rendered the petitioner, of which sum \$27.50 shall be paid by petitioner and \$27.50 by respondent. 40

*Determination and Rule for Judgment.*

Eleventh—That all stenographic fees shall be paid by the respondent.

It is, therefore, on this twenty-second day of November, 1940, Ordered that the judgment of the Workmen's Compensation Bureau be and the same is affirmed and that judgment be entered in favor of the petitioner-appellee, Frank DiMieri, and against the respondent-appellant, Metafield, Inc. and that respondent-appellant make payments as follows:

1. For temporary disability from April 22nd, 1940 to June 11th, 1940 being a period of 7 and 1/7 weeks, which at the weekly rate of \$19.60 amounts to \$140.00 for temporary disability.
2. That in lieu of the bill of \$110.00 submitted by Dr. N. N. Forney for an operation and post operative care and a bill of \$94.63 submitted by St. Peter's Hospital, the said Dr. N. N. Forney is entitled to the sum of \$81.00 and the said St. Peter's Hospital to \$69.00, making a total of \$150.00, which shall be paid by the respondent.
3. That Dr. N. N. Forney is entitled to the sum of \$25.00 for testimony given before the Bureau on behalf of petitioner, which sum shall be paid by respondent.
4. That Fleming & Potter, attorneys for petitioner, are entitled to the sum of \$55.00 for services rendered the petitioner, of which sum \$27.50 shall be paid by petitioner and \$27.50 by respondent.
5. That all stenographic fees shall be paid by the respondent.

*Notice of Application for Writ of Certiorari.*

It is further Ordered that Metafield, Inc., the respondent-appellant, pay to Messrs. Fleming & Potter, attorneys for petitioner-appellee, a counsel fee of one hundred dollars for services rendered upon this appeal, together with the cost of filing this order. 10

KLEMMER KALTEISSEN,  
*Judge of the Middlesex County  
Court of Common Pleas.*

**Notice of Application for Writ of Certiorari.**

NEW JERSEY SUPREME COURT. 20

FRANK DI MIERI, <i>Petitioner-Defendant- Certiorari,</i>	} Notice of Application for Writ of Certiorari.
vs.	
METAFIELD, INC., <i>Respondent-Prosecutor- Certiorari.</i>	

30

To:

Fleming & Potter, Esqs.,  
390 George Street,  
New Brunswick, N. J.  
Attorneys for Petitioner-Defendant.

Sirs:

PLEASE TAKE NOTICE that on Saturday,  
the 7th day of December, 1940 application will be 40

*Petition and Affidavit.*

10 made to the Honorable Clarence E. Case, Justice of the New Jersey Supreme Court or such other Justice as may be sitting at the court house in Elizabeth, New Jersey, at 9:30 o'clock in the forenoon or as soon thereafter as the matter can be heard for a Writ of Certiorari to review the Determination and Judgment entered in the Court of Common Pleas in and for the County of Middlesex on the 22nd day of November, 1940.

Annexed hereto is a copy of the Petition and Affidavit which will be used in support of said Application.

Dated: December 3, 1940.

20

Respectfully,

JOHN W. TAYLOR,  
*Attorney for Respondent-  
Prosecutor-Certiorari.*

**Petition and Affidavit.**

## NEW JERSEY SUPREME COURT.

30

FRANK DI MIERI,

*Petitioner-Defendant-  
Certiorari,*

vs.

METAFIELD, INC.,

*Respondent-Prosecutor-  
Certiorari.*

On Certiorari.  
Petition and  
Affidavit.

40 Your petitioner is the respondent to the petition filed in the Workmen's Compensation Bureau,

*Petition and Affidavit.*

on May 24, 1940. Your petitioner by its Attorney, John W. Taylor, shows that:

1. This Petition and Affidavit is made upon the information, knowledge and belief of John W. Taylor, an attorney and counselor at law of the State of New Jersey, and who was charged with the conduct and supervision of this matter as attorney for the respondent. 10

2. Your petitioner desires to obtain a Writ of Certiorari to review the Determination and Judgment entered in the Court of Common Pleas in and for the County of Middlesex on the 22nd day of November, 1940 in a proceeding wherein Metafield Inc. is named as Respondent-Appellant and Frank Di Mieri is named as Petitioner-Appellee. 20

3. The Petition filed in this cause alleged that the petitioner had suffered a hernia on April 22, 1940 as a result of an accident and out of and in the course of his employment by the respondent.

4. The case was noticed for hearing and was heard formally before Deputy Commissioner Stahl at New Brunswick, New Jersey on July 19, 1940 and August 2, 1940 and before Deputy Commissioner Stahl at Somerville, New Jersey, on August 7, 1940 at which hearings the respondent contended that the petitioner had not suffered a compensable inguinal hernia within the conditions and limits prescribed by the Statute in such case provided, R. S. 34:15-12 (x) known as the New Jersey Workmen's Compensation Act, and 30 40

*Petition and Affidavit.*

10 that petitioner's claim for the same should be denied. After hearing the evidence in the cause the Deputy Commissioner entered a Determination of Facts and Rule for Judgment dated September 3, 1940 whereby an award was made in favor of the petitioner and against the respondent for compensation as follows:

20 Temporary disability from April 22, 1940 to June 11, 1940, a period of 7 1/7 weeks at the rate of \$16.40 per week, amounting to the sum of \$140.00, the further sum of \$150.00 for the petitioner's medical and hospital expenses and in addition certain other fees and allowances were made to the petitioner's doctor and petitioner's counsel.

30 5. The respondent appealed from the whole of that Determination of Facts and Rule for Judgment to the Court of Common Pleas in and for the County of Middlesex. Your petitioner there contended and here alleges that the Deputy Commissioner erred in awarding compensation, medical benefits and other fees to or on account of the petitioner in that the petitioner's hernia was not acquired in the manner and under the terms and conditions prescribed by the Statute referred to, that the petitioner failed to carry the burden of proving that his hernia was compensable under the Statute, that the petitioner failed to establish by conclusive proof as required by the Statute that his hernia was caused and acquired under the conditions and in the manner set forth in the Statute referred to, that the peti-

40

*Petition and Affidavit.*

tioner failed to establish by the evidence any causal connection between the alleged accident of April 22, 1940 and the petitioner's hernia and that the Deputy Commissioner erred in that he failed to apply the statutory requirement of conclusive proof. 10

6. The matter was argued orally before the Honorable Klemmer Kaltheissen, Judge of the Middlesex Court of Common Pleas on October 25, 1940 and briefs were submitted following which on the 22nd day of November, 1940 a Determination and Rule for Judgment was entered in the Court of Common Pleas of Middlesex County, whereby the Judgment of the Workmen's Compensation Bureau was affirmed and the respondent was ordered to pay compensation for a period of 7 1/7 weeks at the weekly rate of \$19.60, amounting to the sum of \$140.00 for temporary disability, the sum of \$150.00 for the petitioner's medical and hospital expenses and certain other fees and allowances to petitioner's doctor and his counsel. 20

7. As a result of the above allegations your petitioner is aggrieved at the Determination and Judgment of the Judge of the Court of Common Pleas of Middlesex County and feels that the findings and the Judgment of said Court are contrary to law and against the weight of the evidence to such an extent as warrants the Supreme Court to review said Judgment. 30

8. Your petitioner further alleges his belief that the facts of this case as revealed by the evi- 40

*Petition and Affidavit.*

dence are controlled by the opinion of the Court of Errors and Appeals in the matter of Prino vs. Austin Co., 121 N. J. L. 518, 3 Atl. 2nd 2D 621.

- 10 WHEREFORE your petitioner respectfully prays that a Writ of Certiorari issue out of the Supreme Court to the Middlesex County Court of Common Pleas, that the Determination made by said Court in this matter and dated November 22nd, 1940 together with a transcript of all the evidence and all the proceedings and all things touching and concerning the same be certified and sent together with this Writ to the Justice of our  
 20 Supreme Court of Judicature at Trenton, New Jersey.

JOHN W. TAYLOR,  
 METAFIELD, INC.  
 by JOHN W. TAYLOR,  
*Attorney.*

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

JOHN W. TAYLOR of full age, being duly sworn according to law upon his oath he deposes and says that:

- As an Attorney and Counselor at Law of the State of New Jersey and also Attorney for the respondent in the above entitled matter and that  
 40 the matters, facts and things alleged in this

*Writ of Certiorari.*

Petition and Affidavit are true to the best of his information, knowledge and belief.

JOHN W. TAYLOR.

Sworn to and subscribed before  
me at Newark, New Jersey, this 10  
3rd day of December, 1940.

Helen G. Verian,  
(Seal) Notary Public of N. J.

Service of the within Notice, Petition and Affidavit is hereby acknowledged by me, this third day of December, 1940. 20

FLEMING & POTTER,  
*Attorneys for Petitioner-Defendant.*

**Writ of Certiorari.**

New Jersey, ss.:

THE STATE OF NEW JERSEY to the Court 30  
of Common Pleas in and for the County  
(Seal) of Middlesex, and Edward J. Patten,  
Clerk of the said Court and Frank  
Di Mieri,

Greeting:

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 22nd day of November, 1940, by the honorable Klemmer 40

*Writ of Certiorari.*

10 Kalteissen, Judge of the said Court of Common Pleas, in and for the said County of Middlesex, in a certain proceeding brought on behalf of Frank Di Mieri, petitioner against Metafield, Inc., a corporation, respondent, for the determination and recovery of compensation under the Statutes of the State of New Jersey, known and cited as R. S. 34:15-1 to R. S. 34:15-102, relating to the liability of an employer to make compensation for injuries received by an employe arising out of and in the course of his employment and the Acts amendatory thereof and supplemental thereto, we command you, the said Court of Common Pleas in and for the County of Middlesex and Edward J. Patten, Clerk of said Court, that the said determination and judgment, together with a transcript of the evidence and all proceedings for the making of the same and all things touching and concerning the same, as fully and entirely as before you they remain, or are in your custody and control, you do certify and send together with this our Writ, to our Justices of our Supreme Court of Judicature at Trenton, on the 27th day of December, 1940, that therein may be caused to be done what of right and justice according to law ought to be done.

20  
30 Witness, the Honorable Thomas J. Brogan, Chief Justice of our Supreme Court at Trenton, this 10th day of December, in the year of our Lord, one thousand nine hundred and forty.

FRED L. BLOODGOOD,  
*Clerk.*

40 JOHN W. TAYLOR,  
*Attorney for Prosecutor.*

*Writ of Certiorari.*

Allocatur:

This Writ is allowed. Let it be sealed.

Dated: December 7, 1940.

CLARENCE E. CASE,  
*Justice of the Supreme Court.* 10

JOHN W. TAYLOR, ESQ.,  
 24 Commerce Street,  
 Newark, New Jersey,  
*Attorney for Prosecutor.*

---

Service of a copy of the within Writ of Cer-  
 tiorari is hereby acknowledged by me this 12th day 20  
 of Dec., 1940.

EDW. J. PATTEN,  
*Clerk of Middlesex County Court  
 of Common Pleas.*

---

Service of a copy of the within Writ of Cer-  
 tiorari is hereby acknowledged by me this 12th 30  
 day of December, 1940.

FLEMING & POTTER,  
*Attorneys for Petitioner-Defendant,  
 In Certiorari.*

**Return to Writ.**

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

10 I, KLEMMER KALTEISSEN, Judge of the  
 Court of Common Pleas of the County of Middle-  
 sex, New Jersey, and Edward J. Patten, Clerk of  
 the Court of Common Pleas of the County of Mid-  
 dlesex, New Jersey, do hereby certify and return  
 to the Supreme Court of Judicature of the State  
 of New Jersey, the judgment, order and all pro-  
 ceedings together with all things touching and  
 concerning the same as by the within writ to us  
 directed, we are commanded.

20 IN WITNESS WHEREOF, we have hereunto set our  
 hands and affixed the official seal of said Court at  
 New Brunswick, New Jersey, this 24 day of De-  
 cember, 1940.

KLEMMER KALTEISSEN,  
*Judge of the Court of Common Pleas  
 of the County of Middlesex.*

30 EDW. J. PATTEN,  
*Clerk of the Court of Common  
 Pleas of Middlesex County.*  
 (Seal)

A true copy.

THOMAS A. MATHIS,  
*Clerk.*

## Reasons for Reversal.

### NEW JERSEY SUPREME COURT.

<p style="margin: 0;">FRANK DIMIERI,  <i>Petitioner-Defendant,</i>  <i>in Certiorari,</i></p> <p style="text-align: center; margin: 10px 0;">vs.</p> <p style="margin: 0;">METAFIELD, INC.,  <i>Respondent-Prosecutor,</i>  <i>in Certiorari.</i></p>	}	<p style="margin: 0;">On Certiorari.  Reasons for  Reversal.</p>	10
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The prosecutor presents the following reasons for reversal of the determination and judgment brought before this Honorable Court by the writ of certiorari in the above entitled cause: 20

First: Because the findings of the Judge of the Middlesex County Court of Common Pleas were inconsistent with and against the weight of the evidence to such an extent as necessitates the reversal thereof.

Second: Because the Petitioner-Defendant in Certiorari failed to establish by conclusive proof that his inguinal hernia was immediately caused by such sudden effort or severe strain that the descent of the hernia immediately followed the cause, as required by the statute, R. S. 34:15-12 (x), in such case provided. 30

Third: Because the Petitioner-Defendant in Certiorari failed to establish by conclusive proof that his inguinal hernia was immediately caused by such sudden effort or severe strain that there was severe pain in the hernial region as required 40

*Reasons for Reversal.*

by the statute, R. S. 34:15-12 (x), in such case provided.

10 Fourth: Because the Petitioner-Defendant in Certiorari failed to establish by conclusive proof that his inguinal hernia was caused by such sudden effort or severe strain that there was such prostration that he was compelled to cease work immediately, as required by the statute, R. S. 34:15-12 (x), in such case provided.

20 Fifth: Because Petitioner-Defendant in Certiorari failed to establish by conclusive proof that his inguinal hernia was immediately caused by such sudden effort or severe strain that there was such physical distress that the attendance of a licensed physician was required within twenty-four hours after the occurrence of the hernia, as required by the statute, R. S. 34:15-12 (x), in such case provided.

Sixth: Because there is a complete absence of proof to support a finding that Petitioner-Defendant in Certiorari suffered his inguinal hernia as a result of the alleged occurrence of April 22, 1940.

30 Seventh: Because the credible evidence demonstrates that the inguinal hernia for which claim is made existed and had in fact descended at a point of time prior to the alleged occurrence of April 22, 1940, which occurrence is alleged to have caused the hernia.

Eighth: The said Determination and Judgment of the Middlesex County Court of Common

*Notice of Argument.*

Pleas is in divers other respects irregular, unjust, illegal and oppressive to the prosecutor.

JOHN W. TAYLOR,  
*Attorney for Prosecutor.*

Service of a copy of the within Reasons for Reversal is hereby acknowledged by us this 16th day of December, 1940.

FLEMING & POTTER,  
*Attorneys for Petitioner-Defendant.*

10

**Notice of Argument.**

NEW JERSEY SUPREME COURT.

20

FRANK DiMIERI,  
*Petitioner-Defendant,*  
*in Certiorari,*

vs.

METAFIELD, INC.,  
*Respondent-Prosecutor,*  
*in Certiorari.*

On Certiorari.  
Notice of  
Argument.

30

To:

Fleming & Potter, Esqs.,  
*Attorneys for Petitioner-Defendant in Certio-*  
*rari,*  
390 George Street,  
New Brunswick, N. J.

Sirs:

40

PLEASE TAKE NOTICE that the argument in the above entitled cause will be moved before

*Notice of Argument.*

the New Jersey Supreme Court, Part II, in the presence of such Justices thereof as shall be holding the same at the State House Annex in Trenton, New Jersey, on the Third Tuesday of January, 1941, at ten o'clock in the forenoon or as soon thereafter as the Court can hear the same.

10

Respectfully,

JOHN W. TAYLOR,  
*Attorney for and of counsel with  
Respondent-Prosecutor in Certiorari.*

20 Service of a copy of the within Notice of Argument is hereby acknowledged by us this 16th day of December, 1940.

FLEMING & POTTER,  
*Attorneys for Petitioner-Defendant,  
In Certiorari.*

30

40

**Opinion of Supreme Court.**

(Filed May 13, 1941.)

## NEW JERSEY SUPREME COURT.

No. 225, JANUARY TERM, 1941.

FRANK DiMIERI,

*Petitioner-Defendant,  
in Certiorari,*

vs.

METAFIELD, INC.,

*Respondent-Prosecutor,  
in Certiorari.*

10

On Certiorari  
from Middle-  
sex County  
Court of  
Common  
Pleas.

20

Argued Jan. 23, 1941; decided \_\_\_\_\_, 1941.

Before Brogan, Chief Justice, and Justices  
Parker and Perskie.For the petitioner-defendant, Fleming & Pot-  
ter.For the respondent-prosecutor, John W. Tay-  
lor, Everitt Rinehart, of counsel.BROGAN, *Chief Justice.*

30

This is a compensation case and brings up the judgment and the record in the Middlesex County Pleas in the return to the writ. The petitioner for compensation was successful in the Bureau and on appeal the award was affirmed in the Pleas. The issue is whether the inguinal hernia that made itself manifest on April 22, 1940, and which necessitated a surgical operation upon the petitioner on the following day, was compensable under the statute. The issue here is one of fact.

40

*Opinion of Supreme Court.*

This particular disability, i. e., hernia, has had special attention at the hands of the Legislature and the cases of hernia that are compensable are carefully delineated and delimited in the Workmen's Compensation Act. The statutory provision (R. S. 34:15-12) is as follows:

- 10      “Inguinal hernia is a disease which ordinarily develops gradually, being very rarely the result of an accident. Where there is a real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall, compensation will be allowed. All other cases will be considered as either congenital or of slow development and not compensable, being a disease rather than an accidental injury; unless conclusive proof is offered that the
- 20      hernia was immediately caused by such sudden effort or severe strain that, first, the descent of the hernia immediately followed the cause; second, that there was severe pain in the hernia region; third, that there was such prostration that the employee was compelled to cease work immediately; fourth, that the above facts were of such severity that the same was noticed by the claimant and communicated to the employer within
- 30      twenty-four hours after the occurrence of the hernia (days when the business is not in operation, such as Sundays, Saturdays or holidays shall be excluded from this twenty-four hour period); fifth, that there was such physical distress that the attendance of a licensed physician was required within twenty-four hours after the occurrence of the hernia \* \* \*.”

40      It is not claimed in this case that the hernia in question is “a real traumatic hernia resulting from the application of force directly to the abdominal wall” for which compensation will be

*Opinion of Supreme Court.*

allowed. Other than this class of traumatic hernia all other cases of hernia are not compensable unless "conclusive proof" of the five particular elements mentioned in the statute, supra, be supplied. That petitioner suffered a hernia is admitted. The employer claims it is not compensable because the proof is not sufficient to meet the requirements of the statute, supra; but rather that the hernia is one that developed gradually. The petitioner claims that it is compensable and that he has shown by conclusive proof that the five concomitant incidents indispensable under the statute, were present. That brings us to the pith of this case, i. e., whether petitioner has proved the five elements by "conclusive proof." What norm or quality of proof satisfies the legislative standard of "conclusive proof?" The term has not been construed or defined in any of our cases. It was decided in *Prino vs. Austin Co.*, 121 N. J. L. 518, that the standard of "conclusive proof" as regards one element of hernia, i. e., prostration, was not met. The authority of that case is not in point. The second syllabus at the head of the opinion is broader than the opinion itself. The usual sources for definition—legal dictionaries and the like—furnish little help. Of course, they define the term "conclusive proof" in general; but an abstract definition is often inept when, as here, we are required to give effect to a word or phrase in its reasonable relationship to the statutory text. It applies not to proof generally in compensation cases but only to those based on hernia that was not caused by the application of traumatic force to the abdominal wall. It might be said that the requirement is that the "conclusive proof" should be so strong as to admit of only one determination; or by contrast that it is proof reasonably

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sufficient to lead to a conclusion. Some authorities believe that the term "conclusive evidence" is synonymous with "incontrovertible evidence," 23 C. J. p. 8, i. e., evidence so strong as to overbear all other in the case to the contrary. It is also suggested that the term means uncontradictable, therefore controlling proof. We do not think the Legislature had such a harsh and inflexible standard in mind when it called for "conclusive proof" on this type of case; for if such proof were required, i. e., uncontroverted or incontrovertible, a petitioner would find it almost impossible to meet this standard. It is hard to imagine a case where the party to be charged could not controvert the petitioner's testimony on at least one of the five statutory requirements and this, if uncontroverted proof be necessary to succeed, would be fatal to the petitioner in almost all cases. Certainly that is not what the Legislature intended in this field of the law, generally regarded as beneficent to the employee.

We think, first, that the statute, in this class of compensation case, contemplates degree of proof. We think, further, that the statutory language should be construed to mean that the fact finder, after hearing the evidence in support of the claim and contrasting and weighing it with the evidence produced to rebut it, is clearly of the view that the claim has been sustained by proof that is convincing in character. The petitioner must prove that the hernia is the immediate result (Cf. *Borodaeff vs. Province, etc.*, 109 N. J. L. 25; Aff. 110 Id. 20) of a sudden effort or strain and the proof of the five requirements must be such as will reasonably negative the inference or conclusion that it was congenital or of slow development or caused by disease rather than an untoward incident.

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(Compare *Borodaeff vs. Province, etc. supra*; *McBride, etc. vs. Kuehn*, 11 N. J. M. sc. 764; 168 Atl. Rep. 64; *Sussick v. Glen Alden Coal, etc.* (a Pennsylvania case), 165 Atl. Rep. 658). Consequently it matters not whether the conclusive proof required by the statute is challenged or not—that it be contradicted or not—so long as it leaves the mind of the fact finder convinced that the hernia resulted not from disease or congenital weakness but immediately from sudden strain or effort in the course of the employment. So the qualifying word “conclusive,” as used in the statute, *supra*, is not to be regarded in a sense that imports to it a quality that will not tolerate challenge or contradiction; but rather in its ordinary sense that the proof is convincing and such that it justifies a conclusion that the statutory requirements of such case were proved. A rigid, inflexible construction of the phrase would require a norm or quality of proof, the equivalent of moral certitude. Such construction we cannot reconcile with the development of the law of evidence on the civil side in this state or elsewhere. The construction we have placed upon the legislative expression, we think, is in accord with the legislative intention. We now proceed to examine the case on the facts and the law.

The petitioner testified that on the afternoon of April 22, 1940, he was carrying a box which contained metal pieces. He had got the box from the “cage” where the unfinished work in the plant was kept, walked about sixty feet to his work bench “and in reaching from one bench to the other to lay my work down my foot slipped out and I dropped the box and I experienced a tearing of the tissues down in the groin.” He said that he was prostrated; that he had severe pain; that

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*Opinion of Supreme Court.*

he tried to work but could not and that he immediately examined the affected part and discovered the hernial lump. He reported the matter to his superiors—first, the assistant foreman, and then the general manager, and was sent by the latter to Dr. Forney who advised an operation which  
10 was done the following day. The proof as regards pain, prostration, the severity of the case, reporting to the employer, and such physical distress as to require the attendance of a licensed physician was not controverted and, in our judgment, satisfied the requirements of the statute, supra, as to the second, third, fourth and fifth points particularly set out therein. Petitioner's statement as to the happening was confirmed by  
20 two fellow employees who saw him bend over, slip, drop the box, "grab his side, turn white, complain of pain and inability to work," etc. The testimony of the general manager, Mr. Gorsline, confirmed the petitioner's statement to this extent—that on the afternoon of April 22, 1940, the employee complained of the appearance of a hernial lump; that he looked "white as a sheet;" that "he was all in," and that at the time the employee said, "I just felt something give way and I can't  
30 go on;" whereupon the manager sent him to see Dr. Forney. If this were all, the case would be a simple one and the judgment probably would not be here for review, but the prosecutor of the writ contends that there was no proof that the hernia was caused by any mishap on that day.

It is said that the medical testimony in support of the petitioner is not persuasive that the hernia in question was caused by "sudden effort or severe strain;" that the testimony of Dr. Forney is vague as to what caused the hernia and when it  
40 was caused. It is true the doctor does not say

*Opinion of Supreme Court.*

that the petitioner's experience of April 22, was the cause of the hernia but a close analysis of his testimony makes it indisputably clear that it was his opinion that the intense pain to which petitioner testified and which made itself felt on the afternoon of April 22, was related to the appearance of the hernia. To the direct question as to whether or not the hernia was old or recent Dr. Forney said that it was recent; further that he did not believe the hernia existed before that day. And his findings were arrived at empirically from examination of the petitioner at the time and from his history as well. This medical witness was not the petitioner's family doctor or even a doctor of his selection; apparently he was the company doctor. This circumstance lends weight to Dr. Forney's testimony. It is safe to assume that he had no "leanings" towards the petitioner. His testimony was direct and at all times frank. He admitted that a hernia does not always descend at the time of a happening which may be said to be its cause; but we are convinced nevertheless that it was his opinion that the exertion or sudden strain on the day in question, April 22, caused a rip or tear in the inner abdominal lining and that the hernia at once appeared. Standing alone, this medical testimony might be wanting in sufficient strength to supply the conclusive proof on this element of the case required by the statute, *supra*, but when read as a supplement to the testimony of the petitioner and his corroborating witnesses we think the proof is sufficiently conclusive in character to support a finding that the first prerequisite of the statute—that "the descent of the hernia immediately followed the cause," was satisfied.

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The main argument of the employer that the petitioner is not entitled to compensation rests on the fact that on April 8, two weeks prior to the date in question, the employee suffered a strain and experienced pain in the area where the hernia later appeared. A statement signed by the petitioner outlining that experience and his history for the two intervening weeks was obtained from the employee at the hospital on April 23, immediately before the time Dr. Forney operated on him. The statement was written out by an investigator for the Liberty Mutual Insurance Company, the insurer of the employer. That account does not mention any "slipping" in the workroom on April 22. As regards this the petitioner replies that the statement was not complete; that he failed to say certain things because he was not asked. The Referee considered that the statement was not controlling and preferred to believe the sworn testimony of the petitioner rather than the unsworn but signed statement; that the adjuster, acting in behalf of the employee's insurer, in obtaining the statement, asked questions, received answers and then reduced the whole to the form of simple narrative; that the investigator, at the bedside of the petitioner, presumably mindful of the legal requirements of the compensation statute with regard to hernia, asked questions which shaped the scope of the narrative. That statement recited that on April 8 (two weeks before the later experience), while lifting a box from the floor, the employee "felt a sudden sharp pain in the right groin;" that he dropped the box for a moment to get his breath but that "in a second or so I picked up the box and carried it about fifty feet to my place of work;" that he worked all afternoon; that the pain kept increasing; that he

*Opinion of Supreme Court.*

reported the matter to the assistant foreman, Mr. Rabinowitz, and later to the manager; that he performed his regular work thereafter until April 22, "but that he had increased pain each day;" that on the morning of the twenty-second he examined himself at the plant and "found a lump on the right side about as large as an egg"; that he thought "it had been tearing down since April 8," so that the lump came on April 22; that he was positive that the occurrence on April 8, caused the trouble. This then is the crux of the case, and the question is what importance we attach to the statement in our evaluation of the proofs. If we accept it as an uninspired, voluntary statement, free from any suggestion from the questioner it is very damaging to the petitioner's present testimony. We do not accept it as such because, as we read it, we think it possesses evidence of its own shortcomings for full faith and credit. For instance, the statement contains this sentence: "On April 22, 1940, was the first time I noticed the lump. *I think it had been tearing down since April 8, 1940, so that the lump came on April 22, 1940*". This last sentence, italicized by us, is hardly the utterance of a lay person. Again, "I am positive that the lift back on April 8, 1940, caused my trouble". This, too, is scarcely a statement that an injured person, under the circumstances that attended the scene, would make. It would seem to be an unusual circumstance for him to remember the precise date, i. e., Apr. 8. The previous sentence in the statement about the hernia "tearing down" for the two week period was one which, if accepted, would destroy his claim for compensation. He probably was unaware of that but in all probability the investigator had that precise point in mind. Another sentence "I had

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to lift the box \* \* \* I didn't hit or strike my side in any way with the box. It was just the severe lift causing me a strain," etc. This passage referred to the happening of April 8, and of course tended to negative completely any compensable case of traumatic hernia mentioned in the statute, supra, resulting from the application of force directly to the abdominal wall, etc. Contrast this phase of the fact situation with the history which the petitioner gave to Dr. Forney just prior to the operation. At that time—and it is most unlikely he would be untruthful at that juncture—he told Dr. Forney that he experienced no pain between April 8 and April 22, and that the hernial lump appeared on the later date. Further, the general manager of the company, Mr. Gorsline, during his testimony, said in passing that "he was bowling" with the petitioner several nights after April 8, and of course prior to April 22. We venture the thought that a man with pain increasing each day from incipient hernia would not spend his evenings at bowling. In our appraisal of the facts on this issue we are impelled to accept the testimony of the petitioner and that of his fellow employees, supported as it is by the medical testimony of Dr. Forney, the company doctor who performed the operation, that the petitioner has offered conclusive proof that the hernia was immediately caused by such sudden effort or severa strain that occurred on April 22, and that the descent of the hernia immediately followed the cause. The fact that he had a sharp pain on April 8, from sudden strain on that day does not defeat his right to recover for hernia that resulted from like strain on April 22, which "immediately" followed such strain. The other four elements required by our statute to make out a case of com-

*Rule of Affirmance and Remittitur.*

pensible hernia injury are proved in the case by abundant unchallenged evidence.

No medical proof whatever was offered by the respondent. It rested its defense on the statement which we have already discussed. That statement leaves us with many misgivings as regards its value as proof. We attach little or no value to it for reasons that are obvious. 10

The judgment of the Pleas will be affirmed with costs. The writ of certiorari should be dismissed.

**Rule of Affirmance and Remittitur.**

(Filed May 15, 1941.)

NEW JERSEY SUPREME COURT. 20

No. 225, JANUARY TERM, 1941.

FRANK DIMIERI, <i>Petitioner-Defendant,</i> <i>in Certiorari,</i>  vs.  METAFIELD, INC., <i>Respondent-Prosecutor,</i> <i>in Certiorari.</i>	}	On Certiorari. Rule of Affirmance and Remittitur. 30
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The Court having inspected the transcript and proceedings of the Middlesex County Court of Common Pleas, returned with the Writ of Certiorari in this cause and the reasons for reversing the judgment below, and having heard the argument of counsel therein, and having duly con- 40

*Rule of Affirmance and Remittitur.*

10 sidered the same; it is hereby ordered that the judgment of the Middlesex County Court of Common Pleas affirming an award in favor of Frank DiMieri and against Metafield, Inc. made by the Workmen's Compensation Bureau, be and the same is hereby in all things affirmed and the Writ of Certiorari heretofore allowed be and the same hereby is dismissed, with costs, and the said record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered May 15, 1941 on motion of

FLEMING & POTTER,  
*Attorneys for Frank DiMieri,*  
*Petitioner-Defendant-in-Certiorari.*

20 RUSSELL FLEMING,  
*Of Counsel.*

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**Notice of Appeal.**

(Filed June 12, 1941.)

## NEW JERSEY SUPREME COURT.

FRANK DiMIERI, <i>Petitioner-Defendant,</i>  vs.  METAFIELD, INC., <i>Respondent-Prosecutor,</i> <i>in Certiorari.</i>	}	On Certiorari. Notice of Appeal.	10
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To:

Frank DiMieri, Petitioner-Defendant, and Fleming & Potter, Esquires, his attorneys.	20
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Sirs:

PLEASE TAKE NOTICE that the respondent-prosecutor, Metafield, Inc., hereby appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

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Dated: June 10, 1941.

JOHN W. TAYLOR,  
*Attorney for Respondent-Prosecutor.*

HARRY E. WALBURG,  
*Of Counsel.*

Due service of the within Notice of Appeal acknowledged this tenth day of June, 1941.

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FLEMING & POTTER,  
*Attorneys of Petitioner-Defendant.*

**Grounds of Appeal.**

(Filed June 13, 1941.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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FRANK DIMIERI,  
*Petitioner-Defendant,*

vs.

METAFIELD, INC.,  
*Respondent-Prosecutor.*On Appeal  
from  
New Jersey  
Supreme  
Court.  
Grounds of  
Appeal.

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The following are the grounds of appeal of the respondent-prosecutor, which will be urged for the reversal of the judgment of the New Jersey Supreme Court:

1. The Supreme Court erred in giving judgment for the petitioner-defendant instead of for the respondent-prosecutor.

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2. The Supreme Court erred in affirming the judgment of the Middlesex County Court of Common Pleas which affirmed the judgment of the Workmen's Compensation Bureau in making an award to petitioner-defendant, whereas the Supreme Court should have reversed the judgment of the said Common Pleas for one or more of the reasons on certiorari.

JOHN W. TAYLOR,

*Attorney for Respondent-Prosecutor.*

HARRY E. WALBURG,

*Of Counsel.*

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Due service of the within Grounds of Appeal acknowledged this tenth day of June, 1941.

FLEMING &amp; POTTER,

*Attorneys of Petitioner-Defendant.*





## New Jersey Court of Errors and Appeals

FRANK DI MIERI,  
Defendant-Appellee,

*v.*

METAFIELD, INC.,  
Prosecutor-Appellant.

On Appeal from  
the Supreme  
Court.

### BRIEF FOR PROSECUTOR-APPELLANT.

#### Statement of Facts.

This is a workmen's compensation case in which the prosecutor-appellant, the employer, appeals from a judgment of the New Jersey Supreme Court which affirmed a judgment of the Middlesex County Court of Common Pleas awarding compensation to the defendant-appellee, the employe, wherein it was found that the employe had sustained a right, inguinal hernia within the meaning of the statute (126 N. J. L. 484). An original award was entered in favor of the employe and against the prosecutor-appellant in the Workmen's Compensation Bureau (S. C., pp. 111 to 116, 120 to 123, 137 to 149).

The defendant-appellee, the petitioner below, testified that he sustained two strains arising out of and in the course of his employment, one on April 8, 1940 and the other on April 22, 1940. It was claimed that the right, inguinal hernia resulted solely from the strain of April 22, 1940.

A chronological statement of the facts as produced at the trial below, is as follows:

The petitioner, Frank DiMieri, testified that he was thirty years of age; that he was employed by

the prosecutor-appellant as a polisher; that on April 8, 1940 he was lifting a wooden box containing metal parts and in doing so he experienced a slight pain below the belt; that he continued working on that day and did not see a doctor; that he felt a pain somewhere around the abdomen; that on the evening of April 8th he mentioned the fact that he had a slight pain to Mr. Gorsline, placement manager of the prosecutor-appellant (S. C., p. 47, l. 10 to p. 48, l. 20).

On April 22, 1940 he lifted another wooden box containing metal parts and walked about sixty feet to his workbench with it. In reaching from one bench to another to lay down his work, his foot slipped and he dropped the box, and experienced a tearing of the tissues in the groin on his right side. He felt nauseous and could not do anything. He held his side for a minute and a half (S. C., p. 48, l. 30 to p. 49, l. 20). He attempted to work about a minute and a half after this occurrence but could not do so. He went to the men's room and examined himself, and found a ball hanging down below the groin about the shape of an egg. This had not been there before. He reported to his assistant foreman, Mr. Rabinowitz, who sent him to see Mr. Gorsline, his superior. He told him what had happened and Mr. Gorsline sent him to Dr. Forney. He went to Dr. Forney immediately. The doctor examined him within half an hour and advised him that an operation had to be performed. He went to the hospital that evening at six o'clock, and an operation was performed the next day (S. C., p. 50, l. 30 to p. 51, l. 20).

The box which the petitioner was carrying on both occasions was about two feet long, ten inches wide, and six inches deep, and weighed between forty-five and fifty pounds (S. C., p. 54, l. 40 to p. 55, l. 20).

On cross examination the petitioner admitted that when he went to Dr. Forney's office on April 22, 1940 *he told the doctor he had suffered a severe pain in his right groin about two weeks prior to April 22, 1940*; that he told him he had a slight pain but that he had not noticed any lump protruding previous to April 22nd (S. C., p. 60, l. 30 to p. 61, l. 20). He admitted that on April 23, 1940, before he was operated on, he signed a statement for a representative of the insurance carrier for the prosecutor-appellant. The statement was offered in evidence and consisted of four pages, each of which was signed by the petitioner below (S. C., pp. 107 to 110). He stated that the insurance investigator talked over the whole incident with him and wrote out the statement; that the petitioner below read it over and signed it (S. C., p. 61, ll. 20 to 40). He admitted that he told the investigator that on April 8, 1940 at about 2 P. M. he had gone over to a cage to get a box filled with brass metal; that the box of metal weighed about sixty to one hundred pounds and was an unusually large one; that it was setting flat on the floor; that he bent down to pick it up without bending his knees, and there was a tight squeeze in the cage, and he didn't have room to move about; that he lifted the box about a foot up and felt a sudden, sharp pain in his right groin; that he dropped the box back on the floor for a second to get his breath and caught his right groin with his hands; that in a second or so he picked the box up and took it fifty feet to his place of work; that he had to lift the box along in an oblong fashion as he had been sitting in tight quarters; that he didn't hit or strike his side in any way with the box; that it was just a severe lift causing a strain; that he continued with his regular polishing work that afternoon; that the pain kept on increasing while he was working at the

polishing wheel; that his work is of a heavy nature at the wheel and he has to press the metal objects against the wheel to polish them; that he told the assistant foreman, Sam Rabinowitz, the same day about the occurrence, and later Mr. Gorsline, the employment manager; that he continued with his regular work until about 2 P. M. on April 22, 1940, but had increasing pain in his groin each day; that on the morning of April 22nd the pain was very severe. He denied that he told the investigator that on the morning of April 22, 1940 the pain was so severe that he went to the men's room and looked at his side, and found a lump about the size and shape of an egg. He denied that the lump was present prior to the strain which occurred at about 2 P. M. on April 22, 1940, and denied that he had said that April 22, 1940 was the first time he noticed the lump and that he thought it had been tearing down since April 8th, although these facts were incorporated in the statement. The petitioner admitted that he read the statement and signed it, but that he may have thought it was not of any importance at the time he made it (S. C., p. 62, l. 20 to p. 65, l. 30). The petitioner attributed the pain which came on following the occurrence of April 8, 1940 and continued until April 22, 1940, to the fact that on April 8, 1940 he had eaten some pickles and milk, and also because he drinks a lot of soda water and he thought he had gas pains (S. C., p. 68, ll. 10 to 30). The petitioner admitted that he had read the four pages and had written on it in his own handwriting, "I read the four pages and they are correct. Frank DiMieri", and that at the time he signed it, it was as close to the truth as possible (S. C., p. 69, ll. 20 to 40). He admitted that on April 22, 1940 at about 2 P. M. he told Mr. Gorsline he could not work any longer, and that he was sent by him to Dr. Forney who told him he had a

hernia on the right side. In explanation of this the petitioner stated that he must have left out the part where he was lifting a box (S. C., p. 70, ll. 10 to 20). He further testified that after the operation and on May 21, 1940 he attended at an informal hearing of the Workmen's Compensation Bureau and at that time he emphasized the incident of April 8, 1940 because he attributed the cause from that date, but that after he noticed the lump there he attributed the cause of the rupture to the second incident; that he didn't have much to say and that the referee told him that he had reported to the doctor too late; that the story he told at the informal hearing was that he felt the pain on the 8th and that he felt it had been caused on that day (S. C., p. 71, l. 30 to p. 72, l. 40); that later, after the informal hearing, upon reviewing the case he came to the conclusion that it was the incident of April 22, 1940 and not that of April 8th that caused the hernia (S. C., p. 73, ll. 10 to 20). He further admitted that on the morning of April 22nd before the second incident occurred, the pain in his right groin was very severe, and that he went into the men's room for the purpose of examining himself to see whether or not he had a rupture. Upon examination he found no lump there (S. C., p. 74, l. 10 to p. 75, l. 30). He admitted that at the time the statement was taken from him he did not make any mention of the alleged accident of April 22, 1940 because he may not have thought about it at the particular time and gave no importance to it at that time (S. C., p. 78, l. 30 to p. 79, l. 10).

Anthony Cullari, a fellow-employee of the petitioner below, testified that he worked alongside of the petitioner; that the employees, including the petitioner, would go to the stockroom to pick up their work in a box and carry it back to their workbenches; that on April 25, 1940 (*sic*) shortly

after lunch, he saw the petitioner go to get his work; that he watched him and as he put his work down he had to reach over four feet to set the box down; that this box was about 2½ feet long, 1½ feet wide and 10 inches deep; that to put it down he had to grab it by the end, and as he leaned over he must have lost his balance; that he dropped his work and held his side (S. C., p. 11, l. 30, to p. 12, l. 40); that he sat down and took a piece of work, but said, "It hurts too much, I can't work" (S. C., p. 13, ll. 30 to 40). The petitioner then got up from his machine and told the witness he was going to see the nurse. He left the machine and didn't come back (S. C., p. 14, ll. 20 to 30).

Eleusippe Brousseau, another fellow employe of the petitioner below, testified that on April 22, 1940 at around one o'clock he saw the petitioner holding a box; that he was reaching over and all of a sudden he dropped the box and grabbed hold of his right side. His box was filled with work, weighing fifty to fifty-five pounds (S. C., p. 19, l. 20 to p. 20, l. 40). After this incident the petitioner waited about a minute, sat down at the machine and tried to work, but stated that he was unable to work. The petitioner then got up and left his machine and did not return (S. C., p. 21, ll. 10 to 20).

Dr. Norman N. Forney, a witness for the petitioner below, testified that on April 22, 1940 he examined the petitioner about two o'clock in the afternoon, at his office. The petitioner gave him a history that *two weeks prior to April 22, 1940 while he was lifting a box he developed a pain in the right, lower groin; that while he was working on April 22nd, 1940 he developed a severe pain and at the same time he noticed a lump*. He examined the petitioner for this lump and found a large, right, incomplete hernia. He advised the petitioner to go to the hospital and the petitioner

did so, and was operated on the following day, April 23rd (S. C., p. 28, l. 10 to p. 29, l. 40). The doctor stated that he thought the hernia was one of recent origin; that in his opinion it was possible that the petitioner could have had the hernia since April 8, 1940 but that he didn't believe it. The reason he didn't believe it was because the history given by the petitioner was that he had a sharp pain and ceased work, and that the petitioner had never noticed the lump before April 22, 1940 (S. C., p. 29, l. 40 to p. 30, l. 20).

On cross examination the doctor admitted that the cause of the hernia and its descent do not necessarily have to coincide, but very often do; that the petitioner told him that two weeks prior to April 22, 1940 while he was lifting a box he developed a pain in the right, lower groin (S. C., p. 32, ll. 20 to 40). He again stated that he didn't think the first incident of April 8th had anything to do with the hernia because the petitioner did not complain of a lump at that time, and that he went on working just the same (S. C., p. 33, ll. 10 to 20). The doctor further stated that he didn't think the hernia occurred on April 8, 1940 because the petitioner did not have any pain or any lump following that occurrence; that if the petitioner had told him that he had had pain from April 8 to April 22, that would have been different, but he told him he didn't have any pain and went right on working and didn't notice the pain until April 22, 1940 (S. C., p. 41, ll. 10 to 20). He also admitted that patients come in and have herniae and have never noticed it (S. C., p. 43, ll. 30 to 40); that they have a lump that they have not noticed and never pay any attention to it; that it is possible to have a partial descent of the hernia without any lump which is observed on the outside of the body in the inguinal region, and that it very often happens (S. C., p. 44, ll. 10 to 20); that the fact that the

hernia descends demonstrates the existence of a hernia, but it doesn't show the cause (S. C., p. 45, ll. 30 to 40).

This concluded the testimony on behalf of the petitioner.

Ralph B. M. Gorsline, personnel manager for the prosecutor-appellant, testified that on April 8, 1940, the petitioner told him that he didn't feel so good and put his hand on his stomach. The witness told him to go see the nurse and the petitioner said he would if it got any worse. He did not tell this witness how he received his pain (S. C., p. 80, l. 30, to p. 81, l. 10). On April 22, 1940, after one o'clock the petitioner came to his office and stated he hurt himself, and couldn't go on working any more, but that he had a lump about the size of an egg. The witness told him to go to Dr. Forney (S. C., p. 81, l. 30, to p. 82, l. 10). He did not tell this witness that he had slipped while carrying a box. He told him that something "gave loose, here" (S. C., p. 82, ll. 10 to 30).

Addison A. Pickleseimer, an insurance investigator, testified that he interviewed the petitioner-below in the hospital on April 23, 1940, before the operation took place; that he asked him questions regarding his injury, and as he received the information he wrote it down in narrative form; that after he had written it down he gave the petitioner the four pages of the statement; that the petitioner read it and said it was correct; that he asked the petitioner to sign it and he signed each of the four pages, and on the last page he wrote in his own handwriting, "I have read it and it is true"; that everything contained in the statement were facts he obtained from the petitioner (S. C., p. 84, l. 10 to p. 85, l. 40).

This concluded the testimony of the entire case.

Neither the Workmen's Compensation Bureau nor the Common Pleas undertook to define what proof was necessary on the part of the petitioner to establish his claim within the hernia statute by *conclusive proof*. The Supreme Court, in its opinion, stated that the conclusive proof required by the statute was such that the "fact finder, after hearing the evidence in support of the claim and contrasting and weighing it with the evidence produced to rebut it, is clearly of the view that the claim has been sustained by proof that is convincing in character" (S. C., p. 140, ll. 30 to 40).

#### **Brief of the Argument.**

The reasons for reversal filed in the Supreme Court (S. C., pp. 133, 134) may readily be grouped and argued under one heading: The Supreme Court erred in finding that the defendant-appellee established by conclusive proof that his inguinal hernia was compensable within the provisions of the Workmen's Compensation Act, R. S. 34:15-12.

#### **I .**

**The Supreme Court erred in finding that the defendant-appellee established by conclusive proof that his inguinal hernia was compensable within the provisions of the Workmen's Compensation Act, R. S. 34: 15-12.**

The defendant-appellee, the petitioner below, recovered compensation in the Workmen's Compensation Bureau for a right, inguinal hernia alleged to have been sustained in the course of his employment on April 22, 1940 with the prosecutor-appellant. This judgment of the Workmen's Compensation Bureau was affirmed by the Common Pleas Court of Middlesex County and the Su-

preme Court (S. C., pp. 111 to 114, 120 to 123, 147 to 148).

The claim presented was not for a traumatic hernia resulting from the application of force directly to the abdominal wall but one alleged to have resulted from a strain.

At the outset it is necessary to come to a determination of the legislative meaning of "conclusive proof" as set forth in the hernia section of the Act. The Workmen's Compensation Bureau and the Common Pleas Court made no direct reference in their findings as to their conclusions as to the legal effect of the use of the words "conclusive proof", as recited in the statute. The Supreme Court did undertake to define the meaning of "conclusive proof", and applied its construction to the facts of the case. The findings of the Supreme Court in this respect we deem to be erroneous. The statute as it existed at the time of the occurrences herein and at the present time is as follows: R. S. 34:15-12(x):

"Inguinal hernia is a disease which ordinarily develops gradually, being very rarely the result of an accident. Where there is real traumatic hernia resulting from the application of force directly to the abdominal wall, either puncturing or tearing the wall, compensation will be allowed. All other cases will be considered as either congenital or of slow development and not compensable, being a disease rather than accidental injury; unless conclusive proof is offered that the hernia was immediately caused by such sudden effort or severe strain that, first, the descent of the hernia immediately followed the cause; second, that there was severe pain in the hernial region; third, that there was such prostration that the employe was compelled to cease work immediately; fourth, that the above facts were of such severity that the same was noticed by the claimant and communicated to

the employer within twenty-four hours after the occurrence of the hernia (days when the business is not in operation, such as Sundays, Saturdays or holidays shall be excluded from this twenty-four hour period); fifth, that there was such physical distress that the attendance of a licensed physician was required within twenty-four hours after the occurrence of the hernia."

The Supreme Court, in determining whether or not the petitioner had proved the five elements provided by statute, by conclusive proof, defined conclusive proof as used in the statute, as follows:

"We think, first, that the statute, in this class of compensation case, contemplates degree of proof. We think, further, that the statutory language should be construed to mean that the fact finder, after hearing the evidence in support of the claim and contrasting and weighing it with the evidence produced to rebut it, is clearly of the view that the claim has been sustained by proof that is convincing in character. The petitioner must prove that the hernia is the immediate result (Cf. *Borodaeff vs. Province, etc.*, 109 N. J. L. 25, aff. 110 Id. 20) of a sudden effort or strain and the proof of the five requirements must be such as will reasonably negative the inference or conclusion that it was congenital or of slow development or caused by disease rather than an untoward incident. (Compare *Borodaeff vs. Province, etc. supra*; *McBride, etc. vs. Kuehn*, 11 N. J. Misc. 764; 168 Atl. Rep. 64; *Sussick v. Glen Alden Coal Co. etc.* (a Pennsylvania case), 165 Atl. Re. 658). Consequently it matters not whether the conclusive proof required by the statute is challenged or not—that it be contradicted or not—so long as it leaves the mind of the fact finder convinced that the hernia resulted not from disease or congenital weakness but immediately from sudden strain or effort in the course of the employment. So the qualifying

word 'conclusive', as used in the statute, *supra*, is not to be regarded in a sense that imports to it a quality that will not tolerate challenge or contradiction; but rather in its ordinary sense that the proof is convincing and such that it justifies a conclusion that the statutory requirements of such case were proved. A rigid, inflexible construction of the phrase would require a norm or quality of proof, the equivalent of moral certitude. Such construction we cannot reconcile with the development of the law of evidence on the civil side in this state or elsewhere. The construction we have placed upon the legislative expression, we think, is in accord with the legislative intention." (S. C., p. 140, l. 30 to p. 141, l. 30).

The Supreme Court in effect has held that the petitioner must establish the five points by the greater weight or the preponderance of the evidence and has held in effect that the burden is no greater than that required in a civil action in this State.

This Court, in *Miller v. New Amsterdam Casualty Company*, 94 N. J. L., at page 511, through Mr. Justice Minturn, in defining "preponderance of evidence", said:

"We may add that it is this preponderance of the aggregate probabilities juridically termed 'the weight of the evidence' which furnishes the legal standard of proof in civil causes, as contradistinguished from the rigid rule applicable in the trial of criminal causes, based on circumstantial evidence, which requires as a basis for conviction the elimination of every other reasonable hypothesis which could afford a rational explanation for the commission of the crime."

A recent, lucid definition of "preponderance of evidence" is found in *Sargent v. Massachusetts*

*Accident Co.*, (Sup. Jud. Ct. of Mass.) 29 N. E. (2d) 825, in which the Court said:

“The weight or ‘preponderance of evidence’ is its power to convince a tribunal which has the determination of the fact of the actual truth of proposition to be proved, and after evidence has been weighed, that proposition is proved by a ‘preponderance of evidence’ if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from evidence, exists in mind of tribunal, notwithstanding any doubts that may still linger there.”

In *Roberg v. Bonner*, 77 N. E. 1023, 185 N. Y. 265, it was held that proof may be required to be clear and convincing without transcending the rule of preponderance, but the word “conclusive” has a larger meaning and when used in connection with the evidence required to prove a given fact, calls for a much higher degree of proof than has ever been held to be necessary in civil actions.

A brief review of the history of this legislation will indicate clearly that it was not the intention of the legislature to permit the employe to recover under the statute by establishing his case by the greater weight of the evidence, but that it was the purpose of the legislature to require the employe to establish his claim conclusively and to require the proof to be the equivalent of moral certitude. The original Workmen’s Compensation Act as passed in 1911 did not have any specific provision relating to injuries as a result of hernia. If an employe sustained an accident arising out of and in the course of his employment which resulted in hernia, he could recover compensation from his employer if he established his case to the satisfaction of the Workmen’s Compensation Bureau by the greater weight of the evidence.

*Stoffa v. Empire Steel & Iron Co.*, 39 N. J. L. J. 175;  
*Peer v. Lehigh Valley R. Co.*, 39 N. J. L. J. 242;  
*Ervey v. Dickisson*, 40 N. J. L. J. 275;  
*O'Connell v. D. V. G. Mfg. Co.*, 41 N. J. L. J. 207.

The hernia provision of the statute was incorporated into the Act, P. L. 1919, ch. 93, pp. 201 to 214, and repeated in the Laws of 1923 and 1928, and appears now as R. S. 34:15-12, section (x). The only change made in the language of the hernia provision since its incorporation in the Act, was in the Revision of 1937 when the word "hernia" was modified to "inguinal hernia". It will, therefore, be seen that the original Act, without the hernia provision, was in force for eight years before the legislature made this drastic change in the Act. The purpose of the legislature certainly limited to a great extent the right of an employe to recover for hernia of this kind unless the employe could conclusively prove the five points. The legislature up to the present time has not seen fit to change the degree of proof required of the petitioner in establishing his case.

This Court has held in *Furferi v. Pennsylvania Railroad Co.*, 117 N. J. L., at page 516, that while the compensation Act generally is to be liberally construed, to effectuate the general legislative policy, the hernia provision is a special one in the nature of an exception and is to be strictly construed; and that an employe must establish his case within the precise letter of the statute or be excluded:

"It is the settled rule in this state, in aid of interpretation, that the Compensation act, grounded as it is in social and economic considerations, is to be liberally construed to ef-

fectuate the general legislative policy, *Sigley v. Marathon Razor Blade Co.*, 111 N. J. L. 25; *Hercules Powder Co. v. Nieratko*, 113 *Id.* 195, affirmed 114 *Id.* 254. The special provision relating to herniae is in the nature of an exception, and, by the same token, is to be strictly construed. A case not within its precise letter is to be excluded."

The effect of the statute is to create a legal presumption in a hernia case of this kind that the hernia is either congenital or of slow development and not compensable, being a disease rather than accidental injury unless conclusive proof is offered establishing the five points set forth therein.

This was so recognized by this Court in *Prino v. Austin Company*, 121 N. J. L. 518. That was a hernia case in which this Court reversed the Supreme Court in awarding compensation for an inguinal hernia. The Supreme Court in its opinion held that, "The criteria of a compensable accidental injury are, first, was the employment one of the contributing causes without which the accident would not have happened; and, second, was the accident one of the contributing causes without which the injury would not have been sustained. In appraising the evidence, probability and not certainty is the touchstone." This Court held that that was error.

In paragraph 2 of the syllabus in that case, this Court held:

"2. Proof cannot properly be held conclusive if the evidence is fairly in dispute on any material point."

The Supreme Court in its opinion in the case at bar held that the syllabus is broader than the opinion, itself, and refused to follow it. Whether this be so or not, the statement as set forth in the syllabus cannot with reason be attacked as inaccurate because it would be impossible to concede

proof as being conclusive if the evidence is fairly in dispute on the material issues.

The legislature, when it changed the hernia provision, obviously did not intend that the degree of proof should remain the same as it was prior to the passage of the amendment, and if it is so held then the legislative mandate is defeated and serves no purpose.

Other judicial definitions of the phrase "conclusive proof" are:

In *Corpus Juris* 23, page 8, "conclusive evidence" has been defined as "evidence incontrovertible—'either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary'. It has also been defined as such evidence as, being uncontradicted, controls the decision".

In *Jackson County v. Meaut* (Miss.), 179 So. 343, the Court held that where a statute gave a right of action for death of livestock in dipping for cattle tick eradication, and required the plaintiff to make out his case by conclusive proof, refusal of instruction that plaintiff was required to prove his case beyond a reasonable doubt was erroneous, "conclusive proof" being equivalent to proof of a moral certainty or beyond a reasonable doubt.

"Conclusive evidence" means evidence that is incontrovertible. *Wood v. Chapman*, 13 N. Y. 509, 67 Amer. Dec. 62.

"Conclusive evidence" means either a presumption of law or else evidence so strong as to overbear all other evidence in the case to the contrary. *Haupt v. Pohlmann*, 24 N. Y. Super. 121.

"Conclusive evidence" is such evidence as being uncontradicted controls the decision. *State ex rel. Railroad and Warehouse Commissioners v. Minneapolis & St. L. R. Co.*, 79 N. W. 510, 76 Minn. 469.

“Conclusive evidence” is that which is incontrovertible; that is to say, either not open or not able to be questioned, as, where it is said that a thing is conclusively proved, it means that such result follows from the facts shown as the only one possible; the term “conclusive proof” meaning either a presumption of law or evidence so strong as to overbear everything to the contrary. *Thompson Lumber Co. v. Interstate Commerce Commission*, 193 Fed. 682.

When one considers that the legislature has stated as the law of this state that inguinal herniae other than those of traumatic origin resulting from the application of force directly to the abdominal wall will be considered as either congenital or of slow development and not compensable, being a disease rather than accidental injury, unless conclusive proof is offered of the five points enumerated herein, the only reasonable conclusion that follows is that it was the intention of the legislature to require a degree of proof that would establish without doubt or question, within a moral certitude that the hernia was one caused by sudden effort or severe strain and not one of congenital or slow development.

It is extremely important that this Court definitely determine the effect to be given to the language of this statute as to conclusive proof, so that there may be some uniformity among the courts on the degree of proof to be required of a petitioner to establish his claim within the statute. There is not any material distinction between the finding of the Supreme Court in the case at bar and that of the Supreme Court in *Prino v. Austin*, *supra*, which this Court refused to follow. We, therefore, urge that the Supreme Court was in error in defining conclusive proof and fell into error in examining the facts in the light of the definition of “conclusive proof” as adopted by it.

We respectfully urge that this Court should review the facts for the reason that the legal principle of "conclusive proof" as enunciated by the Supreme Court is erroneous and because an examination of the facts will show clearly that the Supreme Court judgment is not supported by substantial testimony. It is not enough that a workman sustains a hernia arising out of and in the course of his employment, but it must also be established by conclusive proof that each of the said five conditions occurred. *Huber v. Modern Central Silk Dyeing & Finishing Co.*, 122 N. J. L. 186 (Sup. Ct.).

*The evidence produced by petitioner failed to conclusively prove that the right inguinal hernia sustained by him was immediately caused by such sudden effort or severe strain as required by the statute in such case provided, R. S. 34:15-12(x), and particularly in that: (a) the descent of the hernia did not immediately follow the cause; (b) there was not severe pain in the hernial region; (c) there was not such prostration that the petitioner-defendant was compelled to cease work immediately; and (d) that there was not such physical distress that the attendance of a licensed physician was required within twenty-four hours after the occurrence of the hernia.*

The petitioner in this case on his direct testimony attempted to establish the five points requisite to recover within the statute. His testimony, however, was materially disputed by a statement read, signed and understood by him after the alleged happening and by testimony on cross-examination at the Workmen's Compensation hearing. It must be kept in mind that in this case there were two occurrences or alleged happenings; one occurring on April 8, 1940 and the other on April 22, 1940 at about 1 or 2 P. M. The petitioner's whole claim is grounded on the occurrence of April 22, 1940.

On direct examination the petitioner testified that on April 8, 1940 he was lifting a box in a cage where he received his work. This box contained metal parts which he used in his work as a polisher. He felt a pain below the belt somewhere around the abdomen. He did not lose any time from work as a result of this occurrence. On April 22, 1940 he was lifting a similar box in a cage where he received his work. He picked it up and walked about sixty feet to his workbench and in reaching from one bench to the other to let his work down, his foot slipped, he dropped the box and he experienced a tearing of the tissues of the groin and he felt prostrate right away. He held his side for a minute and then attempted to perform some work but was unable to do so. He went into the men's room and examined himself, and found a ball hanging down below the groin about the size of an egg that had never been there before. He then reported it to the assistant foreman and later to the superior of his department, Mr. Gorsline, who sent him to Dr. Forney. Dr. Forney advised him he would have to be operated and sent him to the hospital that night, and he was operated on the following day (S. C., p. 47, l. 10 to p. 52, l. 30). The box lifted on each occasion weighed about forty-five or fifty pounds (S. C., p. 55, ll. 10 to 20).

One cross examination he admitted that before the operation and while in the hospital he had signed a statement for an insurance investigator. The statement was marked in evidence (S. C., pp. 107 to 110). He was examined on this statement and admitted the correctness of everything contained in the statement except that he found a lump in his right groin prior to the alleged accident of April 22nd. In detail, he admitted as true the following facts, which are contained in the statement: that on Monday, April 8th, at about 2

P. M., he had to go over to the cage to get a box of work filled with brass metal. This box weighed about sixty to one hundred pounds and was an unusually large box. It was setting flat on the floor and he bent or stooped down to pick it up without bending his knees; that it was a tight squeeze in the cage and he didn't have room to move about much. Just as he lifted the box about a foot he felt a sudden sharp pain in his right groin and dropped the box back on the floor for a second to get a breath. He caught his right groin with his hands. Then in a second or so he picked the box up and took it fifty feet to his place of work. He didn't hit or strike his side in any way with the box. It was the severe lifting causing the strain. He continued with his regular work that afternoon. The pain kept on increasing as he was working on his polishing wheel. His work is of a heavy nature and he has to press heavy objects against the wheel to polish them. The foreman was not about so he told the assistant foreman, Rabinowitz, on the same day, and later he told Mr. Gorsline, the employment manager, about an hour after he hurt himself. He continued working until about 2 P. M. on April 22nd, and up to that time he had increasing pain each day. Although the statement signed and read by the petitioner sets forth that on the morning of April 22, 1940 the pain in his right groin was so severe that he went to the men's room and examined his right groin and found a lump there about the shape of an egg, he denied that he had made this statement to the insurance investigator. And although the statement recited that "April 22, 1940 was the first time I noticed a lump. I think it had been tearing down since April 8", he denied that he made this statement to the investigator. If the lump appeared as set forth in the statement, on the morning of April 22, 1940, then

the descent of the hernia had occurred prior to the accident of April 22, 1940 which is alleged to have occurred at about 2 P. M. He admitted that he read the statement but said that he may have thought it was not of any importance at the time he signed it (S. C., p. 62, l. 20 to p. 65, l. 30). He further testified that on April 22nd he told Mr. Gorsline about having injured himself when he lifted a box (S. C., p. 67, ll. 10 to 30).

He also testified as follows:

“Q. By the way, I call your attention to the last page of this statement that says right above your signature, ‘I read the four pages and they are correct. Frank DiMieri.’ Is that in your handwriting? A. It is.

Q. And that is the truth, isn’t it; I mean as you conceived it at the time? A. Well, at the time I thought it was as close to the truth as possible.

Q. And on page three it continues, where I left off before, ‘I am positive that the lifting act on April 8th caused my trouble,’ and you were positive at that time? A. That was only my opinion.

Q. I mean, that is what you thought at the time or you wouldn’t have said it, isn’t that so? A. That is what I thought” (S. C., p. 69, ll. 20 to 40).

He further testified that several weeks after the operation, on May 21, 1940 he appeared at the Workmen’s Compensation Bureau in New Brunswick at an informal hearing of his claim; that at that time he thought the hernia had been caused by the occurrence of April 8th. He testified as follows:

“Q. Well, at the time of the informal hearing you attributed it back to the 8th, didn’t you? A. Well, at the time of the informal hearing I didn’t have much to say. All the Referee had told me, or the Judge had told me, that April 8th that I had reported to the

doctor too late and you had emphasized the fact that I was ruptured on April 8th, which I wasn't, I was ruptured on April 22nd.

Q. (Continuing)—the testimony that you gave was that you had been caused, you felt this pain on the 8th and that is when you felt it had been caused? A. Well, I thought it had been.

Q. Well, I mean that is what you felt at that time? A. It is what I felt at that time; yes, sir.

Q. Well, wasn't it as a result of the informal hearing that you changed your mind about the connection of the incident of April 8th with your subsequent hernia? A. No, sir.

Q. Well, at that time you did feel it was connected and you so testified, we are agreed upon that, are we not? A. Well, I thought it did at that time.

Q. And that sometime subsequently you changed your opinion? A. Well, I come down to the conclusion, upon reviewing the case, that it was not on April 8th, it was April 22nd" (S. C., p. 71, l. 10 to p. 73, l. 20).

He further admitted that on the morning of April 22nd, the pain was very severe but there was no lump protruding; that on the morning of April 22nd prior to the alleged accident of that day, he went into the men's room and looked at his groin. He testified as follows:

"Q. Well, all right, it wasn't. Anyhow, you did go into the men's room and you did look at your groin? A. I didn't have cause to examine myself that morning but I did go into the men's room in the course of nature and upon dressing myself I noticed—I didn't notice anything peculiar—but after the accident, after I did examine myself after this accident, I noticed a lump there.

Q. Did you go into the men's room on the morning of April 22nd because the pain, as you say, was severe that morning? A. Well, I did in a way to see if there was anything

wrong, if that there pain was caused by a rupture, and upon examination I didn't see anything there.

Q. You mean, you were thinking of the possibility of rupture at the time? A. After all, when a man gets pain like that he can be thinking of a lot of things.

Q. You mean to indicate the pain was quite severe? A. Well, I thought the pain could cause a rupture at the time but upon examination I noticed no lump.

Q. And you mean, as I understand it, that you did particularly examine yourself? A. I wouldn't say particularly but innocently I went to see if there was a lump there.

Q. Well, innocently or otherwise or particularly or not, in any event you did go into the men's room and for whatever reason or whatever motives you might have had, the fact is that you did look to see if you had any rupture in your right groin where you were having this severe pain? A. Well, I never had a rupture before so I don't really know the symptoms, but I did look for something that I thought that shouldn't be there from my standpoint and I didn't see anything at all.

Q. You didn't see anything at all? A. No, sir" (S. C., p. 74, l. 20, to p. 75, l. 30).

On re-cross examination he admitted that all of the statement was true except that portion which sets forth that he found a lump in his groin before the accident on April 22nd (S. C., p. 77, l. 40, to p. 78, l. 10). He further testified that he may not have told Mr. Pickleseimer, the insurance investigator, about the lifting of a box on April 22nd; that if he would have thought it was so important he would have mentioned it (S. C., p. 78, l. 40, to p. 79, l. 20).

The petitioner's entire case must stand or fall on the proof offered by him, as testimony of his physician as to the origin of the hernia is based primarily on the history given him by the peti-

tioner (S. C., p. 30, ll. 10 to 20). The two fellow-employees produced by the petitioner testified only to the occurrence of the second accident alleged to have occurred on April 22nd. They, of course, had no knowledge of the petitioner's condition at that time, as to whether or not he had a hernia, nor did they know anything of the occurrence of April 8th.

The Supreme Court in its opinion conceded that the statement made by the petitioner to the insurance investigator was very damaging to the petitioner's present testimony if full faith and credit were given to it as a voluntary, uninspired statement of the petitioner. The Supreme Court refused to accept it as such because "it possesses evidence of its own shortcomings for full faith and credit." However, the petitioner, himself, on cross examination, admitted the truth of all the statements contained therein except that he denied that he had stated that the lump in his groin was present on April 22nd in the morning before he had the accident around 2 P. M. The petitioner does not deny that he was in full possession of his faculties at the time he signed the statement, that he read it and that he signed each page of it; that he wrote on the last page in his own handwriting that he had read it. He admits that when he went to the informal hearing in May after the operation, that he was under the impression that he thought at that time that the occurrence of April 8th had caused his hernia and he was told by the Referee or Judge at the informal hearing that he was two weeks too late in reporting to the doctor.

The petitioner knew as much about his condition before the operation when he signed the statement, and in May of 1940 when he appeared before the Workmen's Compensation Bureau at an informal hearing as he did when the case came

to trial in the Bureau. If any credence is to be given to his testimony in the Bureau, how can it be reconciled with his signed statement and his position before the Bureau at an informal hearing when he had full possession of all the facts regarding his injury. It would be incredible to believe that if he had told the Referee at the informal hearing that he had no lump in his groin prior to the accident of April 22nd and that as a result of the strain on that occasion he immediately had a lump and went to the doctor and was operated on, that the Referee would have told him that he reported to the doctor two weeks too late.

In addition thereto, there is other testimony of the petitioner that destroys all belief in it. He attempts to claim that the pain following the occurrence of April 8th was the result of pickles and milk he had for lunch (S. C., p. 48, ll. 20 to 30). His own testimony is to the effect that the pain increased from April 8th to April 22nd, and that it got so severe on the morning of April 22nd before the alleged accident on that day, that he went to the men's room for the purpose of examining his groin because of the severe pain, to see whether or not he had a hernia at that time; and on cross examination, when asked why if the pain on April 8th came while he was lifting a box he referred to the cause as pickles and milk, he answered that he suffers those pains because he drinks a lot of soda water and when he stopped drinking soda water he did not experience gas pains; that he attributed that pain that he had on April 8 and thereafter to soda water (S. C., p. 68, ll. 10 to 30).

When the petitioner went to Dr. Forney on April 22nd, immediately after the alleged occurrence, he gave him the following history:

“Q. What did the examination consist of and what were your findings? A. Well, the

patient's history—the history was that two weeks ago while he was lifting a box, he developed a pain in the right lower groin. While he was working today he developed a severe pain and at the same time he noticed a lump. I examined him for this lump and when I examined him he had a right incomplete hernia, incarcerated, that is, it was down” (S. C., p. 28, l. 30, to p. 29, l. 10).

Although the petitioner claims that he had no hernia prior to the alleged accident of April 22, 1940 and that he had continuous pain which became more severe from April 8th following that occurrence until April 22nd—so severe that he went to the men's room to find out whether he had a hernia—and which he also attributed to pickles and milk on one occasion and to soda water on another occasion, when he visited his physician within an hour after the alleged occurrence of the hernia he never mentioned to him anything regarding the accident while lifting a box on April 22, 1940. He mentioned only the first accident of April 8, 1940 and stated that while he was working on April 22nd he developed a severe pain and at the same time he noticed a lump.

The doctor testified that he thought the hernia was one of recent origin, and when asked whether or not that hernia could have been there for two weeks he said it was possible but he did not believe it; and that was his opinion because the history was that the petitioner had a very sharp pain and ceased work and came to see him immediately, and he said that he had never noticed the lump before (S. C., p. 29, l. 30, to p. 30, l. 20).

Doctor Forney operated on the petitioner on April 23, 1940. The doctor further testified that it was not necessary that the cause of the hernia and the descent be coincidental, but that it very often is (S. C., p. 32, ll. 10 to 30). The petitioner's

physician who performed the operation had no recollection of whether or not the hernia was a direct or indirect one (S. C., p. 35, ll. 10 to 20). The doctor's testimony as to the origin of the hernia is practically destroyed when he was compelled to assume the true facts as testified to by the petitioner himself, as follows:

“Q. Doctor, assuming that the evidence of the facts was that on April 8th the petitioner, the patient, was lifting a box of work from the floor and suffered a severe pain in his right groin, and assuming that that pain continued intermittently during the period of from April 8th to April 22nd, and became worse over that period of time, would that in any way affect your opinion? A. Yes, but it didn't, because he said he had no pain from April 8th until that afternoon, when he developed a severe pain and noticed the lump. If he had told me he had pain from April 8th until the 22nd, that would have been different, but he said he didn't have any pain. He went right on working just the same, and he didn't notice the pain again until April 22nd” (S. C., p. 41, ll. 1 to 20).

The doctor also admitted that a descent of a hernia may occur without being noticed by the patient. He stated that patients come in and have herniae of which they have no knowledge (S. C., p. 43, ll. 30 to 40), and that it is possible to have a partial descent of a hernia without any lump observable to the layman on the outside of the body in the inguinal region, and that it very often happens, and a person doesn't always notice the lump (S. C., p. 44, l. 10).

It will be seen from this witness' testimony that although he was the operating surgeon, no claim was made that he found any tissue torn and there was no testimony as to whether it was a direct or indirect hernia, or the condition found when

he operated. When a hernia is of recent origin the operating surgeon can usually find evidence of it at the time of the operation (See *Prino v. Austin*, 120 N. J. L., at p. 22). The petitioner's physician did not testify that the hernia was caused by a strain arising out of the work of the petitioner. He testified, partially on an assumption of facts contrary to the testimony of the petitioner, himself, that he thought the hernia was of recent origin, and that it came on April 22nd because the petitioner told him that he had had no pain from April 8th until April 22nd and he noticed the lump for the first time on that day. The petitioner, himself, has admitted that he did have increasing pain from April 8th to April 22nd.

Two other witnesses were produced by the petitioner: Anthony Cullari and Eleusippe Brousseau. Anthony Cullari worked alongside of the petitioner. He testified that on April 25, 1940 (sic.), he saw the petitioner carrying a box of metal; that as he leaned over to put the box down on the bench he lost his balance and fell; that he said he had a sharp pain (S. C., p. 11, l. 30 to p. 13, l. 20); that he held his hand to his right side and turned white (S. C., p. 14, l. 10); that the petitioner then left and did not return (S. C., p. 14, ll. 20 to 30).

Eleusippe Brousseau, the other fellow-employee, testified that on April 22, 1940 at about one o'clock he saw the petitioner carrying a box and that he was reaching over; that all of a sudden he dropped the box and grabbed hold of his right side (S. C., p. 19, l. 20 to p. 20, l. 20); that the petitioner sat down and did not do any more work; that he then left and did not return to his machine (S. C., p. 22, ll. 30 to 40).

Neither of these witnesses, of course, knew what the petitioner's condition was regarding the descent of the hernia prior to the occurrence

to which they testified, nor did they testify to anything regarding the occurrence of April 8th.

This concluded the testimony on the part of the petitioner.

On behalf of the prosecutor-appellant, Ralph B. M. Gorsline, personnel manager, testified that on or about April 8th the petitioner told him that he didn't feel so good and put his hand down indicating his stomach; that he told him that he should make a report of it if he hurt himself in any way, and see the nurse. The petitioner did not tell this witness how he got his pain. The next day he saw the petitioner and asked if he made a report about it, and he said no it was not necessary because he was feeling all right that morning. On April 22, 1940 the petitioner came to his office at about one o'clock and said he had hurt himself, that he could not go on working any more. When he asked the petitioner what he did he said he got a lump about the size of an egg. He then told the petitioner to go to Dr. Forney (S. C., p. 80, l. 20, to p. 82, l. 10). The petitioner did not tell him that he had slipped while carrying a box. He told him that "something came loose, here" (indicating) (S. C., p. 82, l. 20).

On cross-examination he testified that the petitioner told him "I just felt something give way and I cannot go on" (S. C., p. 83, l. 30).

Addison A. Pickleseimer, the insurance investigator, testified that he interviewed the petitioner in the hospital; that he was rational and intelligent on April 23, 1940; that he asked him questions and discussed the occurrence of the accident with him, and reduced it to writing in narrative form; that after he had completed the writing of the statement on four pages he gave it to the petitioner and asked him to read it. He did so and said it was correct and the witness asked him to sign it. He signed his name on each of the

four pages, and on the last page in his own handwriting the petitioner wrote "I have read it and it is true" (S. C., p. 84, l. 10 to p 85, l. 20).

On cross-examination this witness testified that he asked the petitioner whether he had any other lift or trouble that could have caused the hernia. He said no, he had not, and that he was satisfied that the one on April 8th had caused it; that the pain had been increasingly severe and he was satisfied that the groin had been tearing down ever since (S. C., p. 88, ll. 20 to 30); that he never heard of any claim being made by the petitioner of an accident on April 22nd until the claim petition was filed (S. C., p. 89, l. 30), that he did not interview any witnesses because he was told by the petitioner that there were no witnesses to the accident of April 8, 1940 (S. C., p. 89, l. 40 to p. 90, l. 10).

The petitioner's claim is grounded entirely on an unusual strain, occurring at or about 2 P. M. on April 22, 1940, as the cause of the hernia. If the hernia was present as the result of the accident of April 8, 1940 or came on as a result of that and other normal physical exertion, then the petitioner's claim is defeated. All of this would have happened prior to the accident of April 22, 1940. There is no claim presented for an aggravation of an existing hernia.

In *Prino v. Austin, supra*, the point in dispute of the five points was whether or not the petitioner was so prostrated as to be compelled to cease work immediately. The petitioner, himself, testified that he did cease work immediately. The Supreme Court in its opinion (120 N. J. L. at page 21) refers to this testimony as follows:

"The employer frankly concedes that the employe, by his own testimony, has made out a 'prima facie' case of a compensable inguinal hernia resulting from 'sudden

effort or severe strain'. But the insistence is that the weight of the evidence is to the contrary. It is said that, while his own testimony shows the existence of the five statutory prerequisites, his 'story of an alleged accident or strain \* \* \* is not true', and he has in this regard failed to sustain the burden of proof. We do not yield the argument so made."

In this Court it was pointed out that the petitioner did testify on direct examination that he did cease work immediately, but on cross-examination he said he concluded the job with the other three men at the end of the day, and later that there were fifteen more minutes when he stayed on his feet and when they stopped, he stopped. His testimony was somewhat uncertain because he claimed ignorance of English. Fellow workmen of the petitioner in that case testified that they did not see him complain or double up, but that he kept on working as the rest of them did until the work was completed. This court held, in reversing the Supreme Court that there was not conclusive proof of a prostration that caused an immediate cessation of work.

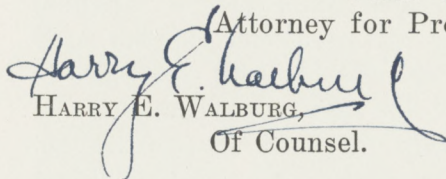
The facts in this case are of less substance and weight than those established in *Prino v. Austin, supra*. The petitioner is contradicted by his own statement, by his statement before the Referee at the informal hearing of the Workmen's Compensation Bureau, by the unusual fact that he didn't mention to his attending physician any accident or unusual strain occurring on April 22nd; by his attempt to attribute his pain from April 8th to April 22nd to pickles and milk and later to soda water, contrary to the facts of his statement which he admits are true; that he had pain from the strain of April 8th which became more severe day by day, and which caused him,

on April 22nd before the accident, to examine himself to see if he had a hernia. He is contradicted by Mr. Gorsline who denies that the petitioner told him at any time that he injured himself by lifting a box. This testimony falls far short of establishing by *conclusive proof* the five points required by the statute, nor has it been established by medical evidence that any strain arising out of the employment of April 22nd caused the hernia.

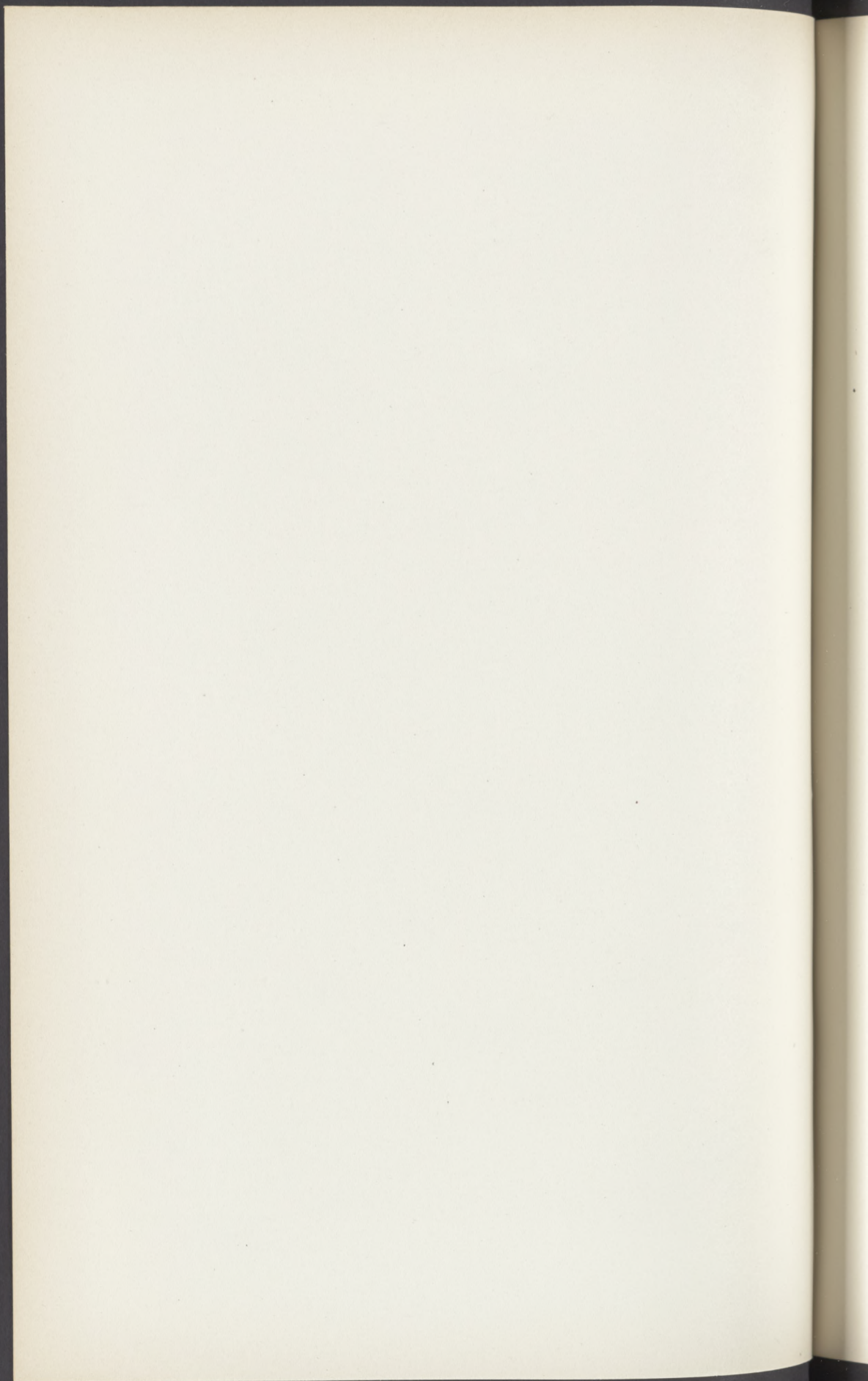
**We, therefore, respectfully submit that the judgment of the Supreme Court should be reversed and judgment entered in favor of the prosecutor-appellant and against the defendant-appellee.**

JOHN W. TAYLOR,

Attorney for Prosecutor-Appellant.

  
HARRY E. WALBURG,  
Of Counsel.







THE STATE OF NEW YORK

IN SENATE

JANUARY 18, 1894

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR 1893

ALBANY:

ANDREW DEWEY, STATE PRINTER

1894

1894

1894

1894

1894

1894

1894

OCT. T. 1941

**New Jersey Court of Errors and Appeals**

FRANK DIMIERI,  
Defendant-Appellee,

*vs.*

METAFIELD, INC.,  
Prosecutor-Appellant.

On Appeal from  
the Supreme  
Court.

**BRIEF OF DEFENDANT-APPELLEE.****Statement of Facts.**

This case involves an award of \$140 to an injured workman, Frank DiMieri, plus medical and legal fees, and costs, made by the Workmen's Compensation Bureau, which award was affirmed by both the Middlesex County Court of Common Pleas and the New Jersey Supreme Court, for a right inguinal hernia sustained on April 22, 1940.

Chief Justice Brogan, speaking for the Supreme Court, found the facts as follows:

"The petitioner testified that on the afternoon of April 22, 1940, he was carrying a box which contained metal pieces. He had got the box from the 'cage' where the unfinished work in the plant was kept, walked about sixty feet to his work bench 'and in reaching from one bench to the other to lay my work down my foot slipped out and I dropped the box and I experienced a tearing of the tissue down in the groin?' He said that he was prostrated; that he had severe pain; that he tried to work but could not and that he immediately examined the affected part and discovered the hernial lump. He reported the matter to

his superiors—first, the assistant foreman, and then the general manager, and was sent by the latter to Dr. Forney who advised an operation which was done the following day.” (Case, p. 141, l. 31, *et seq.*)

Frank DiMieri, the petitioner below, testified that on April 8th while lifting a box of metal he “experienced a slight pain below the belt.” He continued working and did not consult a physician. He had eaten pickles and milk that day for lunch which did not seem to agree with him.

Two weeks later, that is on April 22nd, he walked from the stock room some 60 feet to his work bench, carrying a heavy box of metal. “In reaching from one bench to the other to lay my work down my foot slipped out and I dropped the box and I experienced a tearing of the tissues down in the groin” (Case, p. 49).

It was on the right side. “I felt prostrate right away. I felt nauseous and I dropped the box and I couldn’t do anything and I held my side there for fully a minute and a half.”

The accident happened around 1 P. M. shortly after lunch.

Petitioner testified “I couldn’t do a thing.” After a full minute and a half he attempted to work, but was unable to do so. “Then I went into the men’s room and examined myself and—I seen a ball hanging down below the groin. It was about the size of an egg. It had never been there before.” He reported the matter immediately and the foreman told him to see Dr. Forney. He went to Dr. Forney immediately. It was then about 1:15. The doctor was not in but about half an hour later he was examined by Dr. Forney who advised an operation. He arrived at St. Peter’s Hospital about six o’clock the same day.

Petitioner testified that the floor was quite slippery on the day of the accident which was a Monday. The machines were greased on Saturday and oil from the overhead machinery dropped to the floor where it mixed with the lime used in the polishing of the metal.

Anthony Cullari, called on behalf of petitioner, testified that he worked right along side of petitioner and that he was an actual eye witness to the accident. He testified "that petitioner carried a box two and a half feet long by one and one-half feet wide and maybe ten inches deep filled with some 450 pieces of metal used for ladies vanity cases". Petitioner was a polisher and his duties required him to bring the pieces of metal from the stock room in boxes to his work bench where he polished them. This witness testified that "petitioner had to reach over four feet to set the box down. To put it down he had to grab it by the end and as he leaned over he must have lost his balance and he dropped his work and held his side" (Case, pp. 12-13).

This witness testified that he asked "What is the matter, Frank," and he said "I just got a sharp pain." He sat down and took a piece and tried to work but could not, saying "it hurts too much, I can't work." "He didn't faint, but he turned white. He looked like he was sick" (Case, p. 14).

This witness testified further that petitioner carried the heavy box from the stock room to his work bench and "then he has to turn the box around and reach over and set it down, and as he reached over something happened with him that made me notice" (Case, p. 15).

Another fellow worker, Eleusippe Brousseau, was also an eye witness. He testified that he

worked about seven feet from petitioner. "I seen Frank; he had a box, he was reaching over and all of a sudden he dropped that box, and he grabbed hold of his side" (Case, p. 20).

The box was 2 feet long, about 10 inches wide and 6 inches deep and weighed 50 to 55 pounds.

This witness also testified: "Well, he was reaching, he was almost on top of the other box where he was going to put it, and all of a sudden the box dropped, and he grabbed hold of his side, and his face got white as a sheet" (Case, p. 21).

"He waited a minute or so and he sat down on the machine" but he was unable to work (Case, p. 21).

This witness further testified that "he had to stretch two feet" and immediately following the accident petitioner with "both his hands held his groin and his face got white."

Dr. Norman N. Forney, who treated petitioner, testified that he was a practicing physician for thirty-three years. It is to be noted that this physician was the doctor selected by the employer for the treatment of Mr. DiMieri, so that in a large degree he was testifying against his own interest.

Dr. Forney testified that he examined petitioner about 2 P. M. on April 22nd, 1940 and found "he had a right incomplete hernia, incarcerated, that is, it was down." "It was incarcerated. That means it was down and I had difficulty to put it back. He was in pain and I told him that the only thing he could do was to go to the hospital and have it operated on, so he went in the hospital and the following day I operated on him, on the 23rd of April" (Case, p. 29).

This witness testified further:

“Q. Was it an old hernia or of recent origin? A. I think it was of recent origin.”

Dr. Forney said that while it was possible he may have had it since April 8th but

“I don’t believe he did” (Case, pp. 29 and 30).

“A. In my opinion he had it that afternoon, because the history was that he had a very sharp pain, and he ceased work and came to see me immediately, and he said he had never noticed the lump before” (Case, p. 30).

Counsel for petitioner asked Dr. Forney whether, from the physical examination which he made of petitioner, he could say that the hernia occurred on April 22nd and Dr. Forney, answered “Yes”.

“Q. And from your physical examination, would it seem to be true, doctor, if you can tell? A. Yes, I would think that would be so, that he had it on that day.

Q. You are basing it on the physical findings, too, as well as on what he told you? A. Yes” (Case, p. 30).

The treating physician, the doctor selected by the employer, clearly testified that from his physical findings of the injured workman, the hernia occurred on April 22nd.

Counsel now argues at great length that Dr. Forney’s opinion was erroneous because based on a false history of the case. But this argument overlooks entirely that, apart from any history of the case, the physical findings or objective symptoms, were basis for Dr. Forney’s professional opinion that the hernia occurred on April 22nd and not at an earlier date.

Counsel for the employer never cross examined Dr. Forney on this important aspect of the case and the case is absolutely barren of any testimony whatsoever that contradicts Dr. Forney or that tends to disprove that the objective symptoms observed by Dr. Forney on the afternoon of April 22nd did disclose that the hernia occurred the same day.

Dr. Forney continued:

“He couldn’t work, that is all. He was in severe pain. I think it had to be operated on immediately” (Case, p. 31).

On cross examination Dr. Forney further testified:

“The direct cause of a hernia is some injury, usually lifting or straining. The indirect cause of a hernia is the weakness of the muscles” (Case, p. 32).

It was his professional opinion that petitioner had not suffered a hernia two weeks before April 22 because

“he went on working just the same \* \* \*  
When I saw him he wasn’t able to work”  
(Case, p. 33).

“You don’t have a hernia unless you see a lump. You might have weakness of the ring; he had probably a weakness, which is a predisposing factor” (Case, p. 34).

“\* \* \* the predisposing factor is usually some weakness of the muscles or of the ring; that is the predisposing factor, but you might have that and I might have that and we not know it” (Case, p. 36).

After further cross examination, Dr. Forney, referring to the incident of April 8th, said:

“Well, I would sooner believe that he may have strained the muscles at that time, but the hernia didn't come down at that time” (Case, p. 39).

The argument of the prosecutor-appellant that the injured workman did not sustain a hernia on April 22nd completely overlooks the following:

1. The sworn testimony of the petitioner that on April 22nd when, while attempting to reach over a work bench while carrying a heavy box filled with metal vanity cases, his foot slipped on the floor, made slippery by a mixture of lubricating oil from the overhead machinery and the polishing powder, causing the hernia which caused him to drop the box he was carrying.

2. The sworn testimony of two fellow workers, both still employed by Metafield, Inc., that they witnessed the accident on April 22nd after which petitioner went home and did not return to work for some time.

3. The sworn testimony of both these witnesses that they saw petitioner turn pale and stop working.

4. The testimony of Mr. Gorsline, personnel manager, that petitioner came to him on April 22 in great pain and that petitioner looked “as white as a sheet” (Case, p. 81).

5. The testimony of this Mr. Gorsline that shortly before April 22nd he had bowled with petitioner.

Commenting on this fact, Chief Justice Brogan, speaking for the Supreme Court, observed:

“We venture the thought that a man with pain increasing each day from incipient hernia would not spend his evenings in bowling.”

6. The professional opinion of Dr. Forney, the plant physician, an outstanding surgeon of 33 years experience, that the hernia originated on April 22nd; that it was incarcerated; and that it required an immediate operation.

Against all this proof stands only the statement signed by Mr. DiMieri but entirely written by Mr. Pickleseimer, an investigator for the Liberty Mutual Insurance Company.

This investigator went to St. Peter's General Hospital early on the morning of April 23rd before Mr. DiMieri was operated upon. Petitioner had received the last rites of the Church and was a very sick man. Certainly he was in no condition to give a statement such as he signed.

Mr. Pickleseimer was on hand to get whatever information he could to defeat petitioner's claim for compensation. Petitioner might have died and the insurance carrier did not want to take any chances.

Petitioner's recovery was so complete that he was only awarded \$140 for temporary disability but that did not deter the Liberty Mutual Insurance Company from carrying this case to the Court of Last Resort. All of which indicates how vigorous it tried to avoid paying this claim.

As Deputy Commissioner Stahl observed:

"I believe he was there to get a statement as he could elicit from the petitioner but he likewise knew what the law was and I assume was familiar with the requirements of this particular section of the hernia Act" (Case, p. 99).

In not accepting the statement as giving a true narration of the facts, the Supreme Court stated:

“We do not accept it as such because, as we read it, we think it possesses evidence of its own shortcomings for full faith and credit” (Case, p. 145).

And the Supreme Court then proceeds to analyze it, pointing out that the language used in the statement indicated it was not the natural words of petitioner and that it is couched in the language of only a person versed in a knowledge of the hernia act.

The statement taken by the insurance company's investigator at the hospital leaves out of account entirely the accident of April 22nd.

It is respectfully submitted that the Supreme Court, as well as the Workmen's Compensation Bureau and the Middlesex Pleas, correctly evaluated this statement and refused to accept its contents.

Counsel for the insurance carrier tried to get petitioner to admit that at the informal hearing he attributed the rupture to April 8th but this attempt was wholly unsuccessful.

Any member of this Court who has had actual experience at an informal hearing will appreciate Mr. DiMieri's testimony that:

“A. Well, at the time of the informal hearing I didn't have much to say. All the Referee had told me, or the Judge had told me, that April 8th that I had reported to the doctor too late and you had emphasized the fact, that I was ruptured on April 8th which I wasn't. I was ruptured on April 22nd.” (Case, p. 71.)

No stenographic record is made at informal hearings. The insurance carrier's representative who may be but who is usually not a lawyer stands with a number of files, one for each case. As the

Referee calls the cases, the insurance company's representative briefly outlines the case to the referee. Very often the injured workman just stands there ready to hear the decision. The Notice he has received to appear tells him it is unnecessary for him to employ a lawyer unless the Referee tells him the insurance company refuses to pay him compensation. Most injured workmen have had no previous experience at informal hearings. Many are awed.

So when the representative of the Liberty Mutual Insurance Co. outlined the case to the Referee he undoubtedly stated the contents of the "statement" given by the petitioner which, as we have observed, contained no mention of the accident of April 22nd but only mentioned what occurred on April 8th and which had not made necessary the services of a physician. Hence the only logical answer of the referee to the petitioner was that he did not have a compensable case of hernia. This is precisely what the petitioner swore were the facts.

Thereupon petitioner sought counsel, who after investigating the claim, filed a formal petition. (Case, p. 1.)

It will be noted that Claim petition for compensation was actually prepared and signed on May 24. The informal hearing was on May 21. (Case, p. 71.) Certainly the promptness with which petitioner acted by filing his petition with the Labor Department is strong evidence that he felt aggrieved at the decision of Referee who, because the representative of the insurance carrier "emphasized the fact that I was ruptured on April 8th which I wasn't", told him that he had reported to the doctor too late.

The Referee has, of course, no power under the law to make an award. If the carrier refuses to pay anything, the injured workman must file a formal petition.

## LAW.

### POINT I.

**The Supreme Court did not err in finding that defendant-appellee established by conclusive proof that his inguinal hernia was compensable within the provisions of R. S. 34:15-12.**

#### (1) "Conclusive Proof."

Chief Justice Brogan, speaking for the Supreme Court, held:

"So the qualifying word 'conclusive', as used in the statute, *supra*. is not to be regarded in a sense that imports to it a quality that will not tolerate challenge or contradiction; but rather in its ordinary sense that the proof is convincing and such that it justifies a conclusion that the statutory requirements of such case were proved."

"Conclusive" proof has been defined as "manifest" "plain", "clear", "obvious", "visible", "apparent", "indubitable", "palpable" and "notorious". 12 C. J. 388; Black's Law Dictionary (2d Ed.) p. 237; Words and Phrases:

In *Freeze v. Hibernia Sav. & Loan Soc.*, 73 Pac. 172, 139 Cal. 392, the Supreme Court of California said:

"While the presumption attending the possession of property by either husband or wife is that it is community property, such pre-

sumption is a disputable one, and may be controverted by other evidence. \* \* \* Speaking of expressions \* \* \* such as 'clear and conclusive proof', and 'conclusive proof', Ballinger, in his work on Community Property, says, in section 167: 'It is not believed, however, that these terms should be considered as going to the length that their general meaning might import. Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the marked presumption that the property was acquired with the funds of the community. \* \* \*'

"Clearly, it was never intended to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. \* \* \*"

The Workmen's Compensation Act of Pennsylvania is almost identical with our Statute regarding hernia and requires "conclusive proof" the same as the New Jersey Act.

In *Sussick v. Glen Alden Coal Co.*, 165 Atl. 658, the Supreme Court of Pennsylvania held:

"This appeal involves, therefore, the construction of the terms 'conclusive proof' and 'immediately' as used in \* \* \* the Workmen's Compensation Act \* \* \*"

"\* \* \* we are of the opinion that the evidence in this case was sufficient to convince the fact-finding body that the sudden effort or severe strain, to which the claimant was subjected, was the cause of his sustaining a hernia. That meets the standard of 'conclusive proof' established by the act."

Opposing counsel contend that the proof required is "the equivalent of moral certitude" (Brief, p. 13) Counsel does not cite any authorities in this state in support of this proposition because there are none.

The Supreme Court applied the rule that the proof must be convincing and such that it justifies a conclusion that the five statutory requirements were proved. This is the same degree of proof that is required in cases of fraud or in proving adultery in civil actions. But opposing counsel contend that this is not enough, that the proof must be beyond that required in civil actions, in other words that the proof must be the same as that required in criminal cases. It is respectfully submitted that this was not the legislative intent.

## (2) The "Statement".

The credit to be given a signed statement taken under similar conditions to the case *sub judice*, came before the Supreme Court of Rhode Island in 1937 in *Simone v. W. & H. Jewelry Company*, 192 Atl. 807-809, wherein the Court said:

"The main ground of the respondent's contention seems to be that the trial justice accepted in proof of certain facts the testimony of the petitioner and his medical witness as more credible than that of respondent's representative who took a signed statement from the petitioner as to the cause of his injury and who testified concerning the statement on behalf of the respondent at the trial. This statement was taken from the petitioner while he was in the hospital preparatory to being operated upon for his injury. The trial justice had the opportunity which is denied to us of seeing the petitioner and his medical witness on the witness stand and observing their appearance and demeanor during

their testimony, and was consequently in a more advantageous position than this court in passing upon their credibility. The question of credibility was between a version of the accident given by the petitioner not under oath and another version testified to by him at the trial, and not between the testimony of the respondent's representative and that of the petitioner. The trial justice chose to accept the version of the accident as testified to by the petitioner under oath at the trial and to disregard the unsworn signed statement which petitioner gave at the hospital to the respondent's representative, and which the trial justice felt was given under circumstances unfavorable to the petitioner."

Unquestionably the true situation is disclosed by the testimony of the petitioner, his two co-workers, his foreman and the plant physician.

### (3) "Inguinal Hernia".

The testimony of Dr. Forney was uncontradicted by any other medical testimony whatsoever.

This testimony of Dr. Forney, who was the employer's own physician, as to a hernia is, of course, known by all medical men and has been approved by this Court in *Furferi vs. Pennsylvania Railroad Co.*, 117 N. J. L. 508, wherein Mr. Justice Heher, speaking for the Court, says:

"In the medico-chirurgical sense, hernia is a rupture; it is a protrusion of an organ or part thereof, or tissue of other structure, through the wall of the cavity normally containing it. An inguinal hernia is one which passes through the abdominal wall in the inguinal region. A hernia of the abdomen consists of a sac and its contents. The sac is formed of peritoneum; and the content is made up of the organ or part protruding from the abdominal cavity into the sac. Ma-

loy's Legal Anatomy and Surgery, p. 571; Stedman's Medical Dictionary (8th Ed.); 11 Encyclopaedia Britannica (14th Ed.) p. 507, such is also the medico-legal significance of the expression."

Even though the petitioner may have strained the muscles on April 8th, nevertheless this fact would not defeat his claim for compensation if the descent and all other statutory requirements were met as a result of another accident on April 22nd.

In the above case, this Court said:

"It is fundamental in the statute that an inguinal hernia resulting from an accident is compensable even though the employee has the weakness of body structure predisposing to that condition."

Even assuming that the petitioner strained the muscles and thus caused a weakness on April 8th, nevertheless it was open to the Workmen's Compensation Bureau, to the Court of Common Pleas and to the Supreme Court to find that the hernia, that is the protrusion of the tissue through the wall of the cavity normally containing them, would not have occurred but for the accident that happened on April 22nd.

As was said in *Fuferi v. Pennsylvania Railroad Co., supra*:

"On the evidence adduced, it was open to the triers of the facts to find, as they did find, that the workmen's demise would not have occurred but for the strain so resulting. The twisting and construction of the contents of the hernial sac were ascribed by the physicians to the heavy strain induced by the lifting and carrying of the ties."

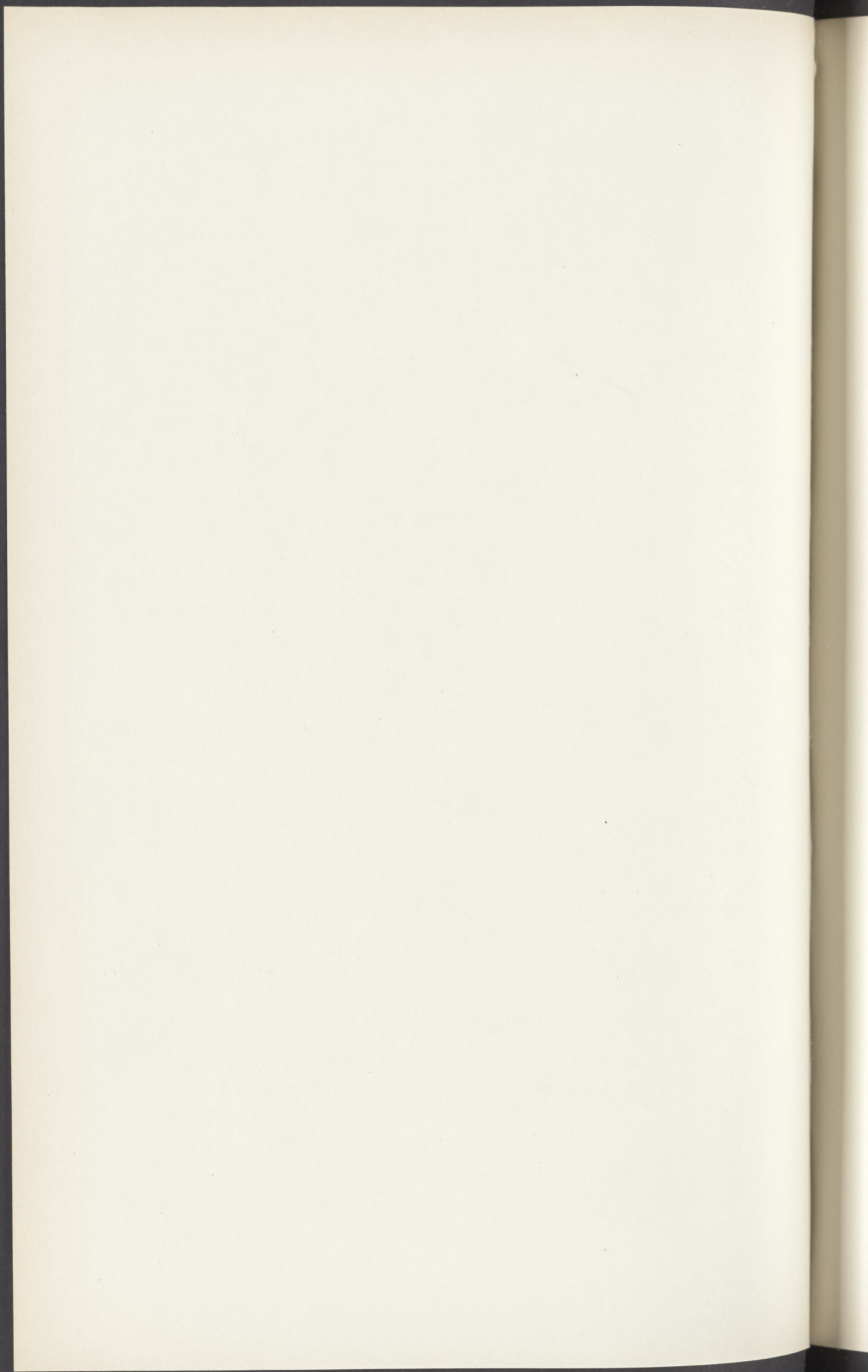
**It is respectfully submitted that the judgment  
of the Supreme Court be affirmed.**

Respectfully submitted,

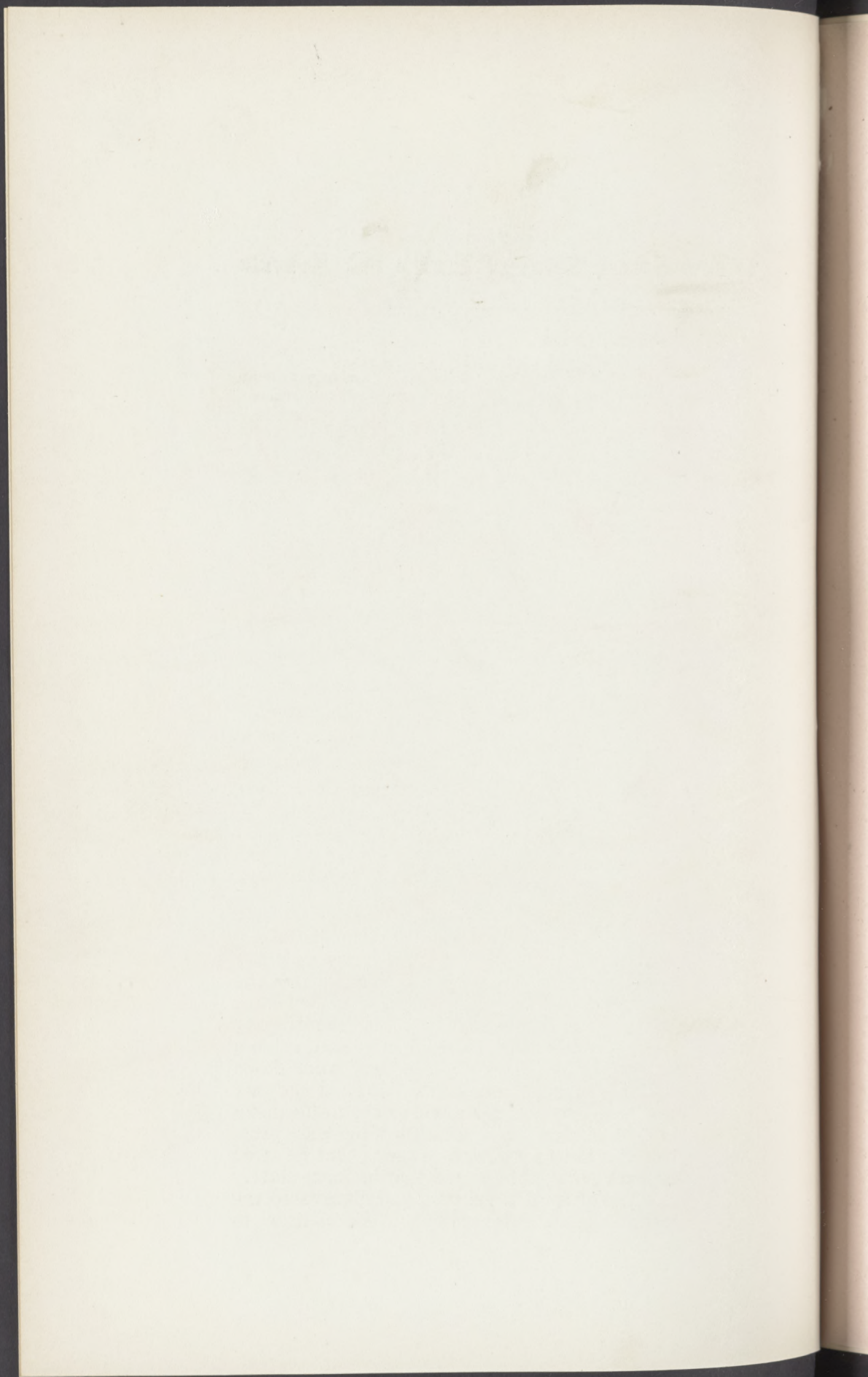
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