

INDEX.

1414

	PAGE
Writ of Certiorari.....	1
Notice of Application for Writ of Certiorari..	3
Affidavit of Clarence B. Tippet.....	5
Return to Writ of Certiorari.....	11
Employee's Claim Petition for Compensation to the New Jersey Department of Labor, W. C. Bureau.....	12
Respondent's (Employer's) Answer to Em- ployee's Claim Petition.....	18
Determination, Award and Rule for Judgment	22
Notice of Appeal by Respondent (Employer) to Hudson County Court of Common Pleas...	26
Order Fixing Time and Place for Hearing....	27
Opinion of Judge James R. Erwin of Hudson County Court of Common Pleas.....	28
Clerk's Certificate.....	30
Order of Affirmance by Judge James R. Erwin	31
Notice of Argument Before Supreme Court...	32
Reasons.	33
Minutes of Hearing of March 7, 1934.....	34
Minutes of Hearing of April 13, 1934.....	62
Opinion of Supreme Court.....	71
Notice of Appeal.....	75
Notice of Argument.....	76

TESTIMONY.

Before New Jersey Department of Labor.

FOR PETITIONER.

Adolph Sariago:	
Direct.	35
Cross.	39
Redirect.	40
Motion to Dismiss.....	41

	PAGE
Adolph Sariego:	
Recalled—Direct.	63
Cross.	64
Vera Sullivan:	
Direct.	65
Motion to Dismiss.	66

FOR RESPONDENT.

Pete Vass:	
Direct.	44
Cross.	46
Gerrit J. Mertens:	
Direct.	49
Cross.	53
Frank Crugeiars:	
Direct.	57
Cross.	58
Motion to Dismiss.	58

Writ of Certiorari.

NEW JERSEY, SS.:

The State of New Jersey, to the Court 10
of Common Pleas in and for the
[SEAL] *County of Hudson, and Gustav Bach,*
Clerk of said Court, and Adolph
Sariego, GREETING:

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 2nd day of April, 1935, by the Honorable James R. Erwin, Judge of the said Court of Common Pleas, in and for the said County of Hudson, in a certain proceeding brought on behalf of Adolph Sariego, petitioner, against Crucible Steel Co. of America, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, we command you, the said Court of Common Pleas in and for the County of Hudson and Gustav Bach, Clerk of the 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 re-

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Writ of Certiorari.

main, or are in your custody and control, you do
 certify and send, together with this Writ to our
 Justice of our Supreme Court of Judicature at
 Trenton, on the 6th day of Aug., 1935, that therein
 may be caused to be done what of right and accord-
 10 ing to law ought to be done.

WITNESS, the HONORABLE THOMAS J. BROGAN,
 Chief Justice of our said Supreme Court at Tren-
 ton, this 26th day of July, 1935.

FRED L. BLOODGOOD,
 Clerk.

CLARENCE B. TIPPETT,
 20 Counsel for Prosecutor.

The within Writ is allowed. Let it be filed.

CLARENCE E. CASE,
J. S. C.

Filed Clerk's Office,
 July 30, 1935,
 Hudson County, N. J.

GUSTAV BACH,
 30 Clerk.

Notice of Application for Writ of Certiorari.

NEW JERSEY SUPREME COURT.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the
said Court of Common Pleas,
and ADOLPH SARIEGO,
Petitioner-Respondent.

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To:

ADOLPH SARIEGO,
278 Kearney Avenue,
Jersey City, New Jersey.

20

And/or:

WILLIAM E. SEWELL, Attorney,
900 Bergen Avenue,
Jersey City, New Jersey.

PLEASE TAKE NOTICE that on Thursday, July 18,
1935, at ten o'clock in the forenoon, or as soon
thereafter as counsel can be heard, I shall apply
to the Honorable Clarence E. Case, a Justice of
the New Jersey Supreme Court, at his Chambers,
Somerville, New Jersey, for a writ of certiorari
to review the judgment and order of the Hudson
County Court of Common Pleas which affirmed the
determination of the Workmen's Compensation
Bureau.

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Notice of Application for Writ of Certiorari.

TAKE NOTICE that I shall urge as grounds for the allowance of the writ of certiorari the following:

10 I. The Court erred in point of law in affirming the judgment rendered by Referee John C. Wegner in favor of Adolph Sariego, petitioner, against Crucible Steel Co. of America, prosecutor herein.

II. The Court erred in holding that the petitioner suffered an accident arising out of and in the course of his employment on August 11, 1933, within the meaning and intent of the Workmen's Compensation Law.

20 III. The judgment and determination herein is in divers other respects without legal warrant, erroneous, improper and oppressive to the prosecutor.

And please take further notice that I shall rely upon the annexed affidavit in connection with the above application.

CLARENCE B. TIPPETT,
Counsel for Prosecutor.

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**Affidavit of Clarence B. Tippet for Writ of
Certiorari.**

NEW JERSEY SUPREME COURT.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the
said Court of Common Pleas,
and ADOLPH SARIEGO,
Petitioner-Respondent.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ES. :

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CLARENCE B. TIPPETT, being duly sworn, deposes and says that he is an attorney and counsellor at law of the State of New Jersey, and is the attorney for Crucible Steel Co. of America, prosecutor herein.

Deponent further states that this affidavit is submitted in support of application for a writ of certiorari to review the judgment and order of the Hudson County Court of Common Pleas which affirmed the determination of the Workmen's Compensation Bureau. Deponent respectfully submits that there are questions of law raised by the determination and judgment as found in this case; and particularly urges that there is the question of whether or not the petitioner herein suffered an accident arising out of and in the course of his employment, within the meaning and intent of the Workmen's Compensation Law.

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Affidavit of Clarence B. Tippett.

10 The facts briefly are: Sariago was employed as a roller's helper and on August 11, 1933, had several fingers caught in the gear of a rolling machine, resulting in partial amputation of the second and third fingers of right hand. The Crucible Steel Co. of America is denying that the accident arose out of and in the course of petitioner's employment. The extent of disability is not in issue. The sole issue is jurisdiction of the Bureau for award in the light of the facts and circumstances surrounding the claimant's employment and the happening of this accident.

20 The petitioner was solely employed to work at one machine as a helper to his operator or boss named Pete Vass. The accident did not occur on the machine at which claimant was employed to work, but did occur upon a machine, located at a distance varying from thirty to one hundred feet away, as the evidence indicates.

30 His operator or boss had stopped his own machine; told him (Sariago) "to stay until I come back"; his boss went outside to the toilet, and instead of Sariago remaining at his own machine, he walked over to the other machine, at which he had no business whatsoever, and he put his hand into the gears of this other or second machine, suffering the injuries complained of.

It is submitted that the evidence reveals he was hired solely to work on his own machine, the operator and boss of which was Pete Vass; that his machine has no connection with the machine on which he suffered an injury, and it was no part of his duties or work to be near or have any contact with the other machine.

Affidavit of Clarence B. Tippett.

It is submitted that claimant was doing nothing in the interest of his employment when hurt; had left his machine at which he was instructed to remain, and solely for the consummation of a personal purpose, casually walked some distance to this other machine (it was being operated by its own men, and who did not even know he was anywhere around it); as he steps up on a small platform, reaches his hand up high above his head, and puts his hand down into a part of the machine. The first intimation the chief operator on *that* particular machine had of any accident was when he happened to observe some blood dripping down in front of him on a board, and then saw a part of a finger. Looking around he observed the petitioner herein walking away from that machine in the direction of the washroom.

The petitioner had no conversation with anyone at the machine at which he was injured, nor did they know he was even there until after he had suffered his injuries.

In support of prosecutor's contention that the injury did not arise out of and in the course of his employment, it is respectfully urged as follows:

That our decisions hold to be compensable the accident must be shown to have arisen not alone out of the employment, but that it arose in the course of the employment.

Bryant v. Fissell, 84 N. J. L. 72.

Steers v. Dunnewald, 89 N. J. L. 601.

Hulley v. Moosbrugger, 88 N. J. L. 161.

In our case, Sario's employment was limited and confined to his own machine. He had no work

Affidavit of Clarence B. Tippet.

or duties at any other machine. His boss told him to remain at his machine until he (Vass) returned. The scope of his employment was not alone defined by what he was hired to do (as the testimony shows), but especially *at that time* particularly limited to *wait there* at his machine.

10 At this time he suffered his injury, it was not a hazard to which he was subjected in performance of any duties to his employer, and was not a natural incident of his work (Hulley v. Moosbrugger, *supra*).

It is quite analogous, in principle, to case of Di Salvio v. Menihan Co., 225 N. Y. 123, where a boy during a lull in his work left his machine, walked across the factory room to say good-by to his fellow employee who was leaving for military service. While talking, he unwittingly placed his hand upon some unguarded gears of the machine his fellow-employee was operating, and lost two fingers. He was awarded compensation by the Commission, but the Court of Appeals of New York State, reversing and dismissing the claim, stated, in part:

30 "There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow-employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. *It*

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Affidavit of Clarence B. Tippett.

was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been it was neither beneficial to his employer nor to himself in the way of completing and performing his work.” (Italics ours.) 10

The Court also stated the claimant went far enough to exchange a perfectly safe occupation for a condition of danger and accident, and cited various cases which were distinguished in contrast to those excluding award.

Our courts have excluded award in cases of horseplay where an employee while doing nothing in furtherance of employer's interests (Hulley v. Moosbrugger, supra; Mountain Ice Co. v. McNeil, 91 N. J. L. 528). For leaving employment, going into another building and suffering injury: Colucci v. Edison Portland Cement Co., 94 N. J. L. 542. See also Hanover v. Penn Brook Golf Club, 159 Atl. 387; Lynch, admx. v. Newman, 237 N. J. L. J. 17; Adams v. Quackenbush, 7 Misc. 444. In Conklin v. Brighton Mills, 140 Atl. 815, a workman was operating a truck for reasons personal to himself during noon recess, not in line of duty, and an injury which he does to a fellow-employee likewise does not come under the Act. 20 30

The employer has a legal right to restrain the work and limit the labors of an employee within the range and scope of desired employment; and when an employee digresses from the range and scope of defined employment, and suffers an injury, we urge that the employer is not liable; especially where the diversion by the employee is strictly per- 40

Affidavit of Clarence B. Tippett.

sonal to himself and he leaves the place of safety to add on to himself an additional, added peril not contemplated by his employment.

10 The Supreme Court in the case of *Nardone v. Public Service Electric & Gas Company*, 174 Atl. 745 and 748, describes when an accident arises out of and is in the course of employment; that a risk is incidental to the employment where it belongs to or is connected with what a workman has to do in fulfilling his contract of service. The proof must show that the cause of death (in that case) was due to a risk which was directly or indirectly connected with it or incidental to the employment. This is stated to be the real test. For award, an employee must be found to reasonably be in his line of duty when injured. In *our* case he was not in his line of duty.

20 Deponent respectfully submits that the award and judgment rendered against the prosecutor constitutes legal error, and respectfully asks that a writ be allowed to review the judgment and order of the trial court and the basis for legality for affirmation by the Court of Common Pleas of Hudson County.

30 CLARENCE B. TIPPETT,
Counsel for Prosecutor.

Subscribed and sworn to before me
this 12 day of July, 1935.

NATHAN RABINOWITZ,
A Master in Chancery of N. J.

Return to Writ of Certiorari.

The answer of James R. Erwin, Esquire, Judge of the Court of Common Pleas, holden in and for the County of Hudson, and Gustav Bach, Clerk of said Court, and within named; the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I send to the Justices of our Supreme Court of Judicature, at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed, as within I am commanded. 10

JAMES R. ERWIN,
Judge.

Attest:

GUSTAV BACH, 20
(Seal) Clerk.

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Employee's Claim Petition for Compensation.

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

10	ADOLPH SARIEGO, Petitioner, vs. CRUCIBLE STEEL CO. OF AMERICA, Respondent.	}	Received at Trenton, Oct. 23, 1933. Claim Petition No..... Date of Accident, August 11, 1933.
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If known, state name of insurance company.....

Attorney for petitioner: WILLIAM E. SEWELL,
 921 Bergen Avenue, Jersey City, N. J.

20 TO THE WORKMEN'S COMPENSATION BUREAU OF
 NEW JERSEY:

The claimant respectfully alleges the following facts:

1. What is your name? Adolph Sariego.
2. Where do you live? 278 Kearny Avenue, Jersey City, N. J.
3. Sex: Male.
- 30 4. Age: 25.
5. Married: No.
6. By whom were you employed at the time of the accident? (Give name and business address.) Crucible Steel Co. of America, foot of Yale Street, Jersey City, N. J.
7. What was the business of your employer? Steel works.
- 40 8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No.

Employee's Claim Petition for Compensation.

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9. Did you receive such notice from your employer? No.
10. Did your employer have knowledge of your accident? Yes.
11. Did you notify your employer of your accident? Yes. 10
12. If so, on what date? August 11, 1933.
13. Have you made claim to your employer for compensation? No.
14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Roller's helper.
15. When did the accident happen? August 11, 1933, at 6 P. M.
16. Where did the accident happen? At shop.
17. What was the nature of the accident, and how did it happen? Gear of rolling machine went over his fingers. 20
18. On what date were you compelled to stop work because of the injury? August 11, 1933.
19. On what date were you well enough to work again? Still not working.
20. If still disabled, on what date do you think you will be able to work? Do not know.
21. Give nature of any injury from which you will recover: Lost part of three fingers on right hand. 30
22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully: Lost part of three fingers on right hand.
23. Were your wages fixed by piecework? No.
24. If so, what was your average weekly wage? \$15.00.

Employee's Claim Petition for Compensation.

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25. If wages were fixed by the hour, state rate per hour: Thirty-five cents an hour.
26. Give number of hours in an ordinary working day: 8 hours a day.
27. Give number of days in an ordinary working week: 5 days a week.
- 10 28. State the amount of weekly wages: \$16.00 per week.
29. How much money have you received from your employer as compensation (not medical aid) since your accident? No.
30. Has your employer promised to pay you any compensation? No.
31. If so, how much?.....
32. Was medical aid required? Yes.
- 20 33. Did you receive any medical, surgical or hospital service? Yes.
34. Did you request your employer to furnish these services? No.
35. Were they furnished? No.
36. If so, between what dates?.....
37. If not, what sum did you expend for medical, surgical or hospital services?.....
38. Give name and address of physician and hospital: Jersey City Medical Center.
- 30 39. What other facts are there which you believe important?.....
40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes.
41. If you are unwilling, state reasons:.....

Employee's Claim Petition for Compensation.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to petitioner from the said defendant under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper. 10

And your petitioner will pray, etc.

ADOLPH SARIEGO, 20
Petitioner,
278 Kearny Avenue,
Jersey City.

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Employee's Claim Petition for Compensation.

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

ADOLPH SARIOGO, of full age, being duly sworn according to law, on his oath deposes and says:
 10 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 matter and things therein set forth are true according to the best of his knowledge and belief.

ADOLPH SARIOGO,
 Petitioner.

Subscribed and sworn to before me
 20 this 20th day of October, 1933, at
 Jersey City, N. J.

BEATRICE G. MARGOLIN,
 Notary Public of N. J.

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

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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. 10

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

WORKMEN'S COMPENSATION BUREAU,
Secretary. 20

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

W. E. STUBBS.

Filed Clerk's Office, June 7, 1934, 30
Hudson County, N. J.

GUSTAV BACH, Clerk.

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

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

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ADOLPH SARIEGO,
Petitioner,

vs.

CRUCIBLE STEEL CO. OF AMERICA,
Respondent.

Claim Petition No. 27253.
November 10, 1933.

Attorney for respondent: CLARENCE B. TIPPETT,
247 Park Ave., N. Y. C.

20

In answer to claim petition filed in this cause:

1. What is the petitioner's name? Adolph Sariego.
2. Where does he reside? 278 Kearny Avenue, Jersey City, N. J. (as alleged in petition).
6. Was the petitioner in your employ at the time of the accident? Accident did not arise out of and in course of employment, although man was an employee.
7. State your business: Steel.
- 30 8. Did you receive written notice from the petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
9. Did you give such notice to him? No.
10. When did you first have knowledge of this accident? After alleged accident.
11. Did you receive notice of this accident from the petitioner?.....
- 40 12. If so, on what date?.....

Respondent's Answer to Petition.

-
13. Has any claim for compensation been made?
Yes.
14. What was the petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Roller's helper.
15. When did the accident happen? Claimed August 11, 1933, at 6.00 A. M. 10
16. Where did the accident happen? Claimed at plant.
17. What was the nature of the accident, and how did it happen? It is alleged fingers of right hand were caught in gears of a roll machine. Respondent denies accident arose out of and in course of his employment.
18. On what date was the petitioner compelled to stop work because of injury? Last day worked, August 11, 1933. 20
19. On what day was the injured well enough to work again? No definite knowledge, but disability approximately three months.
20. If still disabled, on what date do you estimate he will be able to work?.....
21. Give your understanding of the nature of any injury from which he should recover? Injury to second, third and fourth fingers, right hand. 30
22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ. Explain fully: Extent of permanent disability not determined as yet.
23. Were the wages fixed by piecework?.....
24. If so, what was the average weekly wage of the injured?..... 40

Respondent's Answer to Petition.

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25. If wages were fixed by the hour, state rate per hour: 37¢.
26. Give number of hours in an ordinary working day: 8.
27. Give number of days in an ordinary working week: 5.
- 10 28. State the amount of weekly wages: \$14.80.
29. How much money have you paid the injured as compensation (not including medical aid) since the accident? None.
30. Have you promised to pay compensation? Only if case is held compensable.
31. If so, how much?.....
32. Was medical aid required? Yes.
34. Were you requested to supply the necessary medical service required by law? Supplied medical.
- 20
35. Did you furnish this service? Yes.
36. If so, between what dates?.....
37. If not, give reason for failure to do so:.....
38. Give name of physician and hospital rendering service at your direction: Medical Center.
39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion: Respondent denies accident arose out of and in course of the employment.
- 30

CRUCIBLE STEEL CO. OF AMERICA,
Respondent,
Claremont Ave.,
Jersey City, N. J.

Respondent's Answer to Petition.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

CLARENCE B. TIPPETT, of full age, being duly sworn according to law, on his oath deposes and says: That he is the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief. 10

CLARENCE B. TIPPETT,
 Respondent.

Subscribed and sworn to before me
 this 9th day of November, 1933, at
 New York City. 20

VIOLET RICCA,
 Notary Public,
 Bronx Co.

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

30

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

W. E. STUBBS.

Filed Clerk's Office, June 7, 1934,
 Hudson County, N. J. 40
 GUSTAV BACH, Clerk.

Determination, Award and Rule for Judgment.

It was further stipulated and agreed that the petitioner did suffer a fifty per cent. total and permanent disability as a result of the loss of the terminal phalange of the third finger, amounting to a period of 10 weeks.

This matter therefore having come on regularly for a hearing on the issue of liability before the Honorable John C. Wegner, Deputy Commissioner of Labor, at the Workmen's Compensation Bureau, 571 Jersey Avenue, Jersey City, New Jersey, on the 7th day of March and the 13th day of April, 1934, respectively. 10

The Court having heard the witnesses for and on behalf of the petitioner and respondent respectively, and did thereupon find and hold that the petitioner did suffer an injury arising out of and in the course of the petitioner's employment with the respondent company, and the Court did make the following awards based thereon. 20

The Court did award the petitioner the sum of \$110.00 for temporary disability from the 11th day of August, 1933, up to and including October 20, 1933, a period amounting in all to 11 weeks, at the rate of \$10.00 per week.

The Court did further award the petitioner the sum of \$150.00, being the sum based upon a fifty per cent. total and permanent disability as a result of the loss of the terminal phalange of the second finger. 30

The Court did further award to the petitioner the sum of \$100.00, being the sum based upon a fifty per cent. total and permanent disability as a result of the loss of the terminal phalange of the third finger.

The Court did further award to the Jersey City Medical Center the sum of \$121.00 for hospital care 40

Determination, Award and Rule for Judgment.

and treatment of the petitioner from the 11th day of August, 1933, to the 2nd day of September, 1933.

The Court did further award the sum of \$50.00 to Dr. A. P. Trewhella of 809 Montgomery Street, Jersey City, for the treatment of the petitioner and
 10 four appearances in Court on behalf of the petitioner.

The Court did further award Joseph F. White, Esquire, attorney for petitioner, the sum of \$75.00 as counsel fee, \$50.00 of which is to be paid by respondent company and \$25.00 of which is to be paid by the petitioner.

The Court did further order that the respondent company do pay all stenographic charges.

It is therefore, on this 27th day of April, 1934,
 20 hereby ORDERED, ADJUDGED and DECREED that an award of judgment be entered in favor of the petitioner and against the respondent company in accordance with the provisions above set forth.

JOHN C. WEGNER,
 Deputy Commissioner of Labor.

ADOLPH SARIOGO,
 Petitioner.

30 WILLIAM E. SEWELL,
 Attorney for Petitioner.

I approve as to form:

CLARENCE B. TIPPETT,
 Attorney for Respondent.

Determination, Award and Rule for Judgment.

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

W. E. STUBBS.

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Filed Clerk's Office,
June 7, 1934,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

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**Notice of Appeal to Hudson County Court of
Common Pleas.**

HUDSON COUNTY COURT OF COMMON
PLEAS.

10	<p style="text-align: center;">ADOLPH SARIEGO, Petitioner-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">CRUCIBLE STEEL CO. OF AMERICA, Respondent-Appellant.</p>	<p style="font-size: 3em;">}</p> <p>On Petition for Compensation.</p>
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To:

20 W. E. STUBBS, Esq.,
 Secretary, Workmen's Compensation Bureau,
 Trenton, New Jersey.

 WILLIAM E. SEWELL, Esq.,
 Attorney for Petitioner-Appellee,
 502 Trust Company of N. J. Building,
 Jersey City, New Jersey.

 COUNTY CLERK OF HUDSON COUNTY,
 Court House,
 Jersey City, New Jersey.

30 TAKE NOTICE that Crucible Steel Co. of America,
respondent, hereby appeals to the Hudson County
Court of Common Pleas from the determination
and judgment rendered in the above proceeding by
John C. Wegner, Esq., Referee of the Workmen's
Compensation Bureau, Jersey City, New Jersey, on
the 27th day of April, 1934, in favor of the peti-
tioner and against the respondent. This appeal is
taken from each and every part of the said deter-

Notice of Appeal to Court of Common Pleas.

mination and order for judgment entered in favor of the petitioner and against the respondent.

Dated, May 22, 1934.

CLARENCE B. TIPPETT, 10
Attorney for Respondent-Appellant.

Filed Clerk's Office,
May 26, 1934,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Order Fixing Time and Place for Hearing of Appeal. 20

HUDSON COUNTY COURT OF COMMON
PLEAS.

<p>ADOLPH SARIEGO, Petitioner-Appellee,</p> <p>vs.</p> <p>CRUCIBLE STEEL CO. OF AMERICA, Respondent-Appellant.</p>	}	<p>On Appeal from Workmen's Com- pensation Bureau. 30</p>
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Application being made to this Court by Clarence B. Tippett, attorney for respondent-appellant, to fix a time and place for the hearing of the above case on appeal,

Order Fixing Time and Place for Appeal.

10 IT IS ORDERED, that Wednesday, the 19 day of Sept., 1934, at the hour of ten o'clock in the forenoon, before the Hon. James R. Erwin, at the Hudson County Court of Common Pleas, Jersey City, New Jersey, be and the same hereby is designated as the time and place for the hearing of the said appeal.

Dated, June 29, 1934.

JAMES R. ERWIN,
Judge.

Filed Clerk's Office,
July 2, 1934,
Hudson County, N. J.

20 GUSTAV BACH,
Clerk.

Opinion of Hudson County Court of Common Pleas (Erwin, J.).

HUDSON COUNTY COURT OF COMMON
PLEAS.

30

ADOLPH SARIEGO, Petitioner-Appellee, vs. CRUCIBLE STEEL CO. OF AMERICA, Respondent-Appellant.

} On Appeal from
Workmen's Com-
pensation Bureau.

40 This is an appeal from the determination and judgment rendered by the Honorable John C.

Opinion.

Wegner, Referee of the Workmen's Compensation Bureau in the above entitled cause, wherein judgment in favor of the petitioner was entered.

The only question involved is whether or not the injuries received by Sariego arose out of and in the course of his employment. All other questions, such as employment and disabilities, are admitted or are the subject of stipulation. 10

A careful reading of the transcript and of the briefs of counsel leads me to the conclusion that the determination and judgment of the Referee must be sustained. I find nothing in the evidence to substantiate the claim of the defendant-appellant that Sariego was forbidden to leave his machine during his hours of employment. The statement of the witness Vass to the effect that he "told them (his helpers) to stay until I come back" is too vague to establish this contention of the defendant-appellant. It has been held repeatedly that the statute anent workmen's compensation is remedial in its nature and should be liberally and broadly construed. 20

Bearing that in mind, I am of the opinion that there was no error in the finding of the Referee. I will sign the proper order sustaining the judgment under review upon presentation. 30

JAMES R. ERWIN,
Judge.

Filed Clerk's Office,
Apr. 12, 1935,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Clerk's Certificate.

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

10 I, GUSTAV BACH, Clerk of the County of Hud-
 son, and also Clerk of the Court of Common Pleas,
 holden in and for said County, do hereby certify
 that the foregoing are full, true and correct copies
 of Employee's Claim Petition for Compensation,
 Respondent's Answer to Employee's Claim Peti-
 tion, Determination of Facts and Rule for Judg-
 ment, Notice of Appeal, Order Fixing Time and
 Place for Hearing, and Opinion of Erwin, J., as
 fully and entirely as the same remains of record
 and on file in my office in the case of Adolph
 Sario, Petitioner, vs. Crucible Steel Co. of
 20 America, Respondent-Appellant.

IN TESTIMONY WHEREOF, I have hereunto
 set my hand and affixed the seal of said
 County and Court at Jersey City, New
 (Seal) Jersey, this day of September,
 A. D. Nineteen Hundred and Thirty-
 five.

GUSTAV BACH,
 Clerk.

Order of Affirmance.HUDSON COUNTY COURT OF COMMON
PLEAS.

<p style="text-align: center;">ADOLPH SARIEGO, Petitioner-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">CRUCIBLE STEEL CO. OF AMERICA, Respondent-Appellant.</p>	}	<p>On Petition, etc. 10 On Appeal from Judgment of Workmen's Com- pensation Court.</p>
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This matter being heard before the Court, in the presence of William E. Sewell, attorney for the petitioner-appellee, and in the presence of Clarence B. Tippett, attorney for the respondent-appellant, and briefs having been submitted, and the Court having considered the subject matter of the appeal: 20

It is therefore, on this 2nd day of April, 1935, ORDERED, that the determination, award and judgment rendered in the Workmen's Compensation Court by Referee John C. Wegner, Esquire, in favor of the petitioner-appellee, be and the same is hereby affirmed in all respects.

And it is further ORDERED that William E. Sewell, attorney for the petitioner-appellee, be awarded the sum of Two hundred Dollars as counsel fee in addition to the Seventy-five (\$75.00) Dollars allowed by the Compensation Court, together with costs. 30

JAMES R. ERWIN,
*Judge of the Hudson County Court
of Common Pleas.*

Notice of Argument before Supreme Court.

NEW JERSEY SUPREME COURT.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the said
Court of Common Pleas, and
ADOLPH SARIEGO,
Petitioner-Respondent.

On Certiorari.

10

To:

20 WILLIAM E. SEWELL, Esquire,
Attorney for Petitioner-Respondent,
900 Bergen Avenue,
Jersey City, New Jersey.

Sir:

30 PLEASE TAKE NOTICE of the argument of the issue
in this cause before the Supreme Court of New
Jersey, to be held at the State House, Trenton, New
Jersey, on the first Tuesday of October, next, at
ten o'clock in the forenoon, or as soon thereafter
as the Court can hear the same.

Yours respectfully,

CLARENCE B. TIPPETT,
Attorney for and of Counsel to Prosecutor.

Dated, August 2, 1935.

40

Reasons.

NEW JERSEY SUPREME COURT.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the said
Court of Common Pleas, and
ADOLPH SARIEGO,
Petitioner-Respondent.

On Certiorari.

10

The prosecutor presents the following reasons
for setting aside the determination and judgment
brought before this Honorable Court by the Writ of
Certiorari in the above-entitled cause:

20

I. The Court erred in point of law in affirming
the judgment rendered by Referee John C. Wegner
in favor of Adolph Sariego, petitioner, against Cru-
cible Steel Co. of America, prosecutor herein.

II. The Court erred in holding that the peti-
tioner suffered an accident arising out of and in
the course of his employment on August 11, 1933,
within the meaning and intent of the Workmen's
Compensation Law.

30

III. The judgment and determination herein is
in divers other respects without legal warrant, erro-
neous, improper and oppressive to the prosecutor.

CLARENCE B. TIPPETT,
Attorney for and of Counsel to Prosecutor.

40

Minutes of Hearing of March 7, 1934.

NEW JERSEY DEPARTMENT OF LABOR,
 WORKMEN'S COMPENSATION BUREAU,
 Jersey City, Hudson County District.

10

ADOLPH SARIEGO, Petitioner, vs. CRUCIBLE STEEL CO. OF AMERICA, Respondent.	}
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March 7, 1934.

Before: HON. JOHN C. WEGNER, *Referee*.

20

APPEARANCES:

WILLIAM E. SEWELL, Esq., by JOSEPH F. WHITE,
 Esq., for the petitioner.

CLARENCE B. TIPPETT, Esq., for the respondent.

30

The Court: It is stipulated that the temporary disability would run from August 11, 1933, to October 20, 1933. The permanent disability is 50 per cent. of the right second finger, 50 per cent. of the right third finger, which is twenty-five weeks.

Is there any question of the rate?

Mr. Tippet: I think not.

The Court: How much did he get a week?

Mr. Tippet: We have the bookkeeper here.

40

The Court: \$15 a week?

Adolph Sario—Petitioner—Direct.

- Mr. White: He was making \$15 a week.
 The Court: Is there any question about that?
 Mr. Tippett: No.
 The Court: The rate is \$10.
 The only issue in the case is the question of liability.
 Mr. White: The liability; that is all. 10

ADOLPH SARIO, the petitioner, a witness on his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. White.

- Q. What is your name? A. Adolph Sario. 20
 Q. Where do you live, Mr. Sario? A. 278 Grove Avenue.
 Q. 278 Grove Avenue, Jersey City? That is in Jersey City? A. Yes.
 Q. By whom were you employed on or about August 11, 1933? Were you employed by the Crucible Steel Company of America? A. Yes.
 Q. Where are they located?
 Mr. Tippett: We admit that their office is in Jersey City. 30

By Mr. White.

- Q. Well, how long prior to August 11, 1933, were you working for the Crucible Steel Company? A. Yes.
 Q. How long? A. I was working couple of weeks.
 Q. How long prior to the happening of this accident had you been working for the Crucible Steel Company? A. Eight years. 40

Adolph Sariego—Petitioner—Direct.

Q. Eight years. Now, on August 11, 1933, what time did you go to work? A. What time I did go to work?

10 Q. What time did you go to work? What time did you report for work? What time did you go to work? What time did you report for work, in the nighttime? A. Yes; half-past three; that was morning.

Q. Half-past three when?

Mr. Tippet: I will stipulate he went to work—

Mr. White: 12 o'clock at night.

Mr. Tippet: 12 o'clock at night.

The Witness: 12 o'clock I mean. I forgot about that.

20

By Mr. White.

Q. When did this alleged accident happen? A. Around six or after six.

Q. By the way, what kind of business is your employer engaged in, steel business? A. Steel business.

Q. What was your regular occupation at the time of this accident? A. I don't know.

30 Q. What were you doing? A. Working.

Mr. White: Would you stipulate that he was a roller's helper?

Mr. Tippet: Yes, I stipulate that he was employed as a roller's helper on the rolls. That was his employment.

By Mr. White.

40 Q. How much were you getting a week? A. \$14.80.

Adolph Sariego—Petitioner—Direct.

Q. Now, how did this accident happen? Tell us in your own words. A. I went over to talk to the Spaniards.

Q. Why did you go over to talk to the Spaniard?
A. Oh, just go around there like he does.

Q. What is it? A. Just go over talk to him. 10

Q. Well, was your machine going at the time that you went over to speak to him? A. No, stopped.

Q. It stopped. Why did it stop? A. They went out outside.

Mr. Tippet: The boss went out outside?

By Mr. White.

Q. The boss went outside and stopped the machine, then you went over to talk to the Spaniard at the machine next to you? A. Yes. 20

Q. Just tell us how this accident happened while you were over there talking, what happened? A. I leaned on the machine, on the back.

Q. Was there any guards on that machine? A. No.

Q. Was it the same type of machine that you were on, a roller machine? A. Yes.

Q. Then what happened? A. He came over and turned the wheel. 30

Q. Who came over? A. The roller.

Q. What is his name? A. Jerry.

Q. Then what happened then? A. That's all. I got my hands caught. I don't even know nothing after that.

Q. You got your hand caught in the machine?
A. Yes.

Adolph Sariago—Petitioner—Direct.

Q. What did you do after that? What happened then after you got your hand caught in the machine? Did it do any damage to your hand? A. Yes.

Q. What happened to your hand? A. When?

10 The Court: He got his hand caught in the roller. That is admitted.

Mr. Tippet: We admit he got his fingers caught in the roller.

The Witness: Yes.

Mr. Tippet: On a machine other than the one at which he was employed to work.

By Mr. White.

20 Q. Was it usual for the men to go from one machine to the other while there was nothing for them to do at their own machine?

Mr. Tippet: I am objecting to that, if the Court please.

The Witness: Just by talk, that's all.

The Court: Objection overruled.

The Witness: We go over there.

Mr. Tippet: What was that answer, please?

30 (The reporter read the last answer as follows: "Just by talk, that's all. We go over there.")

By Mr. White.

Q. Did you have any work to do at the time you went over to talk to this other man? A. No.

Q. In other words, your machine had stopped? A. Yes.

40

Adolph Sariego—Petitioner—Direct—Cross.

Q. You went over to the next machine and you talked to the other man over there whom you know as the "Spaniard," and while you were there someone suddenly started the machine and your fingers were crushed in the machine, is that right? A. Yes, that is it.

10

Q. Were you allowed to go over there? Was there any order that you are not to go over there or were not to go over there at the time? A. Anybody can go on each machine.

Q. You could go anywhere you felt like it? A. Yes, and talk to the guy.

Mr. White: That is all.

Cross-examination by Mr. Tippett.

20

Q. Who was your boss that operated the machine you worked on? A. Pete.

Q. Pete. Do you see him in court here? A. Yes.

Q. Will you point him out? A. (Indicating.)

Q. You worked under him as a roller's helper? A. Yes.

Q. That is right. Now, how far away was the other machine—how far away from your machine was—where you were working on and Pete was working on, was the other machine where you got hurt? A. From here to the corner there (indicating).

30

Q. From here to the corner, about over to the corner of the room (indicating)? A. Yes, that's all.

Mr. Tippett: Indicating a distance of about 25 or 30 feet.

The Witness: About.

Mr. White: About 25 feet.

40

Adolph Sariego—Petitioner—Cross—Redirect.

By Mr. Tippett.

Q. Your machine was stopped and Pete had gone to the toilet, hadn't he? A. Yes.

Q. Outside somewhere? A. Yes.

10 Q. You walked over to talk to him, you say? A. The Spaniard.

Q. The Spaniard at the other machine? A. Yes.

Q. Were you talking with him at the time you got your hand caught? A. At that time.

Q. Had you started yet to talk to him? A. Yes. He was outside, see? I waited over there till he came in.

Q. You went over to talk to him. What did you do, raise your hand—rest your hand on the machine or something? A. Yes.

20 Q. And the machine was started up and your hand got caught? A. Yes.

Q. You were not doing any work on that other machine, were you? A. No.

Mr. Tippett: That is all.

Redirect examination by Mr. White.

30 Q. Are there any guards on that machine? A. No.

Mr. White: That is all.

(Witness excused.)

Mr. White: The father would testify only to the fact that he learned of the accident when he came in to work that morning, and that is all he can testify to.

Mr. Tippett: Of course, he wasn't there.

Mr. White: No. His testimony would only be hearsay.

Motion to Dismiss.

Mr. Tippett: Is that all you have?

Mr. White: Shall I put him on the stand?

The Court: You don't have to.

Mr. White: That is all I have.

Mr. Tippett: On the strength of the petitioner's direct testimony, Mr. Commissioner, I respectfully move for a dismissal of the petitioner on the ground that at the time of the accident he wasn't doing anything that he was employed to do, that his own machine had stopped, and that he was killing time, in the sense, walked over to talk with a friend and while talking with the friend he inadvertently put his hand on a machine, not his own machine, and loses his two fingers. 10

There are a number of cases which I think are applicable, even on the strength of his own testimony. It is a case that does not come within the sphere of doing something—it does not come within the line of cases where he is doing something in a negligible way and suffers an injury. It is a case where he voluntarily walks away from his machine to talk with someone, and while he is at leisure he gets this accident. 20

There is a case directly on that in New York State, DeSalvo vs. Monahan Company, where an employee was at work at a certain machine. He left his machine to walk across to say good-bye to a man who was leaving for the war, and while talking to him he inadvertently put his hand on the machine and lost several fingers. That case went through the court—through the Appellate 30

40

Motion to Dismiss.

Court in New York, and they held that he took himself outside the scope of his duties when he suffered the injury.

I respectfully request a dismissal.

10 Mr. White: Well, I say as to that, your Honor, this man was employed. He went to work 12 o'clock at night—his hours were from twelve to eight in the morning, and while in the—within the scope of his apparent duties, which wasn't objectionable to the foreman, he walked around while the machines were stopped temporarily, and I say that this accident did arise in the course of his employ.

20 I have a case here, the case of Hulley vs. Mossbrugger, 93 Atlantic 79, which states that where an employee slipped and received fatal injuries in attempting a joke, a playful attack on another employee, it was held in that case he could recover compensation and that the same was within the Workmen's Compensation Act.

Mr. Tippet: Did you go far enough on that?

30 The Court: There is a Court of Errors and Appeals decision.

Mr. White: It was reversed on another ground.

40 There is another case here where a factory employee—the case of Terlicki vs. Strauss, 89 Atlantic 1023—a Court of Errors and Appeals case, and it held that a factory employee while injured—she was injured while combing her hair and it caught in a machine. She was combing it preparatory to going home at the noon hour, after she had quit

Motion to Dismiss.

and she was standing at her machine; it was held that the accident arose out of and in the course of the employment and within the Workmen's Compensation Act.

Mr. Tippet: May I answer that, your Honor?

10

The Court: Yes.

Mr. Tippet: That case is entirely a different case. She was allowed reasonable opportunity to leave her actual place of employment; she was at her place of her employment and she was where she was supposed to be. Here this man inadvertently got caught in the machine while he was away from the machine that he was supposed to work at.

20

Mr. White: I don't see why there should be any distinction there.

The Court: You don't mean to say this man should stay or could stay right at his machine?

Mr. Tippet: Not at all. I say he didn't suffer any accident while he was doing any duties which his work required him to do, that he had left his own machine and at the time he was just standing there when his fingers got caught in the machine.

30

The Court: I feel the man is entitled to compensation.

Mr. Tippet: I have a certain witness I should like to put on in defense.

The Court: I will deny the motion.

Mr. Tippet: I respectfully ask for an exception.

(Whereupon an adjournment was taken to 2 P. M.)

40

Pete Vass—For Respondent—Direct.

AFTERNOON SESSION.

PETE VASS, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination by Mr. Tippett.

10

Q. Mr. Vass, where are you now employed, where do you work? A. Crucible Steel Company of America.

Q. Crucible Steel Company. You worked there on August 11th, last year? A. Yes, sir.

Q. What job did you have there? A. I am operator of four high machine, called "Four High Machine."

20 Q. Now, how large is this machine? Just describe it, about the size of it. A. It is pretty—I can't tell exactly.

Q. Well, it is a high machine? A. The biggest machine in the shop, yes.

Q. How many helpers or roller's helpers do you have? A. Two.

Q. Working on that machine? A. Only two.

Q. Yourself and two helpers? A. Myself and two helpers.

30 Q. That is right. Now, did Sariego work as your helper on that machine? A. Yes, sir.

Q. You were working nights on August 11th? A. Yes, sir.

Q. Do you recall having stopped your machine along in the early morning of August 11th? A. Yes, sir.

Q. Were there two helpers working right along up to that time with you— A. Yes, sir.

40 Q. (Continuing) —on that machine? Well, now, what did you do; you stopped the machine? A. I stopped the machine and I had to go outside.

Pete Vass—For Respondent—Direct.

Q. You left to go to the toilet? A. I told them to stay until I come back.

Q. You told them to stay there until you got back. You stopped the machine? A. Yes, sir.

Q. Well, what was the first you knew that anything happened to Sariego? A. The first thing I know nothing because when I went out and I am coming back—when I comes out he is going out. 10

Q. You passed him going to the toilet? A. I passed him in the middle of the floor.

Q. You passed him in the middle of the floor? A. Right there.

Q. Then did he say anything to you? A. I asked him, "Where you go?" He didn't say a word.

Q. In what direction was he going, towards the toilet? A. He was going outside, going towards the toilet. 20

Q. Now, what did you do then, go up to your machine? A. No. Jerry come and tells me he got hurt on the other machine. He is coming after, he told me after, "Your helper got hurt on the machine." I told him, "No, I just met him outside and I asked him where you are going," and he say nothing. So we got to go after him after that.

Q. You and Jerry went after him? A. We see him after that. 30

Q. You went after him and where did you find him then? A. We find him right by the toilet.

Q. You found him by the toilet? A. Yes.

Q. Did he say anything to you then when you were with Jerry? A. No.

Q. Now, did Sariego have any other employment or work to do except on your machine? Was he hired to work on your machine alone, if you know, 40

Pete Vass—For Respondent—Direct—Cross.

or was he hired to work on somebody else's machine? I am talking about Sariego. A. No, on my machine, that's all.

Q. On your own machine. When you left to go to the toilet after stopping your machine, did he say anything to you? A. He no say nothing to me.

Q. You told him to wait here until you come back? A. Yes, sir.

Mr. Tippett: Cross-examine.

Cross-examination by Mr. White.

Q. You say there are two helpers on the machine of which you are foreman at the Crucible Steel Company? A. Yes.

20 Q. How high is this machine, about how many feet? A. About 8, 9, 10 feet.

Q. How high is the part where they put the steel in to have it rolled from the ground?

Mr. Tippett: Just a moment. Are you talking about his machine?

Mr. White: Yes.

Mr. Tippett: That is his own machine.

Mr. White: They are all similar.

30 Mr. Tippett: No, they are not. This is different.

By Mr. White.

Q. Well, how high is your machine, anyway? A. From the floor to the top, you mean?

Q. Yes, you say 8 feet? A. About 8 feet.

Q. You say you have got two helpers on that machine? A. Yes.

40 Q. Sariego is one and who is the other helper?
A. Jerry Martens.

Pete Vass—For Respondent—Cross.

Q. You say that the machine was stopped and you went out to the toilet? A. Yes.

Q. When you were on your way back you passed Mr. Sariego? A. Yes.

Q. Did Mr. Sariego—did you notice anything unusual about him? A. No.

10

Q. Was he shaking his hand? A. I don't know.

Q. What did you do then, return to the machine?
A. When?

Q. After you saw Sariego running toward the toilet, as you said before.

Mr. Tippett: Walking, he said.

By Mr. White.

Q. He walked; he is walking out. He didn't seem excited or anything? A. He didn't say anything.

20

Q. Did you look at the hand? A. I looked at him when I go after him again.

Q. Did he hold—did he show any damage to his hand? A. He hold his handkerchief there.

Mr. Tippett: That is after he went back with Jerry.

By Mr. White.

Q. You didn't notice anything out of the way?
A. No.

30

Q. He was holding his hand when you met him, was he? A. No.

Q. You didn't look for it, did you? When you and Mr. Mertens went out to the toilet you examined his hand immediately, didn't you, or did you?
A. I met him after when this happened.

Q. What did he say to you, if anything? A. He didn't say nothing.

40

Pete Vass—For Respondent—Cross.

Q. Well, how did you first know of this accident?

A. Jerry told me.

Q. How soon after it happened did you find that
out? A. Well, when I left my machine I shut off
my machine and I tell him and the helper I have
10 to go outside. When I come back after ten minutes
he starts to come outside again; he is going out
and I am coming in. I passed him there, then
Jerry run after him and he tell me he got hurt and
what happened. He comes to me and he says,
“Your helper had got hurt.” I says, “Get out.” I
says, “I just passed him there and he don’t say
nothing to me. I asked him where he is going and
he don’t say nothing to me.” Me and Jerry we go
20 outside to go after him, we go after him again to
see what is happened to him. Then I said, “Let
me see your hands.” He had his handkerchief like
that (indicating) and we take it off.

Q. His hand was crushed then?

The Court: There is no question about
that.

By Mr. White.

Q. Was your machine in operation when you re-
30 turned to it?

Mr. Tippet: You mean his machine?

Mr. White: Yes.

By Mr. White.

Q. Was your machine—was your machine in op-
eration after you had gone to the toilet? A. No,
stopped.

Q. It was stopped? A. Yes.

40 Q. You are sure of that? A. Yes, sir.

Pete Vass—For Respondent—Cross.
Gerrit J. Mertens—For Respondent—Direct.

Q. How sure are you? A. I know, because nobody got to touch that machine, only me.

Q. Are you the one that operates this machine? You start it and stop it? A. I operate it. I start it and stop it.

10

Mr. White: That is all.

By Mr. Tippett.

Q. He didn't get hurt on your machine? A. No.

Mr. Tippett: That is all.

(Witness excused.)

20

GERRIT J. MERTENS, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination by Mr. Tippett.

Q. Now, Mr. Mertens, you are the operator of a machine at the Crucible Steel plant, are you? A. Yes, sir.

Q. How big is your machine? A. Well, high as about 8 feet off the ground. It is about 8 feet off the ground.

30

Q. Now, is your machine the same size— A. No.

Q. (Continuing) —as Vass'? A. No, small one.

Q. Yours is smaller? A. Yes.

Q. How many helpers do you have? A. One.

Q. You were working there on the night of August 11th of last year? A. Well, I don't know exactly August 11th, but I was there when the accident happened.

40

Gerrit J. Mertens—For Respondent—Direct.

Q. You were there? A. I didn't keep track of the day.

Q. You were there? A. Yes.

Q. When this accident happened? A. Yes.

10 Q. This accident to him, as far as you know, happened on your machine? A. On my machine; yes, sir.

20 Q. Now, will you tell us just what you know about this alleged occurrence, tell us what you were doing, what your helper was doing with you, and what happened there? A. Well, I was trying to stick a coil of wire in my machine. My helper, he was holding the coil of wire on a staunch, and when I had the end of the coil in the machine, then I tried to bring—or rather I did bring the roll down by
 30 spinning the wheel. After giving the wheel a certain amount of turns—I might as well say it rolled by myself, it comes down until it hits the wire. But in the meantime while it was spinning and I was working by the guides, what is guiding the wire through the machine, through the part that it tightens, while I was doing that I noticed somebody step on my platform; I didn't look around who it was. Of course, at the same time, the same person he stepped off the platform; I then turned my head
 30 to see who it was and then it was Sariego. The man didn't say anything, so when I finished with tightening down my guides, I turned around and I saw blood on the platform. So I looked first at my own hands, I said, "Do I get caught?" But I didn't feel anything. So I ran after Sariego—he was about half way in the building already on the floor, and said to him, "Did you get hurt?" He didn't say anything to me. He just simply raised his hand and showed me his hand. I just simply
 40 stood there on account of—I don't know what to say.

Gerrit J. Mertens—For Respondent—Direct.

Q. Surprised? A. Well, surprised. I might as well say it would—I was more than surprised.

Q. Astounded? A. Yes, astounded. He kept on going, he went away on, and while I was then standing there Vass came along. I said, "Your helper had his finger cut off." He said, "You are crazy." "No," I said, "no, because better go get a doctor." So the two of us went out the building after him. When we came near the toilet, why, he just staggered out the toilet, Sariago, and fainted. So we picked him up and brought him inside the toilet, throw some cold water on his face and helped him there until he came to. In the meantime Vass' other helper, I had told him to go call up a doctor, he went out to the gates by the watchman to get him up to the hospital. Well, after that when he revived again he just started to walk around without saying anything, and I went back to my machine. When I got down to my machine I saw part of his finger was laying on top of my machine yet with all the blood. I cleaned off and continued my work.

Q. Now, just where were you and your helper working at the time on your machine when you heard a step on your platform? A. I was on the platform.

Q. How high is the platform? A. The platform is about—say about a foot off the ground.

Q. About a foot off the ground? A. About a foot and a half, about a foot high.

Q. How long is that platform? A. Well, I suggest about 7 or 8 feet.

Q. Now, were you at one end of the platform? A. Yes, I was on one end of the platform, on the left side of the machine.

Gerrit J. Mertens—For Respondent—Direct.

Q. Where was your helper with relation to you?
A. He was standing about 4 feet away from the platform, being down where the coil of wire was hanging on.

10 Q. Off the machine? A. Off the machine, right to the left.

Q. Where then on the platform with relation to yourself did Sariego step or stand? A. He stepped on the right side of the platform.

Q. South, or off the other side from you? A. Yes, sir.

Q. Now, what part of your machine was it in which his fingers got caught? A. It was way up on the machine, on the right side of the machine.

20 Q. How high above the platform would you say that spot was? A. I figure it is about 7 feet; it is about that.

Q. For him to have gotten up there what would you say he had to do? A. That is how he happened to get caught.

Q. With his hands or hand that was up there?
A. I stand on the platform and I can't reach it. He must have stood on the platform because when I stand on the platform I can just about maybe reach it.

30 Q. Now, from the level of the floor you can't reach it? A. No, it is impossible.

Q. Now, how far from your machine was his machine located, his own machine at which he worked?
A. I don't know the exact distance, but I figure about a hundred feet.

Q. About how much? A. A hundred feet.

Q. You heard him say it was from here to there (indicating)? A. No, that is a miscalculation of his.

G. J. Mertens—For Respondent—Direct—Cross.

Q. You would say at least a hundred feet? A. Yes, a hundred feet easy.

Q. Your machine has no connection with Mr. Vass' machine? A. No, sir.

Q. Did you have any conversation with Mr. Sariego at all? A. No, sir; I didn't even see him.

10

Q. You didn't even see him. You didn't even see how he got hurt? A. No, sir.

Q. Did your man who was right near you? A. My helper.

Q. Strike it out. Did you hear any conversation with your Spanish helper? A. No, he was just helping me. There was no conversation whatsoever.

Q. There was no conversation? A. No, sir.

Q. You didn't ask Sariego to come over on your machine? A. No, sir.

20

Q. Would you say Sariego had any work at all to do on your machine? A. No, sir.

Q. Do you know if it was part of his duties to come to your machine? A. No, sir.

Q. That is, it was not or was? A. No part of his duties at all. He is supposed to stay on his own machine, like we all have to do. He is supposed to be by his own machine.

Mr. Tippet: Cross-examine.

30

Cross-examination by Mr. White.

Q. You say that you and your helper, Mertens, was putting wire in the machine? A. Well—

Mr. Tippet: No, his helper was Crugeiars.

The Witness: I don't know exactly his name, Crugeiars.

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Gerrit J. Mertens—For Respondent—Cross.

By Mr. White.

Q. Well, whatever his name is. A. Crugeiars.

Q. You two were working on the machine at the coil in the machine? A. Yes.

10 Q. That machine is situated on a platform 1 foot high? A. The platform is alongside the machine in order to operate it.

Q. Do you walk along that platform? A. Yes, sir.

Q. You say the first time that you saw someone step up on the platform— A. No, I didn't see him do it. I heard it. I felt it, rather, through the vibration that somebody was stepping on the platform.

Q. Did you look around? A. No, sir.

20 Q. Didn't you testify before that you looked around and you saw Sariego? A. No, sir.

Q. You didn't testify to that? A. No, sir. I said after I noticed somebody step off I turned around and saw who it was, saw that it was Sariego.

Q. You saw Sariego? A. Yes.

30 Q. Then you looked around and saw blood on the platform? A. Yes, sir—no, sir, I didn't exactly turn around. I turned around after I finished tightening my guides.

Q. And after that, you testified, you found some part of the finger? A. Why, after we had him, when I come back to work I saw it. I cleaned it off and continued to my work after we were through with him.

Q. Did you say that your helper didn't speak to Sariego at all? A. No, he wasn't speaking to him at all.

Gerrit J. Mertens—For Respondent—Cross.

Q. Did you pay any attention as to whether or not they were talking? A. There was no talk because he was helping me. He could not talk unless he had——

Q. Your machine was in operation? A. No, the operation—the machine was standing still. 10

Q. How were you putting this coil into or inside the machine if it wasn't working? A. We were preparing the machine for work.

Q. You said you were working there and someone stepped on the platform? A. Yes.

Q. You were preparing the machine for work? A. Yes. We had to stick the coil into the machine. It would not go in there by itself.

Q. You say where his fingers were caught is about 7 feet high? A. Yes, it must be that, 7 feet high. It must be that high, about. I can just about reach it. 20

Q. How tall is Sariego? You know him quite well? A. I figure he is as tall as I am, 5 foot 6.

Q. He certainly would have to jump to get up there? A. I guess he can reach it; he can just about reach it.

Q. 7 feet? A. I think it is 7 feet. I am not so exact on that; it is about 7 feet.

Q. In other words, you are trying to say that he advertently put his hand into the machine? A. No, I didn't say he put his hand into the machine. How could I say he stuck his hand in there? That is something I don't know anything about. He didn't have no business about there. 30

Q. Well, a man would certainly have to jump to get into a machine, to put his fingers into a machine. A. He didn't have to exactly jump; he has

Gerrit J. Mertens—For Respondent—Cross.

to stretch himself in order to reach up there, because I have to do that in order to touch that particular spot.

10 Q. After Sariego jumped off the platform, you looked around to see who it was and you saw it was Sariego? A. Yes, I saw it was Sariego.

Q. He went out to the toilet? A. I didn't know where he was going. He just simply walked away.

Q. You went over and told his foreman that the accident had occurred at your machine, is that right? A. Yes, after I saw Sariego; Sariego went out and Vass came in. I said to Vass, "Better get a doctor as Sariego got his fingers cut off."

20 Q. Then they called a doctor and brought him to the hospital. You told Vass' other helper to go out to the gate? A. By the watchman.

Q. Was there any guards on this machine? A. Well, guards, I don't know what exactly—

Q. Is there any safety device? A. Yes, there is a safety device; as far as the insurance company is concerned them gears there is covered so that we could not—he could not stick his hands in there. You really could not do that.

30 Q. There is a safety device on there? A. There is a safety device there.

Mr. White: That is all.

By the Court.

Q. You saw the blood? A. Yes, sir.

Q. That is the first you knew about it? A. That is the first I knew about it.

Q. And you say he walked away? A. Yes, sir; he walked away.

40 Q. And then you went after him? A. Yes, after I looked at my own hands. Sometimes you cut or

Gerrit J. Mertens—For Respondent—Cross.

Frank Crugeiars—For Respondent—Direct.

you get a cut and you don't notice it right away. Then I thought it must be—it must have been maybe he, so I went after him. He was halfway in the building already.

Q. You met his boss coming out? A. Probably 10
200 feet away.

Q. You met his boss coming in? A. Not right away. After I saw him, Sariego, and he just showed me his fingers and kept on walking without saying anything, I ran after him in order to catch up with him. He kept on walking and after I was just standing there just like astounded.

Q. It is customary for the men in the factory when their machines are stopped to go over and speak to the men at the other machines? A. I don't 20
get that right.

Q. Isn't it customary for the men— A. Well, customary; that all depends on how close the machines are together.

Q. Do they visit one another or don't they? A. We ain't allowed to, but it happens.

Q. It does happen? A. It does happen.

The Court: That is all.

(Witness excused.)

30

FRANK CRUGEIARS, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination by Mr. Tippet.

Q. You worked as helper on Jerry Mertens' machine? A. Yes. 40

*F. Crugiars—For Respondent—Direct—Cross.
Motion to Dismiss.*

Q. Are you Spanish? A. Yes, Spanish.

Q. Do you remember the night that Sariego got hurt, you remember the time? A. Yes, I remember the time, but I don't know the night.

10 Q. Just before he got hurt, did you have any conversation with Sariego? A. No.

Q. You were working with Jerry, fixing the machine. A. Yes.

Q. As Jerry described, weren't you? A. Yes.

Mr. Tippett: Cross-examine.

Cross-examination by Mr. White.

20 Q. You say you didn't speak to Mr. Sariego at all? A. No, because I am busy all the time.

Q. You were busy and you didn't say anything at all. You were busy working, is that it? A. Yes.

Q. You are sure you didn't speak to him at all? A. Sure, by time he hurt I didn't speak.

Q. Didn't you call him over to your machine? A. What? No.

Q. Didn't you call him over to your machine? A. No.

30 Mr. Tippett: The answer is no.

Mr. White: That is all.

(Witness excused.)

Mr. Tippett: I want to renew my motion, Mr. Commissioner, to dismiss this case. There is evidence that this man was employed on one machine only and when his foreman stopped the machine to go to the toilet, he told him to stay there until he came back. Instead of the man remaining there until his boss returned, he left and

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Motion to Dismiss.

started to walk over to another machine a considerable distance away, on which he wasn't employed, which was no part of his work or duties to be with or near, or monkeying with. He stepped directly, we claim, outside of any contemplated employment. He was doing nothing incidental to any employment at a time when he was employed or at a place where he might reasonably be during his employment. Merely because it may be permissible for men or for a man to talk with his co-worker if he is at rest and has nothing at the moment to do, is not a basis to say that in this case he can go and walk a distance of almost a hundred feet, as Jerry says is the distance there to his own machine, walk to another machine and then step on a platform and reach up a considerable height, put his fingers or his hands on that second machine upon which he had no work to do.

I submit that is not a case similar to the principle laid down in the case of Kolaszynski vs. Klie, which your Honor may be familiar with.

The Court: Yes, I am familiar with the Klie case.

Mr. Tippett: It is not similar to that case because there the woman was told to use kerosene, instead of which she used gasoline, and an explosion occurred. There is no occasion or emergency under which he was acting; he was doing nothing in connection with his employment. It is not a case of

Motion to Dismiss.

doing something in a disobedient manner which might hold him in the scope of his employment.

10 What he was doing we don't know, it wasn't on the request of anybody, it wasn't to assist anybody, and I now submit, on the strength of the respondent's proof, it clearly shows he was doing something which took him clearly outside the scope of his own employment and the petition should be dismissed.

20 The Court: I feel that the man met with an accident arising out of and in the course of his employment. I will allow compensation from August 11th to October 20th, at \$10 a week. The permanent disability has been stipulated as 50 per cent. of the right second finger and 50 per cent. of the right third finger, twenty-five weeks at \$10 a week; Dr. Trewhilla \$50 by the respondent, which is for four court appearances.

Counsel fee of \$75, \$50 by the respondent and \$25 by the petitioner.

The stenographic fee of \$10 will be paid by the respondent.

30 Mr. Tippet: I order a copy of the minutes from the stenographer now.

Exception, I respectfully ask an exception.

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

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JACOB BAER,
Court Reporter.

Motion to Dismiss.

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

JOHN C. WEGNER, 10
Referee.

I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby attest the authenticity of the signature of John E. Wegner, and that he, as the official who heard this case, is the proper one to certify as to the transcript of the testimony. 20

W. E. STUBBS,
M

Filed Clerk's Office,
June 7, 1934,
Hudson County, N. J.
GUSTAV BACH, Clerk.

30

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Minutes of Hearing of April 13, 1934.

NEW JERSEY DEPARTMENT OF LABOR,
WORKMEN'S COMPENSATION BUREAU,
Jersey City, Hudson County District.

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ADOLPH SARIEGO,
Petitioner,

VS.

CRUCIBLE STEEL COMPANY,
Respondent.

Before: HON. JOHN C. WEGNER, *Referee.*

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APPEARANCES:

JOSEPH F. WHITE, Esq., for the petitioner.

CLARENCE B. TIPPETT, Esq., for the respondent.

30

Mr. White: Your Honor, this is an application to reopen an award made by this Court on March 7, 1934, for the purpose of having included therein the hospital bill in the sum of \$121, which was, due to an oversight on my part, not put in at that time.

I therefore move to the Court to reopen the case for the purpose of having that hospital bill entered in the award of that date.

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Adolph Sariego—Petitioner—Direct.

ADOLPH SARIOGO, recalled as a witness, testified as follows:

Direct examination by Mr. White.

Q. What is your name? A. Adolph Sariego. 10

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

Q. On August 11, 1933, you sustained an accident at the Crucible Steel Company? A. Yes, sir.

Q. What time did this accident occur? A. I think 6 o'clock in the morning.

Q. It happened right in the plant itself? A. Yes.

Q. Whereabouts? A. At a machine.

Q. At which you were working? A. I was stopping at that time— 20

Mr. Tippett: All of that testimony is in, if your Honor please, as to where the accident happened and so forth.

By Mr. White.

Q. The accident happened at 6 o'clock in the morning? A. Yes.

Q. Where did you go to immediately after the happening of this accident? A. I walked out. 30

Q. You walked out to where? A. Nobody was in there at that time and I walked out.

Q. Well, how did you get to the hospital? A. They called up an ambulance.

Mr. Tippett: I object to "They called up," and also I think if he were taken he can testify to the fact and by whom.

The Court: Objection sustained.

Adolph Sariago—Petitioner—Direct—Cross.

By Mr. White.

Q. You were taken to the hospital? A. Yes.

Q. By whom? A. No, it wasn't by whom.

Mr. Tippett: Who took you there?

10 *By Mr. White.*

Q. What were you brought to the hospital in?

A. In an ambulance.

Q. What ambulance? A. The City Hospital.

Q. The Jersey City Hospital? A. Yes.

Q. You were brought there on August 11th? A. Yes.

Q. How long did you remain at the hospital? A. From August 11th to September 2nd.

20 Q. From August 11th, 1933, to September 2nd, 1933? A. Yes.

Q. What were you treated for while at the hospital during that period? A. I was operated on, on the table, that's all.

Q. They performed an operation on your fingers— A. Yes.

Q. (Continuing) —that were crushed at the factory, is that so? A. Yes.

30 Q. How long did you remain there—from August 11, 1933, to September 2nd? A. Yes.

Mr. White: That's all.

Cross-examination by Mr. Tippett.

Q. Did anyone take you to the hospital? A. The ambulance.

Q. The ambulance took you? A. Yes.

Mr. Tippett: That's all.

(Witness excused.)

Vera Sullivan—For Petitioner—Direct.

VERA SULLIVAN, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination by Mr. White.

Q. What is your name? A. Vera Sullivan. 10

Q. Are you connected with the record department of the Jersey City Medical Center? A. I am.

Q. Have you the record of one Adolph Sariego being interned at your hospital? A. I have.

Q. In August, 1933? A. Yes, sir.

Q. Will you kindly tell us what the hospital treated him for and what the amount of their bill is, and so forth? A. Well, according to my record here, he was treated for a compound amputation of the distal portion of his second and third fingers of the right hand and a crushing injury on the fourth finger. 20

Q. How long did he stay at the hospital? A. From the 11th of August, 1933, to the 2nd of September, 1933.

Q. How much does the hospital charge per day for him? A. \$4.50.

Q. Is that a reasonable charge? A. That is the charge, I believe, was agreed upon by the Compensation of the State of New Jersey. We have the list of the charges. 30

Q. How much would that amount to for the number of days he was in there? A. For twenty-three days, \$103.50.

Q. Any other charges? A. \$7.50 for an X-ray of the right hand and \$10 for the use of the operating room.

Q. The total bill, then, amounts to \$121? A. Yes, sir. 40

*Vera Sullivan—For Petitioner—Direct.
Motion to Dismiss.*

Q. Do you feel that that was a reasonable bill?

A. Yes, sir.

Mr. White: That's all.

Mr. Tippet: No questions.

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Mr. White: That is all I have.

Mr. Tippet: If your Honor please, may I, in view of the reopening of this matter, respectfully renew my motion previously made in this case, and, in view of the stenographic transcript covering the testimony, I wish to particularly point out that I believe a reconsideration by the Court, in the light of the actual transcript of testimony, would incline to merit the belief, and your Honor's opinion on reconsideration, that the petitioner has failed to prove the right to compensation.

20

I particularly point out these two elements: First, that the claimant was employed on one machine operated by—

Mr. White: I object to any such motion as this at this time. Now, I don't believe the motion is proper.

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Mr. Tippet: May I finish my motion, please?

The Court: Go ahead. I will overrule the objection at this time.

Mr. Tippet (resuming): —his boss, Mr. Vass, on which there were two helpers. One of the helpers on that machine was Sariego—that is the petitioner—and that Mr. Vass testified that he stopped the machine to go outside to the toilet and told Sariego, "Wait here until I come back." That ad-

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Motion to Dismiss.

monition was a direction and an order to Sariego restricting him and limiting the range and scope of his employment. Instead of that, Sariego states he walked over to talk with a Spanish friend at another machine. That other machine he admits was about twenty-five to thirty feet away from his machine. He admits he had no work to do on that other machine. 10

Mertens testified—Mertens, the operator of that other machine, testified that there is a distance of a hundred feet between these two machines. The testimony of Mertens reveals that Sariego had no work to do on the machine operated by Mertens, to which and toward which Sariego went, and on which Sariego was hurt. That Sariego had no conversation with this Spanish helper on Mertens' machine, and Crugeiars, the Spaniard, testified he had no conversation at all with Sariego. 20

Therefore, in view of the fact there is no corroboration of Sariego of any conversation and the fact that if he were free when his machine was not in motion to naturally engage in conversation with any friends there when he had and they had no work to do, that would be one thing; but in the definite testimony which is revealed by a reading now of the actual record it shows that if there were a time of leisure and ease when Sariego may have had nothing to do, still he was restricted and limited to the range of where he could go by order and direction of his superior, Vass, who told him to "Wait here until I come back." 30 40

Motion to Dismiss.

10 Therefore, I respectfully submit that there was a limitation in the range and scope of his employment and that there is no corroboration on the part of the petitioner that he had any conversation in the leisure interval with the Spaniard, but, on the contrary, it is flatly denied by the Spaniard and also by Mertens, the operator of the other machine, upon which he was hurt, that he had no business, and he had no business on the other machine, and I feel, sir, that in the light of the testimony which is indicated, that a reconsideration would seem merited by your Honor, and it would further seem that with the fact that I mention there is
20 no liability on the employer to compensate this man for his injury. He had stepped out of the scope of his employment, he had diverted himself from the place where he was told to remain, to go to a machine at which he had no work, some 100 feet away, as one man says, and 30 feet away, as he says, and on which machine he apparently had put his hand, sticking his fingers at a place revealed directly in the testimony of
30 Mr. Mertens.

Mr. White: I object now to any motion being made by the respondent company.

Your Honor has judicially noticed the demeanor of the witnesses and watched their various actions on the witness stand and noticed the truthfulness of the testimony of the petitioner and the evasiveness of the witnesses for the respondent company, and I think on the further ground that this motion
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Motion to Dismiss.

to-day is for a reopening for the purpose of admitting in at this time the hospital bill and for no further consideration of the case. I think on that further ground your Honor should dismiss the motion for a reconsideration of the petition.

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The Court: Well, which do you do, object to the motion or move to dismiss it?

Mr. White: I object to the motion.

The Court: Overrule the objection. I will grant your motion for the addition of a \$121 hospital bill. You may include that in an amended determination and order.

I will deny Mr. Tippett's motion for a dismissal.

Mr. Tippett: I ask an exception to your Honor's ruling.

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

WILLIAM C. O'BRIEN,
Official Court Reporter.

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

JOHN C. WEGNER,
Referee.

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Motion to Dismiss.

I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, hereby attest the authenticity of the signature of John C. Wegner, and that he, as the official who heard this case, is the proper one to certify as to the transcript of the testimony.

W. E. STUBBS.

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**Opinion of Supreme Court, December 10,
1935.**

NEW JERSEY SUPREME COURT.

#213 October Term, 1935.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the
Court of Common Pleas, and
ADOLPH SARIEGO,
Respondents.

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Submitted October , 1935. Decided , 1935.

On Certiorari.

For prosecutor, CLARENCE B. TIPPETT.
For respondents, WILLIAM E. SEWELL.
Before JUSTICES CASE and BODINE.

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BODINE, *J.* Prosecutor seeks to reverse an award made by the Bureau and affirmed in the court of Common Pleas in a Workmen's Compensation case. The employee lost part of the second and third fingers of his right hand as the result of an accident at the plant of the Crucible Steel Company where he was employed for the last eight years as

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Opinion of Supreme Court.

10 a roller's helper. The proofs indicate that the boss stopped the machine for his own purposes, telling the helper to stay until he came back. The injured man walked over to another machine to talk to a fellow worker. That machine was suddenly started up crushing his fingers.

The trial court was justified in finding that the instructions given did not necessarily mean that the injured man should not move from the spot. The proofs do not show that workmen were forbidden to move about the room when there was no work for them to do at a particular machine where they were assigned to work. It is so customary for workmen to chat with their fellow workers when opportunity offers that the award was justified.

20 Perhaps the proofs were capable of the inference that there was a custom among the helpers to move about the room when a machine was stopped and chat with their fellows. It had been done before, but it seems unnecessary so to hold.

30 The findings of fact by the trial court are not disturbed when supported by the evidence, nor are the findings of two concurring tribunals lightly disturbed. The Workmen's Compensation Act is remedial legislation and recovery is not confined to the actual time the workman is engaged at his machine. *Terlecki v. Strauss*, 85 N. J. L. 545, affirmed 86 Id. 708. Cases are collected in *Hanna v. Erie R. R. Co.*, 152 Atl. Rep. 179, indicating that a workman struck by an automobile while going to a toilet across a public street may recover where a custom existed. So also where a woman suffered an injury while combing wool from her hair preparatory to departure. Further, that an employee suffering an accidental injury while eating lunch

Opinion of Supreme Court.

upon the employer's premises may recover for injuries sustained when it appears that the employees usually ate in the place where the accident occurred.

Prosecutor argues that there was an abandonment of the work for which the man was employed. Not so. The proofs show a necessary cessation of work to meet the needs of the boss and a mere movement to another part of the room to chat with another workman. Such movement seems not to have been expressly forbidden. The case has no resemblance to cases where workmen disobey instructions or use machines which they were not engaged to use or were forbidden to use. 10

The case of *DeSalvio v. Menihan Co.*, 225 N. Y. 123, a boy saying good-bye to a friend before going to war, adopts to our mind far too narrow a view as to what takes an employee out of his employment. The better rule, we think, is stated in 71 *Corpus Juris* 680, as follows: "An employee may, in intervals of leisure during his working hours, move from place to place on the premises of the employment and visit with co-employees or other persons, and, in doing these things within the bounds of reason, he does not go out of the course of his employment; and where injury results from a risk incidental to the performance of his contract while so visiting, the injury also arises out of the employment. Where, however, the employee is visiting with coemployees at a place where he might not reasonably be about matters unrelated to the performance of his work, it does not arise out of or in the course of his employment." 20 30

In the present case, there is nothing to indicate that in the interval of leisure during the employment the injured workman did anything not within 40

Opinion of Supreme Court.

the bounds of reason. He went to another part of the room to chat with a friend and was injured when an unguarded machine, on which his fingers rested, was suddenly started up. To limit the recovery to the time the workman was actually engaged at his machine would not only be too narrow
10 a construction of a statute designed to place industrial loss upon the industry, but would be contrary to our settled law.

The writ will be dismissed with costs.

Filed Dec. 5, 1935.

FRED. L. BLOODGOOD,
Clerk.

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Notice of Appeal.

NEW JERSEY SUPREME COURT.

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

v.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the said
Court of Common Pleas, and
ADOLPH SARIEGO,
Petitioner-Respondent.

On Certiorari

10

To:

WILLIAM E. SEWELL, Esq.,
Attorney for Petitioner-Respondent,
900 Bergen Avenue,
Jersey City, New Jersey.

20

TAKE NOTICE that Crucible Steel Co. of America,
prosecutor, hereby appeals to the Court of Errors
and Appeals of the State of New Jersey, from the
judgment of the New Jersey Supreme Court ren-
dered in the above-entitled matter.

CLARENCE B. TIPPETT,
Attorney for and of Counsel to Prosecutor.

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Notice of Argument.

NEW JERSEY SUPREME COURT.

10	ADOLPH SARIEGO, Petitioner-Respondent, v. CRUCIBLE STEEL CO. OF AMERICA, Prosecutor.	}	On Certiorari
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To:

WILLIAM E. SEWELL, Esq.,
 Attorney for Petitioner-Respondent,
 900 Bergen Avenue,
 Jersey City, New Jersey.

Sir:

PLEASE TAKE NOTICE of the argument of the issue in this cause before the Court of Errors and Appeals of the State of New Jersey, to be held at the State House, Trenton, New Jersey, on the first Tuesday in February, next, at 10 o'clock in the forenoon, or as soon thereafter as the Court can hear the same.

Yours respectfully,

CLARENCE B. TIPPETT,
 Attorney for and of Counsel to Prosecutor

Dated, January 20, 1936.

Sat Below: Justices Case and Bodine.

96 FEB.T.1936

NEW JERSEY
Court of Errors and Appeals

CRUCIBLE STEEL CO. OF AMERICA,
Prosecutor,

VS.

COURT OF COMMON PLEAS in and
for the County of Hudson, and
GUSTAV BACH, Clerk of the
said Court of Common Pleas,
and ADOLPH SARIEGO,
Petitioner-Respondent.

On petition for
compensation.

On appeal from
the Supreme
Court.

BRIEF OF APPELLANT.

Statement.

This cause is upon appeal from the Supreme Court. The Court below dismissed a writ of certiorari, granted at the instance of Crucible Steel Co., appellant herein, to review a determination and judgment of the Hudson County Court of Common Pleas which affirmed an award and judgment of the Workmen's Compensation Bureau (Case, pp. 71-74).

The only question raised below was whether or not the injuries received by Sariego arose out of and in the course of his employment. The Referee of the Bureau held for award (Case, pp. 22-24). The opinion of the Hudson Court of Common Pleas is contained in case (pp. 28-29).

The Facts.

The petition filed herein showed Sariego was employed as a roller's helper, and, on August 11, 1933, had several fingers caught in the gear of a rolling machine, resulting in partial amputation of the second and third fingers of right hand. The prosecutor was denying that the accident arose out of and in the course of employment.

The case was heard on March 7, 1934, and concluded April 13, 1934. There was no question as to the extent of disability. The sole issue was respecting jurisdiction of the Workmen's Compensation Bureau for award.

There were two machines being operated at the plant. Sariego and another helper were employed at the *larger machine*, the operator or boss of which was a man named Pete Vass (Case, p. 44). The accident did not occur on the large machine at which claimant was employed to work, *but did occur* upon a machine located at a distance about 100 feet away, as the operator states (Case, p. 52). The petitioner had thought the distance between the two machines was about 25 feet, but the operator of that machine states he figured the distance between these two machines about 100 feet, and that any other statement by petitioner was a miscalculation.

The *other* machine (on which he was hurt) was operated by a foreman named Mertens, who had one helper, Frank Crugeiars (Case, pp. 49, 54).

It appears that, from the stories related, this petitioner was at work upon his own machine and, his operator, or boss, Mr. Vass, stopped the machine; told him (Sariego and the other helper) "to stay until I come back." His boss went outside to the toilet; the machine was stopped; and in-

stead of Sariego remaining at his own machine as his superior instructed him to do, he left his machine and states that he went over to talk to the Spaniard at the machine next to his (Case, p. 37); that he leaned on the machine, on the back, and someone suddenly started the machine and his fingers were crushed in the machine (Case, p. 39). He admits his work was under Pete Vass (Case, p. 39), and that he was not doing any work on that other machine on which he got his hand caught (Case, p. 40).

The evidence clearly shows that his hiring and work was solely to be confined to his own machine, and there was no connection between his machine and the machine on which he suffered an injury.

Vass, petitioner's boss, described that his own machine was the biggest in the shop; that after he stopped the machine and told them to stay there until he came back, he started to go outside to the toilet. The first he knew of any accident to have occurred was when Jerry (the operator of the other machine) met him as he was coming from the toilet, and said: "'Your helper had got hurt.' I says, 'Get out.' I says, 'I just passed him there and he don't say nothing to me. I asked him where he is going and he don't say nothing to me.' Me and Jerry we go outside to go after him, we go after him again to see what is happened to him. Then I said, 'Let me see your hands.' He had his handkerchief like that (indicating) and we take it off" (Case, p. 48). When he returned his own machine was still stopped. Petitioner did not get hurt on his own machine (Case, p. 49).

Jerry Mertens, operator of machine on which claimant suffered his injuries, testified that he and his helper, Crugeiars, were at work on their machine; that he was trying to stick a coil of wire

in his machine, and his helper was "holding the coil of wire on a staunch." While he and his man were doing this work, he thought he heard or noticed somebody step on his platform. The platform is a foot or so off the ground, running alongside of this machine. Jerry did not look around to see who it was, but was at the time spinning and working the guides, guiding the machine. He noticed, or rather felt, through vibration, that somebody was stepping on the platform, and then noticed someone stepped off. He then turned around, seeing Sariego, after he had finished tightening his guides. Sariego did not say anything, but was walking off in the direction of the toilet (Case, pp. 50-54).

This witness Mertens definitely testifies *Sariego said nothing at all, either to him or to his helper*. There was no conversation. When he suddenly turned around he noticed blood on the platform. He looked at his own hands to see if they were all right, and then started and ran after Sariego, who was going in the direction of the toilet. He called to him, "Did you get hurt?" Sariego said nothing, simply raising his hand. Jerry states he was not merely surprised but was "astounded." Just then Vass came along from the toilet and Jerry told him, "Your helper had his finger cut off." Vass said, "You are crazy." Whereupon they together went after Sariego, meeting him near the toilet. Sariego fainted and they endeavored to assist him and then sent for a doctor.

When Jerry got back to his machine he saw part of Sariego's finger lying on top of his machine (Case, p. 51). The place where Sariego had his fingers caught in the machine was at a place about 7 feet high from the ground or floor. This witness could not reach this place where Sariego's hand

must have been caught, indicating that Sariago had stepped on to the platform, and then in some unaccountable way had raised his right hand high up on to and in the right side of the machine (Case, p. 52).

There is testimony, very emphatic, that there was "no conversation whatsoever" between Sariago, Jerry or the Spanish helper, Crugeiars (Case, p. 53). No one asked Sariago to come over to this machine; that Sariago had no work at all to do there, it was no part of his duties; and "he is supposed to stay on his own machine, like we all have to do. He is supposed to be by his own machine."

Crugeiars, Jerry's helper, corroborated Jerry by testifying that he worked as Jerry Merten's helper on his machine; that he did *not* have any conversation with Sariago before he got hurt; that Crugeiars was working with Jerry, fixing the machine, as was described (Case, p. 5). He did not call Sariago over to his machine, was busy all the time at his own work, and did not say anything to him at all.

POINT I.

The injuries sustained by Sariago did not arise out of and in the course of his employment, and the judgment of the Court below constitutes legal error, meriting reversal.

To warrant recovery under the Act it must appear (1) that the injury was caused by accident, (2) that the accident arose out of the employment, and (3) that the accident arose in the course of the employment.

Bryant v. Fissell, 84 N. J. L. 72.

Steers v. Dunnewald, 89 N. J. L. 601.

Hulley v. Moosbrugger, 88 N. J. L. 161.

In this case Sariego's employment was:

(1) Confined solely to his own machine, and he had no work or duties at any other machine.

(2) His boss stopped his machine, told him to wait there at his own machine; that he would be right back. Thus there is a definite limitation as to range and scope of employment of this petitioner shown in the testimony which is important in the light of what subsequently happened, as set forth under the facts.

It is respectfully submitted that the scope of his employment was not alone defined by what he was hired to do, but especially *at that time* he was *directly told to wait there at his machine*.

We urge that he was doing nothing in the interest of his employment when hurt; that he had no work or business to be actually upon, and with his hand put inside of the other machine, located at a distance of almost 100 feet from his own machine. He had, apparently, left his own machine, and solely for the consummation of a personal purpose casually walked some distance to this other machine, steps upon a small platform, reaches his hand up high above his head, and puts it down into a part of that other machine. All of this was without the knowledge of the chief operator on *that* machine as well as of the Spanish helper. Both Mertens and Crugeiars state there was no conversation had at all with the petitioner which, from the circumstances indicated in the record, tends to nullify any possible corroboration to the story related by the petitioner that he went over to talk with the Spanish helper.

At the time he suffered his injury it was not a hazard to which he was subjected in performance

of any duties to his employer, and was not a natural incident of his work (*Hulley v. Moosbrugger, supra*).

The master is not liable unless the servant at the time is in the performance of some duty for which he was employed to work (*Bryant case, supra*).

In *Colucci v. Edison Portland Cement Co.*, 94 N. J. L. 542, the Court of Errors reversed an award, holding accident did not arise out of and in the course of employment where an employee during working hours stopped his work which he was employed to perform, went into another building, laid down to sleep and was killed. He had abandoned his employment. The Court said (pp. 445-446):

“But no matter how good his reason for leaving his employment may have been, the controlling fact is that he did leave it, and that the accident to him occurred while he was deliberately away. It did not, therefore, arise in the course of his employment within the meaning of the Workmen’s Compensation Act.”

The same ruling has been followed in later cases:

Hanover v. Pennbrook Golf Club, 159 Atl. 387. The Supreme Court held: Injuries sustained by an employee of a golf club while climbing to cupola of a barn to chase pigeons, after having carried working tools to the barn, held not to arise out of and in course of employment, since employment had been abandoned. Case of *Colucci v. Edison Portland Cement Co.*, *supra*, was cited as a principle applicable.

On subject of exceeding his duties, in *Lynch, Adm. v. Newman*, 37 N. J. L. J. 17, it was held where a workman does something that is no part

of his duty to do, and while so doing sustains injury, claim is not compensable.

Adams v. Quackenbush, 7 Misc. 444, a cleaner was told not to do any work on an electric dishwasher. She took herself outside of the scope of employment when she worked on the dishwasher.

Conklin v. Brighton Mills, 144 Atl. 815 (Court of Errors), where a workman is operating a truck for reasons personal to himself *during noon recess, and not in line of duty*, an injury which he does thereby to a fellow-employee, likewise off duty, does not come under the Act. The Court expressed the guiding principles and rules of laws to acts of servants under certain circumstances, and particularly excludes a liability upon an employer where acts of employees cause injury during spare time.

On violation of orders, it was held in *Schelf v. Kispough*, 37 N. J. L. J. 173, that an injury to a workman when he is violating an express order of his employer is not by accident within intentment of the statute.

In *Reimers v. Proctor Publishing Co.*, 89 Atl. 931, claim was disallowed for accident which occurred while disobeying express orders not to use an automobile.

In *Smith v. Corson*, 93 Atl. 112, a workman told to keep off a scaffold, and not to do any climbing, does not by a fall from such scaffold sustain an accident arising out of and in course of employment (see also *Glynn v. J. F. Boyle Co.*, 6 Misc. 873).

The employer has a legal right to restrain the work and limit the labors of an employee within the range and scope of desired employment; and when an employee digresses from the range and scope of defined employment, and suffers an injury, we urge that the employer is not liable; especially

where the diversion by the employee is strictly personal to himself and he leaves the place of safety to add on to himself an additional, added peril not contemplated by his employment.

The Supreme Court in the case of *Nardone v. Public Service Electric & Gas Co.*, 174 Atl., at p. 748, states that "an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person as incidental to it. And a risk is incidental to the employment where it belongs to or is connected with what a workman has to do in fulfilling his contract of service. *Bryant v. Fissell*, 84 N. J. Law 72, 86 A. 458."

In the Supreme Court's opinion in the case of *Belyus v. Wilkinson, Gaddis & Co.*, 178 Atl., at page 184, cites *McNicol's* case, 215 Mass. 497, on the subject of an accident arising out of and in the course of employment, as follows:

"An accident arises 'in the course of' the employment when it occurs (a) within the period of the employment; and (b) *at a place where the employee may reasonably be*; and (c) while he is reasonably fulfilling the duties of the employment or doing something incidental to it. It arises 'out of' the employment when the risk of such an occurrence is reasonably incidental to the employment. *Such a risk is one that grows out of or is connected with what a workman has to do in fulfilling his contract of service.*" (Italics ours.)

Our case seems quite analogous, in principle, to case of *DiSalvio v. Menihan Co.*, 225 N. Y. 123, where a boy during a lull in his work left his machine, walked across the factory room to bid good-bye to a fellow-employee who was leaving for

military service. While talking he unwittingly placed his hand upon some unguarded gears of the machine which his fellow-employee was operating and lost two fingers. He was awarded compensation by the Commission, but the Court of Appeals of New York State reversed and dismissed the claim and stated, in part:

“There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow-employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer’s interests. *It was simply and solely the expression of a private desire and the consummation of a personal purpose.* However natural and even commendable his act may have been it was neither beneficial to his employer nor to himself in the way of completing and performing his work.” (Italics ours.)

Mr. Justice Bodine, in writing the opinion of the Court below (Case, p. 73), believes the case of *DiSalvio v. Menihan Co.*, *supra*, presents “too narrow a view as to what takes an employee out of his employment”; and refers to the “better rule” stated in 71 *Corpus Juris* 680, as follows:

“An employee may, in intervals of leisure during his working hours, move from place to place on the premises of the employment and visit with co-employees or other persons, and, in doing these things *within the bounds of reason*, he does not go out of the course of his employment; *and where injury results*

from a risk incidental to the performance of his contract while so visiting, the injury also arises out of the employment. Where, however, the employee is visiting with co-employees at a place where he might not reasonably be about matters unrelated to the performance of his work, it does not arise out of or in the course of his employment." (Italics ours.)

Mr. Justice Bodine continues (Case, pp. 73-74) :

"In the present case there is nothing to indicate that in the interval of leisure during the employment the injured workman did anything *not within the bounds of reason*. He went to another part of the room *to chat with a friend* and was injured when an unguarded machine, *on which his fingers rested*, was suddenly started up." (Italics ours.)

Appellant urges that the evidence in our case points to the fact that this employee's work, and contract of employment, was limited and confined, solely and only, to work at his *own* machine; *not* at the machine where injury occurred. The *rule* expressed by Mr. Justice Bodine is a fair one, but we contend that the facts must bring the employee within the intendment of that rule; and *in our case* we believe Sariago went *outside* of its intendment, in that :

(a) It was not *within the bounds of reason* that he would leave his machine when a *particular defined instruction* from his foreman and superior at the time directed him to stay here.

Case (pp. 45, 46), Pete Vass testifying :

"Q. You left to go to the toilet? A. I told them (meaning Sariago and the other helper) to stay until I come back.

Q. You told them to stay there until you got back. You stopped the machine? A. Yes, sir.

* * * * *

Q. Now, did Sario go have any other employment or work to do except on your machine? Was he hired to work on your machine alone, if you know, or was he hired to work on somebody else's machine? I am talking about Sario. A. No, on my machine, that's all.

Q. On your own machine. When you left to go to the toilet after stopping your machine, did he say anything to you? A. He no say nothing to me.

Q. You told him to wait here until you come back? A. Yes, sir."

And, at Case (pp. 48, 49) :

"By Mr. White.

Q. Was your machine—was your machine in operation after you had gone to the toilet? A. No, stopped.

Q. It was stopped? A. Yes.

Q. You are sure of that? A. Yes, sir.

Q. How sure are you? A. I know, because nobody got to touch that machine, only me.

Q. Are you the one that operates this machine? You start it and stop it? A. I operate it. I start it and stop it.

Mr. White: That is all.

By Mr. Tippet.

Q. He didn't get hurt on your machine? A. No."

Hence, we question if the instruction is not a limitation so as to have legally restrained the range and scope of the employee's activities, at the time and place; and nullify permissible application of the rule enunciated by the Court below under the circumstances.

(b) We believe he clearly was not acting, within the bounds of reason, where his interval of leisure was restrained on the superior's order; and, yet, he leaves his machine, walks over to the other machine, and suffers injury there. We think the last sentence of the aforesaid rule has applicability, in that he was visiting (or attempting to visit) "with co-employees at a place where he might not reasonably be about matters unrelated to the performance of his work." We think the Court below erred to hold him within the employment, under the reasonable intendment of such rule, upon the facts.

It would seem that, in large factories, definite orders and directions of superiors must be enforced, not alone for the orderly progress of work, but to avoid accidents occurring where men interject themselves in places, and among machines, where their work does not call them; and where a diversion is in no way incidental to their work or duties.

Jerry Mertens, operator of machine on which this accident occurred, testified:

Case (p. 52):

That the place where this boy's fingers were caught was a point "about 7 feet" up on the machine, on the right side; and this witness said:

"A. I stand on the platform and I can't reach it. He must have stood on the platform because when I stand on the platform I can just about maybe reach it."

At Case (p. 53):

"Q. Your machine has no connection with Mr. Vass' machine? A. No, sir.

Q. Did you have any conversation with Mr. Sariego at all? A. No, sir; I didn't even see him.

Q. You didn't even see him. You didn't even see how he got hurt? A. No, sir.

* * * * *

Q. Would you say Sariego had any work at all to do on your machine? A. No, sir.

Q. Do you know if it was part of his duties to come to your machine? A. No, sir.

Q. That is, it was not or was? A. *No part of his duties at all. He is supposed to stay on his own machine, like we all have to do. He is supposed to be by his own machine.* (Italics ours.)

The witness Crugeiars, with whom the claimant said he went over to talk to (Case, p. 37), testified at Case (p. 58):

“Q. Do you remember the night that Sariego got hurt, you remember the time? A. Yes, I remember the time, but I don't know the night.

Q. Just before he got hurt, did you have any conversation with Sariego? A. No.

Q. You were working with Jerry, fixing the machine? A. Yes.

Q. As Jerry described, weren't you? A. Yes.

* * * * *

Cross-examination by Mr. White.

Q. You say you didn't speak to Mr. Sariego at all? A. No, because I am busy all the time.

* * * * *

Q. Didn't you call him over to your machine? A. No.”

The opinion below mentions (Case, p. 74) :

“He went to another part of the room to chat with a friend and was injured when an unguarded machine, on which his fingers rested, was suddenly started up.”

The testimony as to that indicates (Case, p. 37) :

“Q. Just tell us how this accident happened while you were over there talking, what happened? A. I leaned on the machine, on the back.

Q. Was there any guards on that machine?
A. No.”

Mr. Mertens, the boss and operator on that machine, said (Case, p. 56) :

“Q. Is there any safety device? A. Yes, there is a safety device; as far as the insurance company is concerned them gears there is covered so that we could not—he could not stick his hands in there. You really could not do that.”

At Case (p. 55) :

“Q. In other words, you are trying to say that he inadvertently put his hand into the machine? A. No, I didn't say he put his hand into the machine. How could I say he stuck his hand in there? That is something I don't know anything about. *He didn't have no business about there.*” (Italics ours.)

Upon the legal proposition as to liability, it would appear that, whether the machine was guarded or not, it would be immaterial. He had digressed from a place of safety to a place of danger by his own intentional and voluntary act.

We recognize the rule laid down in *Geizel v. Regina Co.*, 96 N. J. L. 31, aff'd 97 N. J. L. 331,

and in *Kauffeld v. G. F. Pfund & Sons*, 97 N. J. L. 335, 336, that findings of fact by the Trial Judge will not be disturbed if they are supported by evidence.

However, case of *Terlecki v. Strauss*, 85 N. J. L. 545, aff'd 86 id. 708, in counsel's view, is dissimilar in point of analogous facts. In that case a girl was combing wool out of her hair after quitting and before leaving the factory when her hair was caught in machinery and she was injured. It was held that the preparation reasonably necessary for beginning work after the employer's premises are reached and for leaving when the work is over, is a part of the employment; and that it was reasonably necessary that she should comb her hair and remove the particles of wool before leaving the factory. Therefore, her accident arose out of and in the course of employment.

The Hudson Common Pleas Court, in its opinion, appears to confine the basis for affirmance to the following words (Case, p. 29) :

"I find nothing in the evidence to substantiate the claim of the defendant-appellant that Sario was forbidden to leave his machine during his hours of employment. The statement of the witness Vass to the effect that he 'told them (his helpers) to stay until I come back' is too vague to establish this contention of the defendant-appellant. It has been held repeatedly that the statute anent workmen's compensation is remedial in its nature and should be liberally and broadly construed."

While we agree with the view that the statute should be liberally and broadly construed, we nevertheless urge that an employer is not the insurer of every act performed by an employee during certain

hours which are presumptively during the course of a man's anticipated employment. An employer is not liable for every personal act which an employee seeks to do in furtherance of an individual desire where his act has nothing to do with his employment; and at the time an injury occurs he is seeking to do something or does something, neither incidental to nor in the interest of his employment. In those cases where our courts have affirmed awards, there has been some definite performance of duty for and in the interest of the employer. Here, instead of remaining at his machine in accord with the special order and direction of his boss, he rambled away from his machine, goes on a purported visit to another employee, and without the knowledge of that other employee suffers an accident brought about by his own act *upon a machine* other than one upon which he was solely hired to work. We think there is a distinction evidenced in this record which merits review of the judgment rendered herein. Any permissible practice of men to converse with one another, while not actually at work, must be viewed in the light of reason, dependent upon the set-up in each case.

The burden rests upon a petitioner to prove by a fair preponderance of credible testimony the essential elements necessary for an award. We do not believe the petitioner has sustained that burden in justifying his departure from his machine under the particular circumstances. He gives no credible explanation for his act which occasioned the accident. His personal desire to talk with the Spanish friend is not corroborated in any manner by showing any conversation had with that friend; and the fact that the order to remain at his own machine, given by Vass, was a definite instruction to remain at his machine, is evidenced by the extreme surprise shown by Mr. Vass when Mertens first told him that the claimant was injured.

CONCLUSION.

(1) We respectfully submit that the Court below erred in point of law in affirming the judgment rendered in favor of the petitioner and against the prosecutor herein.

(2) That the Court erred in holding that the petitioner suffered an accident arising out of and in the course of his employment on August 11, 1933, within the meaning and intent of the Workmen's Compensation Law.

We respectfully ask that the judgment of the Courts below be reversed and claim for compensation dismissed.

Respectfully submitted,

CLARENCE B. TIPPETT,
Counsel for Prosecutor.

THE HISTORY OF THE
CITY OF BOSTON

The first settlement in the town of Boston was made in 1630, when a number of Englishmen, led by John Winthrop, arrived in the harbor of the city. They were followed by other settlers, and the town grew rapidly. In 1639, the town was incorporated as a city, and in 1688, it was again incorporated as a city. The city has since that time continued to grow and prosper, and is now one of the largest and most important cities in the United States.

The city of Boston is situated on a peninsula in the harbor of the city. It is bounded by the harbor to the south and east, and by the city of Cambridge to the north and west. The city is divided into several wards, and is governed by a city council.

The city of Boston is one of the oldest cities in the United States, and has a rich history. It was the site of the first settlement in the town of Boston, and has since that time continued to grow and prosper. It is now one of the largest and most important cities in the United States.

New Jersey Court of Errors and Appeals

CRUCIBLE STEEL CO. OF AMERICA,
Appellant,

v.

COURT OF COMMON PLEAS IN AND
FOR THE COUNTY OF HUDSON,
and GUSTAV BACH, Clerk of
the said Court of Common
Pleas, and ADOLPH SARIOGO,
Petitioner-Appellee.

On Petition for
Compensation.

On Appeal from
the Supreme
Court.

BRIEF OF PETITIONER-APPELLEE.

Statement.

This matter comes before this Honorable Court upon an appeal from the Supreme Court to review the dismissal by that Court of a writ of certiorari granted at the instance of the Crucible Steel Co. of America, the appellant herein, to review the determination and judgment of the Hudson County Court of Common Pleas which affirmed the award and judgment of the Workmen's Compensation Bureau (Case, pp. 71-74).

The only question involved was whether or not the injuries sustained by Adolph SarioGO, petitioner, arose out of and in the course of his employment. The Referee of the Workmen's Compensation Bureau held that the injuries sustained by petitioner did arise out of and in the course of his employment (Case, pp. 22-24) and the Hudson County Court of Common Pleas affirmed the award of the Workmen's Compensation Bureau (Case, pp. 28-29).

Statement of Facts.

The petition as filed herein shows that the petitioner was employed as a roller's helper and on August 11, 1933 had several fingers caught in the gear of a rolling machine, resulting in partial amputation of the second and third fingers of the right hand.

The respondents filed an answer admitting that the petitioner was employed by the respondent Company, but denied that the injuries so received by the petitioner arose out of and in the course of the petitioner's employment with the respondent Company. There was no question as to the extent of disability suffered by the petitioner, it having been stipulated and agreed by the respondent Company that the petitioner suffered temporary disability from the 11th day of August, 1933 up to and including the 20th day of October, 1933, a period of 11 weeks.

It was further stipulated and agreed that the petitioner did suffer fifty percent total and permanent disability of the second and third fingers of the right hand.

The sole issue before the Court below was whether or not the petitioner sustained an accident arising out of and in the course of his employment. The testimony as adduced at the hearing by both parties hereto shows the following facts. That Sario was in the employ of the respondent company on August 11, 1933 and had been so employed for 8 years prior to the accident herein (Case, pp. 35-36). That his duties were that of a roller's helper. That on the day of the accident Sario reported for work at midnight and was to work until 8 o'clock in the morning (Case, p. 36). That around 6 o'clock of the

morning in question, Mr. Vass, operator of the machine on which Sarioego was employed, stopped his machine and went to the lavatory (Case, p. 37), and according to his testimony (Case, p. 45) said, "I told them to stay until I come back," meaning those employed at his machine. The petitioner Sarioego on direct examination (Case, p. 39) testified that nothing was said to him and that they were allowed to go over there, meaning to the adjoining machine. There was no testimony showing what Mr. Vass actually meant when he told them to "stay until I come back," whether Mr. Vass meant for the men to stay at the machine or to stay inside of the plant itself, we do not know from his testimony. When Mr. Vass left to go to the lavatory, Sarioego walked over to the adjoining machine which was about 25 feet away from his own machine, to speak to a Spanish friend of his named Crugeiars (Case, p. 39). While he was over at his friend's machine, which machine was stopped, the petitioner was leaning against the same, when suddenly the machine was started by Jerry Mertens, operator of the same, and Sarioego's fingers were crushed (Case, p. 39). The machine upon which Sarioego was working and the one upon which he was injured did not have any guards or safety devices, as is required by law (Case, p. 37).

Sarioego testified on direct examination (Case, p. 37) to the following:

"Q. Why did you go over to talk to the Spaniard? A. Oh, just go around there like he does."

By this testimony Sarioego meant that it was the custom of the men to go from one machine to another and talk when their own machines were stopped.

The following testimony was brought out on direct examination (Case, p. 38) by the petitioner:

“Q. Was it usual for the men to go from one machine to the other while there was nothing for them to do at their own machine?

A. (By Sariego) We go over there” (meaning that the men could leave their machines and walk over and talk to those at adjoining machines, if they so desired. It was the usual thing and common practice for the men to do so under such circumstances).

On direct examination of Sariego (Case, p. 39):

“Q. Were you allowed to go over there? Was there any order that you are not to go over there, or were not to go over there at the time? A. Anybody can go on each machine.

Q. You could go anywhere you felt like it? A. Yes, and talk to the guy.”

The petitioner by this testimony meant that the men were not restricted alone to their own machines, but could go from one to another when there was no work for them to do, or as in this particular case where the operator absented himself, the helpers thereof were permitted by common practice and custom to go wherever they desired until he came back.

Cross-examination of the petitioner by Mr. Tibbett, elicited the following information (Case, p. 40):

That Sariego, after Mr. Vass had left to go to the lavatory, had proceeded over to the adjoining machine and spoke to Mr. Crugeiars, and while so speaking to him was injured when the machine was suddenly started by Jerry Mertens, the operator of the same.

The testimony of the petitioner that it was a custom among the men to go from one machine

to the other while there was no work at their machine was further corroborated by Mr. Mertens, a witness for the respondent company. When he was examined by the Court, the following information was elicited (Case, p. 59):

“By the Court:

Q. Is it customary for the men in the factory when their machines are stopped to go over and speak to the men at the other machines? A. I don't get that right.

Q. Isn't it customary for the men * * *
A. Well, customary. That all depends on how close the machines are together.

Q. Do they visit one another, or don't they? A. We ain't allowed to, but it happens.

Q. It does happen? A. It does happen.”

This testimony clearly shows that a custom existed in the plant of the respondent, for the workers to talk to men at adjoining machines, and the Company tacitly allowed the same to continue and it was therefore a waiver of any rules or regulations that they had imposed upon the men from going from one machine to another.

POINT I.

The petitioner, by going from his machine to the machine of another, which was the common practice and custom in the plant, did not take himself outside of his scope of employment, and when injured, sustained an accident arising out of and in the course of his employment.

The case of *Etherton v. Johnstown Knitting Mills Company*, 184 N. Y. App. Div. 820, 172 N. Y. Supp. 724.

Petitioner came to work about 7 A. M. and set a bottle of tea on the boiler in the basement, and while on her way back upstairs, slipped and fell at the foot of the staircase. *In order to be acting in the course of her employment, therefore, it was not necessary that she should have been actually engaged in the work thereof. It was sufficient if she was performing some act upon the premises of her employer which, though directly beneficial to herself, was an ordinary incident of a day of employment. It is true that her employer had previously promulgated a rule prohibiting the use of the boiler room and the boiler by its employees. However, it was the common practice of employees at the time of the accident to make use of the room as did this claimant. The acquiescence of the employer in this practice was sufficient to abrogate the rule; also the injuries sustained by the claimant arose through an accident arising out of her employment.*"

In the case of *Richardson v. Denton Grocery Co.*, Gordon's W. C. Rep. (1913) 554, it was held:

If employees have, to the employer's knowledge, for a considerable period, violated the rules

of the employer without the employer giving any reprimand or uttering any protest, the rules should be held to have been waived and a tacit permission to act in violation of the terms of such rules should be held to have been given.

In this case the Court allowed compensation.

In the case of *Morris v. James Bell Company, Inc.*, 160 Atl. 211, 10 Misc. 619, it appeared that the workman Patrick J. Morris filed a petition for compensation with the Workmen's Compensation Bureau, alleging that on August 23, 1930, while in the employ of the James Bell Company, he was injured in an accident arising out of and in the course of his employment, and prayed for compensation. The company filed an answer admitting that the petitioner was in the employ of the company at the time of the accident, but averring that petitioner, contrary to specific instructions to refrain from riding on top of cab of truck, rode on the top of the cab of the truck, and as the truck was passing under an overhead bridge, he was injured by coming in contact with the bridge. The Deputy Commissioner, after hearing the case, found that the accident arose out of and in the course of the employment, and awarded compensation. The company thereupon appealed to the Court of Common Pleas, and there judgment final was entered for the workman, the Court further holding that a workman's disobedience to an order as to the way in which the work should be done, does not result in the conclusion that the injury did not arise out of the employment.

Zabriskie v. Erie Railroad Company, 85 N. J. L. 157, 88 Atl. 124, 86 N. J. L. 266, 92 Atl. 385, where an employee during the hours of his work found it necessary to resort to a toilet upon the defendant's premises, and it was shown to be the continued practice of the employer's workmen to

use, without dissent of the employer, but it was so located as to make it necessary for the employee to cross the employer's railroad tracks to reach it, in doing which he was struck by one of the employer's trains, receiving fatal injury, the death was held to be by accident arising out of and in the course of employment.

Perry v. Submarine Boat Corp., 42 N. J. L. J., page 370:

Where a boy employed to supply a crane crew with water was killed by the crane while riding on it in the discharge of such duty, it was established that it was against the printed rules of his employer to ride on the crane and that he had been often warned by his fellow workmen of the great danger of doing so, but had never been ordered or warned by his employer in any way, not to ride on the crane, and he could perform his work more rapidly by using the more dangerous method of riding on the crane; and that he was playing on a musical instrument when killed. Held that the boy's death was the result of an accident which arose out of and in the course of his employment.

There is no testimony that the Crucible Steel Company, respondent herein, had posted notices in their said plant, warning the employees not to go from one machine to another, nor prohibiting them from doing the same. The only testimony that the petitioner was not to go in any other part of the plant was the testimony given by Mr. Vass, respondent's witness, which testimony was denied by the petitioner and Mr. Mertens, a witness for the respondent company.

Hart v. Wilhelm, 41 N. J. L. 13. Petitioner was caught between cars while crossing the track on his way to a toilet room he had been accustomed to use while working for the defendants. The defendants sought to avoid the payment of com-

pensation under the Workmen's Compensation Act, on the ground that they furnished toilet facilities which were accessible to petitioner, without his crossing the track, and that he should not have attempted to go to the toilet in the yard on the opposite side of the track. But it did not appear that he knew of the existence of the other toilet. Held that his injury arose out of and in the course of his employment.

In the case of *Madden v. Whitham*, 38 N. J. L. 113, petitioner was struck by a train while on his way from his work to the toilet room in a nearby railroad station. It was held—that the act of the petitioner in following the course which he took along the railroad track, *was such an act as to be reasonably expected of one engaged in his work at the place in question*, and under the circumstances of his need at the time, and, further, that the said injuries were sustained during his employment and at a place where he might reasonably have been during that time, and therefore occurred in the course of the employment of the petitioner.

Kolaszynski v. Klie, 39 N. J. L. 344. While the act (using wood alcohol to start a fire) causing decedent's death was a disobedient one, it was within the scope of her employment, and compensation should be paid to her dependents under the Workmen's Compensation Act.

71 *Corpus Juris*, page 680, Sec. 427. *An employee may, in intervals of leisure during his working hours, move from place to place on the premises of the employment, and visit with co-employees or other persons, and, in doing these things within the bounds of reason, he does not go out of the course of his employment, and where injury results from a risk incidental to the performance of his contract while so visiting, the injury also arises out of his employment.*

In the case of *Bryant v. Fissel*, 84 N. J. L. 72: The purview of the "Employer's Liability Act" of 1911 shows an accident is an unlooked for and untoward event which is not expected or designed. The question whether or not the injury is an accident within the purview of the act is a mixed one of law and fact. When applied to certain facts it is a question of law.

In the cases of *Newcomb v. Albertson*, 89 Atl. 928, 85 N. J. L. 435; *Terleckie v. Straus*, 85 N. J. L. 454, 89 Atl. 1023, affirmed 86 N. J. L. 708, 92 Atl. 1087.

For an accident to arise out of employment, it has been held not necessary that the employment be the proximate cause of the accident; in the cases so holding it is said to be enough if the employment be a cause in the sense, *but that for the employment the accident would not have happened.*

Bryant v. Fissel, 84 N. J. L. 72, 86 Atl. 458; *Zabriskie v. Erie Rd. Co.*, 85 N. J. L. 157, 88 Atl. 824, affirmed 86 N. J. L. 266, 92 Atl. 385.

Hulley v. Moosbrugger, 88 N. J. L. 161, 95 Atl. 1007, held that an accident arises out of employment when it is something, the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it.

Sigley v. Marathon Razor Blade Co., 166 Atl. 518, the Court of Errors and Appeals case, opinion by Mr. Justice Heher:

"The Workmen's Compensation statute should be reasonably interpreted to effectuate its beneficent purposes, and a construction that leads to a harsh, unjust and unreasonable result should be avoided. It is remedial in its nature, and should be liberally and broadly construed."

citing with approval:

- Combination Rubber Manufacturing Co.*
v. Obser, 96 L. 544, 115 Atl. 138;
Fisher v. Tide Water Building Co., 97 L.
 324, 116 Atl. 924;
O'Mara v. Kirch, 106 L. 151, 147 Atl. 511.

In the case *sub judice* the petitioner was injured while he was actually on the respondent's property.

In the following cases compensation was awarded where the employee was injured not on the company's property.

In the case of *Bolos v. Trenton Fire Clay Co.*, 102 N. J. L. 479, 133 Atl. 764, which was affirmed by the court on the opinion below in 103 N. J. L. 483, 135 Atl. 915, shows that the employee during the noon hour was eating his lunch in a barn on the employer's property. Just after he had finished his lunch the factory whistle blew, recalling all the employees to their work. The barn in which Bolos was at that time was near the company's garage, in which garage the company kept its trucks. As Bolos started back upon the blowing of the whistle to another part of the premises where he was working, one of the employer's trucks came from the garage near the barn and he jumped on the running board to ride a few hundred feet to that part of the factory where his work was carried on. The truck traveled over a public road from the garage entrance to the entrance into the employer's property. As it turned into this entrance from the public road Bolos fell off and was injured, held that he was still in the course of his employment, and the court allowed compensation in this case.

The following cases will show how liberally the courts of the various States have construed the Workmen's Compensation Act.

In the case of *Erie R. R. Co. v. Winfield*, 244 U. S. 170, the employee while leaving the railroad premises at the end of the day's work, but had not entirely cleared the premises, was struck by a switch engine, inflicting a fatal injury. The Supreme Court of the United States held:

In leaving the carriers' yard at the close of the day's work, the deceased was but discharging a duty of his employment.

In *Challis v. London and Southwestern Railway Co.*, 84 L. 77 (1905) 2 K. B. 154, an engine driver, while driving a train under a bridge, was injured by a stone dropped by a boy from the bridge. It was held that the injuries were caused by an accident arising out of and in the course of his employment.

Madden v. Whitman, 38 N. J. L. 113, holds:

A workman in the employ of a contractor putting up a building for a railroad along the tracks, was injured by a train while he was going along the tracks to a toilet, court held he suffered an accident arising out of and in the course of his employment.

Jensen v. Woolworth, 40 N. J. L. J. 146, held that injuries following the swallowing of pins through laughter caused by remarks of an assistant manager of respondent's store, were held to be an accident arising out of and in the course of his employment.

Corbett v. H. S. Pitt & Co., 8 B. W. C. C. 466, in which a violation of an order not to light fuses and fire holes in a blasting operation until told to do so did not take a workman outside the sphere of his employment; it was merely misconduct within the sphere of the employment and did not bar recovery.

George T. Newell, Jr. v. Workmen's Compensation Bureau, 157 Atl. 243, 9 Misc. 1123, in which

case it was held that the findings by the Compensation Bureau were not lightly disturbed. See also case of *Pisko v. Nelson*, 132 Atl. 301, 4 Misc. 154. Findings of fact in the Workmen's Compensation cases will not be disturbed when supported by evidence.

The Supreme Court, speaking through Mr. Justice Heher, in the recent case of *Hall v. Doremus*, 171 A. 781, 12 N. J. Misc. 319, sustained an award for compensation allowed to the petitioner for shock which was accompanied by disability. The Court in that case said the following:

"Generally the cases in this State hold that where the action is in negligence, if the injury consists of shock merely, or physical injury resulting from shock, damages cannot be recovered. However, the shock to Hall grew out of the birth of a calf on the defendant's farm, which the court said produced a shock to his nerves and senses of such severity as to paralyze Hall's faculties. In the resultant state of unconsciousness Hall fell to the concrete floor, suffering a skull fracture with consequent disability."

Justice Heher further said it is not essential that there be a physical injury. The statute imposes no such requirements. The Court further held that direct injury suffered by Hall consisted of mental, emotional and nervous shock. This is just as much a personal injury as if a falling timber from the upper portion of a structure in which he was rendering service and at which he was employed had inflicted physical injury.

In the cases cited in the prosecutor's brief, they show a violation of some express order not to do a certain thing, or the doing of something personal to the employee himself while off their employer's property. In the case *sub judice* there

was no express order made to the petitioner that he was directly to stay at his machine, nor was there any evidence submitted at the trial that posted notices or signs were in the plant forbidding the men from moving about in their leisure time, but on the contrary, a common practice and custom was shown to have existed both by the petitioner and Jerry Mertens, a witness for the respondent company, that the men were allowed to visit one another in their leisure time. This being so, surely it must be classed as an incident of his employment, as so many of the cases heretofore cited show, and when he suffered an accident while at this adjoining machine, which was 25 feet away, it was an accident arising out of and in the course of his employment, and compensable, as was so properly held by the three lower Courts.

Appellant admits the reasonableness of the rule laid down in the opinion of the Court below, stating: "The rule expressed by Mr. Justice Bodine is a fair one", but contends that Sariego went outside of its intendment, and claims that particular defined instructions were given to Sariego by his foreman. He relies solely upon Case (pp. 45, 46), Pete Vass testifying:

"Q. You left to go to the toilet? A. I told them (meaning Sariego and the other helper) to stay until I come back."

However, appellant entirely ignores the testimony of Sariego (Case, p. 39):

"Q. Were you allowed to go over there? Was there any order that you are not to go over there or were not to go over there at the time? A. Anybody can go on each machine.

Q. You could go anywhere you felt like it?
A. Yes, and talk to the guy."

Mr. Justice Bodine in the opinion rendered in the Court below, stated:

"The trial court was justified in finding that the instructions given did not necessarily mean that the injured man should not move from the spot. The proofs do not show that workmen were forbidden to move about the room when there was no work for them to do at a particular machine where they were assigned to work. It is so customary for workmen to chat with their fellow workers when opportunity offers that the award was justified.

"The findings of fact by the trial court are not disturbed when supported by the evidence, nor are the findings of two concurring tribunals lightly disturbed."

Quoting from the same opinion (Case, p. 73):

"Prosecutor argues that there was an abandonment of the work for which the man was employed. Not so. The proofs show a necessary cessation of work to meet the needs of the boss and a mere movement to another part of the room to chat with another workman. Such movement seems not to have been expressly forbidden. The case has no resemblance to cases where workmen disobey instructions or use machines which they were not engaged to use or were forbidden to use."

From the same opinion, bottom page, Case, page 73:

"In the present case, there is nothing to indicate that in the interval of leisure during the employment the injured workman did anything not within the bounds of reason."

Conclusion.

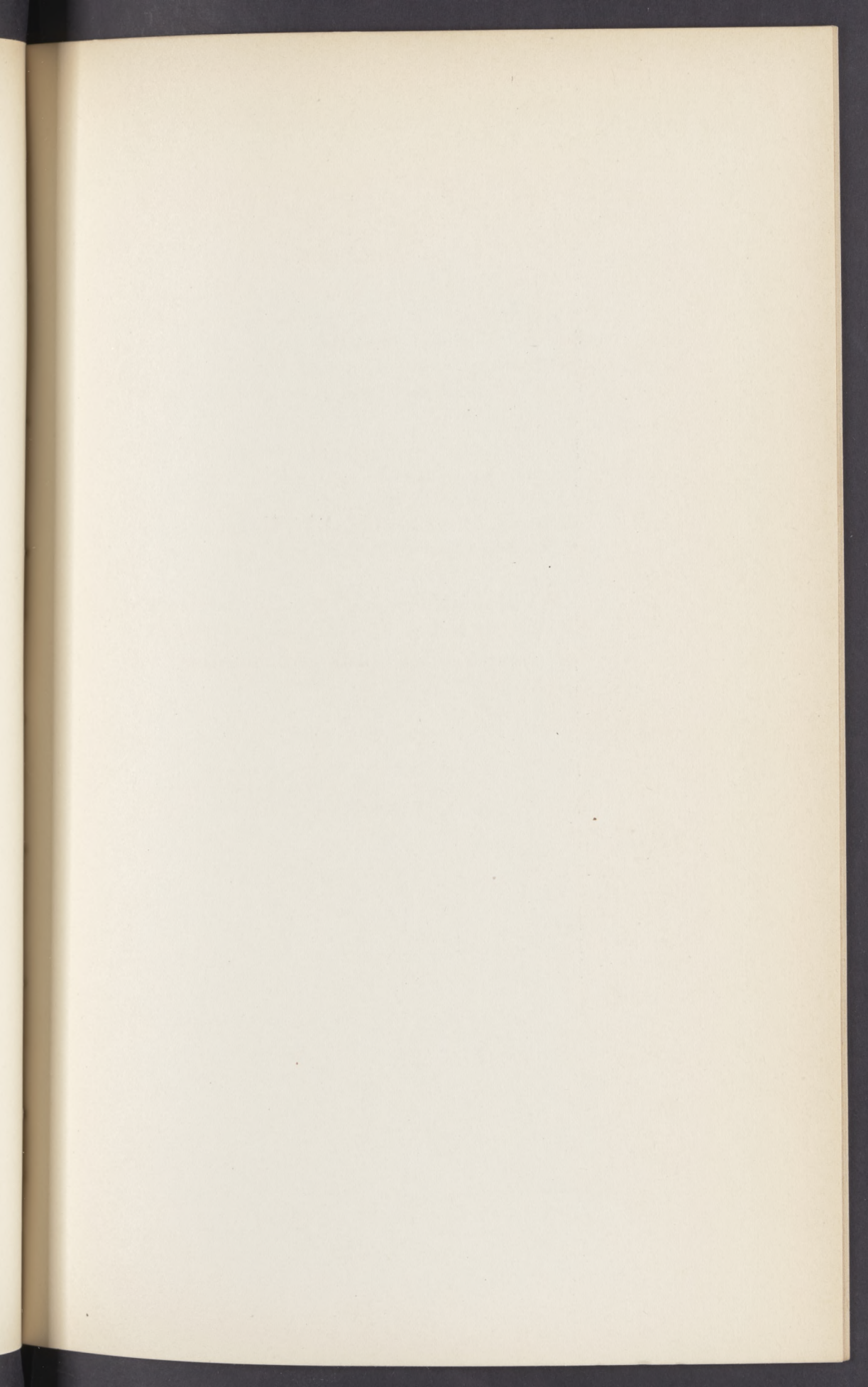
1. We respectfully submit that the Court below committed no error in point of law in affirming the judgment rendered by the Referee and the Hudson County Court of Common Pleas, in favor of petitioner and against the appellant herein.

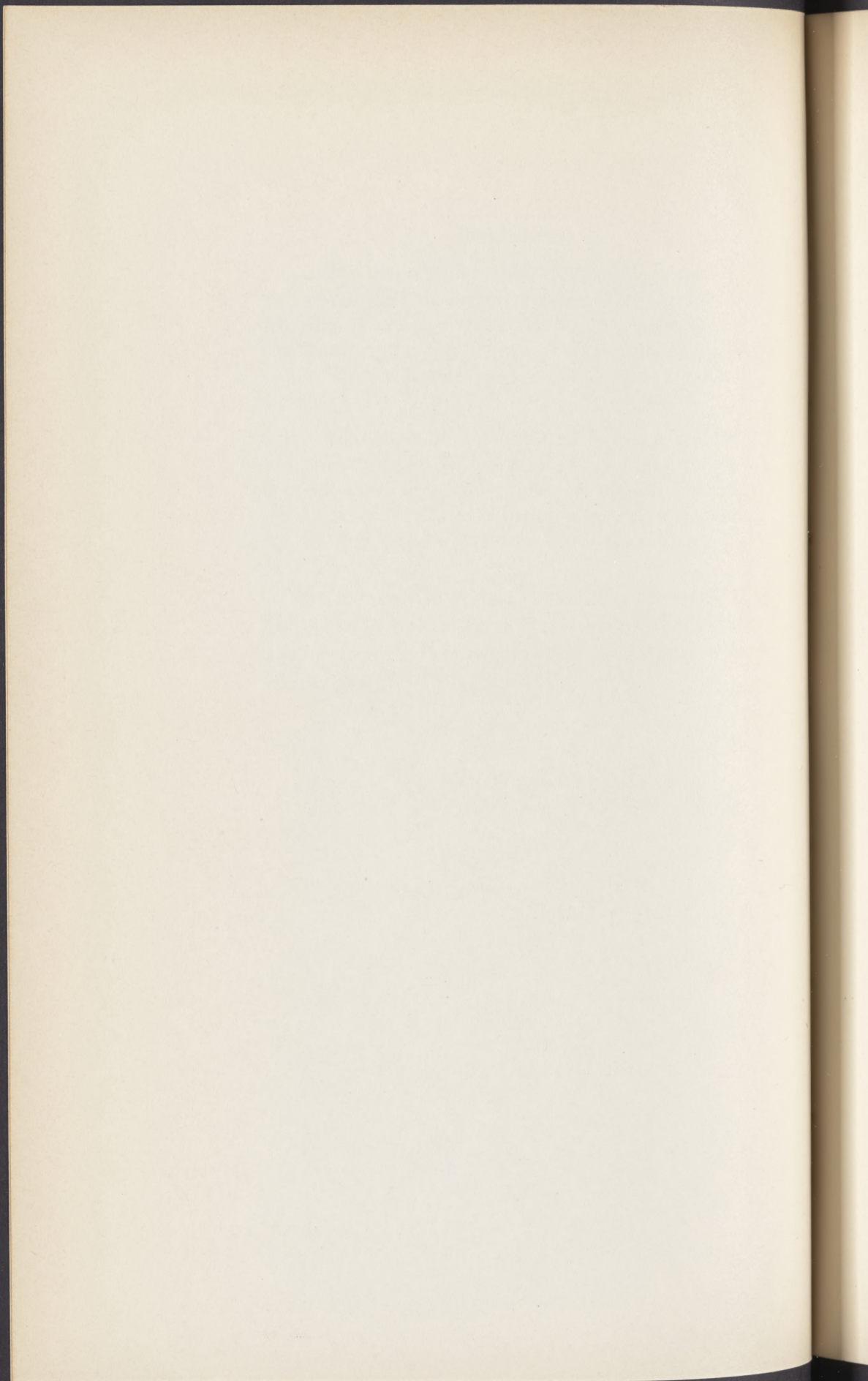
2. That the Court committed no error in holding that the petitioner suffered an accident arising out of and in the course of his employment on August 11, 1933, within the meaning and intent of the Workmen's Compensation Law.

We respectfully ask that the judgment of the Courts below be affirmed and the claim for compensation sustained, together with costs.

Respectfully submitted,

WILLIAM E. SEWELL,
Counsel for Petitioner-Appellee.







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