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This article surveys the existing law of Tennessee applicable to the problems of determining what is covered employment and what constitutes a compensable injury. The survey indicates no radical differenees between the law of Tennessee and that of most American jurisdictions, although there are a few troublesome problems in particular areas, such as the "Act of God" and "positional risk" cases.

I. Scope of the Article

The purpose of this article is a simple one: to discuss the "who, what, when and where" of compensable injuries under the workmen's compensation statute of Tennessee. By "who" we refer to the problem of who is an employer and who an employee within the meaning of the statutory definitions. The "what" concerns the meaning of accidental injury. "When and where" involve the familar problems of "arising out of and in the course of employment." Other related problems, such as the benefit structure under the statute, the application of exclusive remedy provisions, and procedural limitations on recovery, are omitted save as they bear on these particular issues.

The overall development of workmen's compensation law in Tennessee has not differed greatly from that of most jurisdictions. In 1919, when the basic compensation statute was enacted, Tennessee courts were still applying familiar tort law concepts to employee injuries. At first, there was a natural tendency to carry over some of those principles in the interpretation of the compensation act.[1] Yet even in the

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In the course of this essay, the reader will discover few citations to law review articles. The reason is that most of the Tennessee problems involved have been dealt with in articles that are probably familiar to most attorneys in the state. Rather than list them repeatedly through the course of the notes, it has been decided to list them here in a group. In general, the reader is directed to the article on workmen's compensation developments included each year in the *Annual Survey of Tennessee Law*. On the problem of covered employment, consult the recent case comments at 27 Tenn. L. Rev. 317 (1960); 24 Tenn. L. Rev. 317 (1957). On compensability, consult the student note in 8 Vand. L. Rev. 616 (1955) and these recent case comments: 29 Tenn. L. Rev. 477 (1962); 7 Vand. L. Rev. 861 (1954); 12 Tenn. L. Rev. 140 (1934).

1. Milne v. Sanders, 143 Tenn. 602, 619-20, 228 S.W. 702, 706 (1920). In this case, the court stated: "As a general rule, where an employee is intentionally injured by a

first major decision involving the statute[2] the Tennessee Supreme Court evinced sympathy for its basic purpose, and in the years since then the court has construed the statutory provisions with a liberality in accord with the act's remedial intent. The basic structure of the statute has not been radically altered since its enactment; the majority of the amendments have been clarifications or have involved only minor changes. The most important alteration was probably the addition of the occupational disease provisions in 1947.[3] With the enactment of those provisions, the compensation act assumed very much the character in which we find it today, and in this article we concern ourselves principally with cases that have been decided since that time.

II. COVERED EMPLOYMENT

A. *Existence of the Employment Relation*

The obvious first step in determining whether there is employment covered by the statute is to determine whether there is an employment relation. The primary guides are the definitions of "employer" and "employee" in the statute:

> "Employer" shall include any individual, firm, association or corporation . . . using the services of not less than five persons for pay. If the employer is insured, it shall include his insurer, unless otherwise herein provided.[4]
>
> "Employee" shall include every person, including a minor, whether lawfully or unlawfully employed . . . in the service of an employer . . . under any contract of hire, apprenticeship, written or implied.[5]

These definitions are typically broad. They require only that there be (1) a person (2) using (a term which has not attracted much attention, although there are some implications in it that might bear exploring) (3) services (4) of at least five persons (the number requirement can be waived, which makes one wonder whether it should appear in the basic definition) (5) under contracts of hire. In spite of the apparent simplicity of the definitions, there have been a number of problems concerning their outer limits.

1. *The Employee-Contractor Distinction.*—The Tennessee courts,

fellow servant, there is no liability." *Ibid.* This is essentially a carry-over of the common law fellow-servant rule so far as intentional torts are concerned. The compensation statute does not draw the distinction between intentional and negligent acts in its terms, so that the statement is obviously of tort-law derivation. The Tennessee court has not retained this notion. See the material on assaults below at 1151-52.

2. Scott v. Nashville Bridge Co., 143 Tenn. 86, 223 S.W. 844 (1919).
3. Tenn. Pub. Acts 1947, ch. 139, codified as chapter 11 of title 50 of the code.
4. TENN. CODE ANN. § 50-902(a) (1956).
5. TENN. CODE ANN. § 50-902(b) (Supp. 1963).

like those in almost every other jurisdiction, have interpreted the compensation act's "employee" to be the equivalent of the common law's "servant"—that type of agent whose employer ("master") is liable for torts of the servant committed in the scope of the servant's employment.[6] While this approach is subject to criticism because it has led too often to the proliferation of intricate and minute legal niceties not reflected in the actualities of industrial employment,[7] it is fundamentally sound. If the purpose of compensation legislation is reflected in the campaign slogan "The cost of the product should bear the blood of the workman," then it makes considerable sense that an individual who has the opportunity to set the price of the product should not ordinarily be considered an employee.[8] Independent contractors may usually be regarded as fitting that description; they are thought of as entrepreneurs, in business on their own, able by their own decision and initiative to influence directly the price of goods or services in the market place. The problem, of course, is that people do not order their affairs so as to fit into the compact categories set up by lawyers and judges; all too often we encounter individuals who are more independent and free-wheeling than the ordinary servant, yet less able to direct the course of their business than the ordinary entrepreneur. How are the courts to go about deciding whether to tack on the label of servant or independent contractor?

The traditional approach has been, of course, to ascertain whether the alleged employer has the right to control the details of work in

6. See, *e.g.*, Brademeyer v. Chickasaw Bldg. Co., 190 Tenn. 239, 229 S.W.2d 323 (1950) (window cleaner subject to supervision and to immediate firing not an independent contractor); Siskin v. Johnson, 151 Tenn. 93, 268 S.W. 630 (1924) (car unloader working without any supervision on piece rate held an independent contractor and thus not entitled to compensation). The court specifically determined to use the term "servant" as equivalent of "employee" in Finley v. Keisling, 151 Tenn. 464, 270 S.W. 629 (1924) (citing tort cases and treatises on master and servant). See also STONE & WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION §§ 40-42 (1957).

7. The best known criticism on this basis is probably that in Mr. Justice Rutledge's opinion in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) ("employee" held not to mean "servant" for purposes of Wagner Act). The court was legislatively overruled shortly afterwards. See Labor Management Relations Act, 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1958). The court has since used another means of avoiding the narrow limits of the "servant" concept—expanding the notion of who is a servant under common law rules. See, *e.g.*, United States v. Silk, 331 U.S. 704 (1947) ("economic reality" as a factor in determining who is a servant). This approach is more akin to what the Tennessee court has done.

8. See 1 LARSON, WORKMEN'S COMPENSATION §§ 43.20, .51 (1952) [hereinafter cited as LARSON]. Under the circumstances indicated, the individual would be able to protect himself against the ills of industrial injury. With the growth of the insurance industry this argument has particular appeal, since small entrepreneurs do have available a ready means of protecting themselves: health and disability insurance contracts. *Query*, however, whether even the more flexible modern policies offer adequate protection. See SOMERS & SOMERS, DOCTORS, PATIENTS AND HEALTH INSURANCE 335-82 (Anchor ed. 1962).

connection with the service rendered.[9] But this test itself is notably flexible. As Justice Felts said in *Smart v. Embry*: "Each case must depend upon its own facts and ordinarily there is no one infallible test, but all the circumstances must be looked to; and the question is ordinarily one of fact."[10] If this is indeed a question of fact, then it should normally be left to the judge who is the primary trier of the fact, and the Tennessee Supreme Court has said as much.[11] This does not mean, however, that the existence of the employment relation is a question that the appellate courts cannot consider. The right to control is ordinarily a contract-based right; and interpretation of contracts, while properly regarded as a matter of fact, must often be treated as if it were a matter of law, reviewable by appellate tribunals on that basis.[12]

Seals v. Zollo[13] demonstrates the willingness of the Tennessee Supreme Court to review the decisions of lower tribunals concerning the existence of the employment relation. In that case, the claimant was a sixty-six-year-old ice cream peddler who bought ice cream products from the defendant at wholesale prices and sold them to his route customers at retail prices. Thus his compensation amounted to what would usually be called "profit" rather than "wages." On this basis, the lower court held that claimant could not recover since he was not an employee. When the decision was appealed, the supreme court went beyond this bookkeeping method to consider other facts in the record it felt to be important. The opinion, written by Chief Justice Neil, reviews these facts at some length: the defendant company, not the claimant, owned the cart used in the work; its products were advertised in detail on the cart; claimant's hours were fixed by company practice (though not by any official "rule"); peddlers such as claimant were given instructions on how to do their job, they were told not to drink, and those found violating this rule were fired; credit to ordinary customers of defendant was for a month, but to those in claimant's position was only for a day—*i.e.*, at the end of each day peddlers paid for the ice cream they checked out in the morning. After reviewing these facts, the court states: "The statement above, that is the factual situation as to the relationship of the parties, is

9. RESTATEMENT (SECOND), AGENCY § 220(1) (1958). It is unfortunate that this has so little to do with the injured claimant's ability to obtain adequate protection for himself outside the compensation act. See 1 LARSON §§ 43.41-.54.

10. Smart v. Embry, 208 Tenn. 686, 690, 348 S.W.2d 322, 324 (1960).

11. Barker v. Curtis, 199 Tenn. 413, 419, 287 S.W.2d 43, 46 (1955).

12. 3 CORBIN, CONTRACTS § 554 (1960): "[T]he question of what is the meaning that should be given by a court to the words of a contract is a question of fact, not a question of law. . . . We must bear in mind, however, that this question of fact is like other questions of fact in this: it may be a question that should be answered by the judge rather than by the jury. In cases in which it is so answered, it is probable that interpretation of language is a 'question for the court.'"

13. 205 Tenn. 463, 327 S.W.2d 41 (1958).

practically without conflict. This being true we think the question relating to this contractual relationship is *solely one of law.*"[14] The opinion then reiterates the court's policy to construe the compensation act liberally in favor of finding a claimant to be an employee,[15] and goes on to consider in detail the effect of each of the arrangements listed in the statement of facts on the business independence of the claimant. The opinion places particular emphasis on the ability of the defendant to discharge any of its peddlers at will and on the fact that defendant owned the peddler's cart, the most expensive item of equipment needed to conduct trade. Perhaps the most significant passage in the opinion is the paragraph in which the court pointedly refuses to feel constrained by "the theory that it is part of the political history of this State that 'peddlers' were regarded as being engaged in an independent occupation . . . ."[16] The old labels sometimes cannot be carried over into the modern business situation. In this instance the "peddler" method of operation was not a method selected by the peddler as an independent calling, but a method "designed by an employer solely for *his* own protection"[17] and "which was necessary to the successful management of *its* business."[18]

The fact-by-fact approach to the employment relation used in *Seals v. Zollo* is the generally accepted method of dealing with these problems. Section 220 of the *Restatement (Second) of Agency* is one of the most excellent formulations of this technique, and it may safely be asserted that that section is indicative of the Tennessee view.[19] It should be pointed out that the existence of a factor indicating the presence of a right to control is generally more significant than the absence of such a factor.[20] For example, in *Barker v. Curtis*,[21] the fact

14. *Id.* at 469, 327 S.W.2d at 43. (Emphasis added.)

15. *Id.* at 470, 327 S.W.2d at 44. This principle has long been enunciated, and is reflected in cases stating that there is a presumption that one performing services for another is an employee. See Carter v. Hodges, 175 Tenn. 96, 132 S.W.2d 211 (1939).

16. 205 Tenn. at 472, 327 S.W.2d at 45.

17. *Id.* at 475, 327 S.W.2d at 46. (Emphasis added.)

18. *Id.* at 473, 327 S.W.2d at 45. (Emphasis added.)

19. The section is quoted and its application to a Tennessee tort decision is discussed in Render, *Agency—1962 Tennessee Survey*, 16 VAND. L. REV. 627, 630-32 (1963) (note the narrower use of "servant" in the present article).

20. "[F]or the most part, [the presence of] any simple factor is not merely indicative of but, in practice, virtually proof of the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." 1 LARSON § 44.31. The reason would seem obvious. The presence of one fact alone—the power to hire and fire, for example—may have the effect of giving the person who has that power almost total dominance over another's work, while the absence of that fact would not necessarily deprive him of dominance—if, for instance, he exchanged the power to hire and fire for the power to control prices. It seems equally apparent that it is the extent rather than the existence of such powers which is significant; the power to control hours of work is less important, for example, if the range of variation is pre-determined.

that the defendant, owner of a coal mine, paid compensation insurance premiums on the claimant was felt to be of greater importance than the fact that the defendant had not been paying social security taxes on claimant's behalf.

Barker demonstrates how, on occasion, a hiring party must choose between two risks: the risk of being held covered by the compensation act, or the risk of being without insurance. *Bond Brothers v. Spence*[22] provides another illustration of the same sort. In that case an individual who hauled logs for another at a rate of seven dollars a thousand (or somewhat more, depending on the distance of the haul) was held to be an employee of the other, largely because the checks issued to him contained a stipulation that all dealings between the two were in accordance with the federal Fair Labor Standards Act. It is only fair to say that other interpretations of the stipulation were possible, but the court determined that it meant the defendant acknowledged the log-hauler to be an employee under FLSA.[23]

2. *Loaned Employees.*—There have been relatively few cases involving "loaned employees" in Tennessee.[24] The few that have reached the courts have been typical of such cases throughout the nation, and have normally involved an employee who was sent out by his general employer to operate machinery which was being leased by the general employer to the alleged special employer. There are three possible relations that can result from this lending: (1) the employee may remain exclusively in the service of the general employer;[25] (2) the employee may leave the service of the general employer and be regarded as solely the employee of the special employer;[26] or (3) the employee may be regarded as being simultaneously the employee

21. 199 Tenn. 413, 287 S.W.2d 43 (1955).

22. 198 Tenn. 316, 279 S.W.2d 509 (1955).

23. In this regard it should be pointed out that stipulations in an agreement to the effect that a given individual is not an employee are of little, if any, effect. Schroader v. Rural Educ. Ass'n, 33 Tenn. App. 36, 228 S.W.2d 491 (M.S. 1950).

24. Cradic v. Eastman Kodak Co., 202 F. Supp. 590 (E.D. Tenn. 1962); Kempkau v. Cathey, 198 Tenn. 17, 277 S.W.2d 392 (1955); Owen v. St. Louis Spring Co., 175 Tenn. 543, 136 S.W.2d 498 (1940); Wardrep v. Houston, 168 Tenn. 170 76 S.W.2d 328 (1934); Wilmoth v. Phoenix Util. Co., 168 Tenn. 95, 75 S.W.2d 48 (1934).

25. Owen v. St. Louis Spring Co., *supra* note 24. The claimant was sent by the general employer to show employees of the alleged special employer how to use equipment sold by the general employer. The general employer was obligated to do so by contract with the alleged special employer. *Held,* the general employment continued.

26. Kempkau v. Cathey, *supra* note 24. The claimant, a truck driver, was directed to help a general foreman of the company move some personal belongings. The general employer paid for the time spent, although it had nothing to do with his business. The claimant was given orders on how to do the work by the foreman, and was also given three dollars by the foreman in addition to what the employer was paying. *Held,* claimant was a loaned employee to whom only the special employer was liable for injuries.

of both.[27] How does one tell which relation exists? The Tennessee cases have in language adopted an unhelpful approach, for they state that the prime test is: "In whose work was the employee engaged at the time, *i.e.*, whose work was being done?"[28] Such a "test" is not really a test at all, but only a rephrasing of the question: "Who is the employer?" Fortunately, while nominally using the "whose business" test, the Tennessee courts have in fact adopted a more consistent approach: "Does the special employer have the right or duty to direct the details of performance of the work?"[29]

In effect this means that if "the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee as to such act becomes a servant of the temporary employer."[30] In this way, the problem of determining whether an individual is a "loaned employee" covered by the compensation act is the equivalent of asking whether he would be regarded as an employee of the special employer if there were no general employment, and the decisions on the existence of the employment relation become relevant.

3. *Minors.*—Under a 1961 amendment to the act, minors are included within the term "employee" even though their employment is unlawful because of child labor statutes.[31] Prior to the passage of this act, minors illegally employed without permits were held to be able to elect whether they would bring action under the compensation act or in tort.[32] In the usual case, the minor desired not to be covered, since he could recover more in a tort action than under the compensation statute.

4. *Partners and Joint Venturers.*—In two cases, the Tennessee court has held members of partnerships not to be employees.[33] The

27. See 1 LARSON § 48.40.

28. Cradic v. Eastman Kodak Co., *supra* note 24, at 591. The defect in the test is that it is of little help in the difficult cases in which the business of both masters is being done. This is the case, for instance, in which the general master is in the business of renting machinery with operators to other businesses.

29. Owen v. St. Louis Spring Co., *supra* note 24, at 548-49, 136 S.W.2d at 500.

30. RESTATEMENT (SECOND), AGENCY § 227, comment *d* (1958).

31. Tenn. Pub. Acts 1961, ch. 184, § 1, codified in TENN. CODE ANN. § 50-902(b) (Supp. 1963).

32. See, *e.g.*, American Surety Co. v. City of Clarksville, 204 Tenn. 67, 315 S.W.2d 509 (1958). The election existed on the theory that the contract of employment is voidable, rather than void, at the election of the minor. See STONE & WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION §§ 66-67 (1957) (now out of date).

33. Tidwell v. Walden, 205 Tenn. 705, 330 S.W.2d 317 (1959); Gebers v. Murfreesboro Laundry Co., 159 Tenn. 51, 15 S.W.2d 737 (1929). The relationship in *Tidwell* may not have been a partnership in the traditional seuse, but, if not, was a joint venture to which the same reasoning would apply. The fact statement is not detailed enough to be certain concerning the preeise relation.

basis for such holdings is the aggregate theory of partnerships according to which each partner is viewed as having rights of control and therefore generally not subject to the control of other partners. The holdings in both these cases seem correct, for in each instance the claimant partner apparently did possess an appreciable amount of control. It is possible, however, for members of a partnership to delegate rights of management and control to less than all partners.[34] In such an instance, a partnership becomes more like an impersonal entity and it would seem theoretically possible that in such a case a partner who by agreement had in fact given up management rights might be regarded as an "employee,"[35] although the general trend of decisions in this country is to the contrary.[36]

B. *Those Electing Not To Be Covered*

The Tennessee statute is of the "elective" type. Employers of more than five persons and their employees are presumed to have elected to be covered, but may elect not to be covered.[37] Section 50-904 of the Tennessee Code Annotated prescribes the manner in which such an election shall be made.[38] If both employer and employee elect not to be covered, an injured employee's action against the employer is governed by common law and the usual defenses are available to the employer.[39] The same result applies if the employee alone elects not to be covered.[40] If the employer elects not to be covered, an injured employee may bring a tort action and the employer cannot make use of the defenses of assumption of risk, the fellow-servant rule, and contributory negligence.[41] Under section 50-1206, if the employer fails to comply with the requirements of the workmen's compensation act relating to insurance and financial responsibility, but has not filed formal notice of election not to be covered, an injured employee may elect whether to seek benefits under the compensation act or to sue

34. See CRANE, PARTNERSHIP § 14, at 63 n.1 (2d ed. 1952).

35. This would seem in accordance with the purpose of compensation, since a partner without management rights might well be unable to protect himself against serious loss from industrial injury. The *Tidwell* case would seem to underscore this inability, for the claimant's decedent's economic position was not strong. However, it has been said that it is theoretically impossible for a partner to be an employee. Cook v. Lauten, 335 Ill. App. 92, 80 N.E.2d 280 (1948).

36. 1 LARSON § 54.30.

37. TENN. CODE ANN. § 50-903 (1956).

38. The employer must post notices of the election in his shop; the employee must give written notice to his employer. Each must file a duplicate copy with the state office. Sample forms may be found in STONE & WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION §§ 9, 12 (1957).

39. TENN. CODE ANN. § 50-913 (1956).

40. TENN. CODE ANN. § 50-912 (1956).

41. TENN. CODE ANN. § 50-911 (1956); *cf.* 4 VAND. L. REV. 713 (1951).

in tort. If he sues in tort, the employer may not use the three defenses listed above.[42]

In *Pearson Hardwood Flooring Co. v Phillips*,[43] the defendant employer had posted notices in the plant to the effect that he elected not to be covered, but failed to file a duplicate notice with the division of workmen's compensation as required by section 50-904. Later an employee was injured and sued the employer in tort. The employer defended on the ground that since he had not filed proper notice the compensation act still applied to him and the tort action was therefore barred by the act's exclusive remedy provision. It was held that the employer was estopped from making use of the exclusive remedy provisions under these facts, and would be treated as if he had filed the notice properly. Since estoppel was the basis of the decision, it would seem that the employee could have proceeded under the compensation act instead. Such a decision is undoubtedly correct as an interpretation of the statute's intent, for it accomplishes virtually the same result as section 50-1206 of the code, discussed in the preceding paragraph.

C. *Statutory Employers*

Under section 50-915 of the code a principal or intermediate or subcontractor is made liable as an employer under the compensation act to any employee "injured while in the employ of any of his subcontractors and engaged upon the subject matter of the contract . . . ." Provisions are made for subrogation to the rights of the employee when a secondarily liable statutory employer is required to pay. The relations resulting from these provisions can be quite complex. Since they are discussed in some detail elsewhere in this issue,[44] no further commentary on them will be offered here.

Under section 50-902(a), an employer's insurer is considered an "employer" under the act. The effect of this is to make the insurer primarily liable to the injured employee.[45] In the *Kirkland* case,[46] the statute of limitations had run as against the actual employer, but not as against the insurer. When the insurer argued that its liability was purely derivative so that any defense available to the insured employer would be available to it, the court relied on 50-902(a) to hold

42. Schroader v. Rural Educ. Ass'n, 33 Tenn. App. 36, 228 S.W.2d 491 (M.S. 1950).
43. 22 Tenn. App. 206, 120 S.W.2d 973 (E.S. 1938).
44. Harbison, *Third-Party Liability and Adjustments Between Different Employers and Insurance Carriers in Tennessee*, 16 VAND. L. REV. 1113 (1963).
45. T. H. Mastin & Co. v. Loveday, 202 Tenn. 589, 308 S.W.2d 385 (1957) (injured claimant may sue insurer in county of his residence if service can be obtained; the employer need not be joined).
46. General Acc. Fire & Life Assur. Corp. v. Kirkland, 210 Tenn. 39, 356 S.W.2d 283 (1962).

to the contrary. In the concluding paragraphs of the opinion it was stated that "the employer and insurer are each principals and are jointly and severally liable to the employee."[47] The decision does not, of course, mean either that the insurer and the employee are to be regarded as in privity, or that the insurer is deprived of any of the substantive defenses available to the actual employer.[48]

D. *Inclusions, Exclusions, and Elections Under Section 50-906*

The principal exclusions from coverage are those listed in section 50-906: carriers engaged in interstate commerce; casual employment; domestic and agricultural labor; employment involving less than five persons; employees of state and local governments. In the last two instances, the statute specifically states that the parties can elect to come under the provisions of the act if they so desire.

1. *Carriers in Interstate Commerce.*—Subsection (a) of section 50-906 exempts common carriers doing an interstate business while actually engaged in interstate commerce, provided that the business is one whose employees already have the benefit of a federal employer's liability act or compensation statute. Thus the exemption in general is defined by the breadth of federal legislation, covering all those employees of carriers who are unable to take benefit of the federal law. While the court did not state it explicitly, the opinion in *Louisville & Nashville R.R. v. Potts*[49] indicates that the court will avoid construing coverage under workmen's compensation to duplicate coverage under the Federal Employer's Liability Act and related legislation.

2. *Employers of Less Than Five Persons.*—The exemption of small employers has caused little controversy in the cases. The only recent decision of any interest is *Commercial Insurance Co. v. Young.*[50] In that case defendant employer had in his service only three persons and so was not covered by the compensation act. He decided, however, to elect coverage, and with this in mind he procured a compensation insurance policy from defendant insurer, and paid the first premium. The employer had not, however, filed the formal notice of election of coverage with the workmen's compensation division more than thirty days prior to the occurrence resulting in claimant's injury. The defendant employer filed notice of the accident with the compen-

47. *Id.* at 51, 356 S.W.2d at 288.

48. An injured employee is not entitled to obtain one judgment against his employer and a separate judgment for a different amount against the insurer. Bituminous Cas. Corp. v. Smith, 200 Tenn. 13, 22-23, 288 S.W.2d 913, 917 (1956).

49. 178 Tenn. 425, 158 S.W.2d 729 (1942) (fireman who could recover under FELA denied recovery for injury resulting from accident while doing intrastate work).

50. 209 Tenn. 608, 354 S.W.2d 779 (1961).

sation division and proceeded on the theory that the claimant was covered. Defendant insurer, on the other hand, resisted payment of any benefits on the grounds that the employer was not subject to coverage, since he had neglected to file proper notice. It was held by the supreme court that the provisions allowing election of coverage to be accomplished by notice are not exclusive, and that defendant employer had done enough to elect coverage under the act by taking out the policy and paying the premium. Thus the court indicated that though an employee who would not be covered under the act but for an affirmative election of coverage by the employer has the burden of proving such election,[51] the court will be liberal in admitting evidence tending to show the election and will not require even substantial compliance with the statutory notice procedures.

3. *Government Employees.*—Federal employees are never covered by state compensation laws. They have their own questionably effective federal act.[52] Employees of state, county, and municipal governments may be covered under the state act if their employer so elects. The case of *Travelers Insurance Co. v. Dudley*[53] is almost a twin of the *Young* case discussed above. The city of Dyersburg had for years maintained a compensation insurance policy with defendant insurer, covering its municipal employees, but had failed to file proper notice. When a claim was brought under the policy the insurer defended on the grounds of sovereign immunity and failure to elect coverage. The court held the insurer to be estopped from asserting either defense, since it had taken premiums and adjusted small claims for years, thus inducing the municipality to maintain the policy for the benefit of its employees.

One alarming decision now three decades old deserves mention if only because hopefully it can be buried. In *Cornet v. City of Chattanooga*[54] it was held that a city which had elected coverage for its employees could nonetheless resist the claim of a policeman under the compensation act on the ground that a policeman was a governmental "officer" rather than an "employee" because his rights and duties were defined by statute and ordinance rather than by a contract of hire. No argument of estoppel against the insurer was apparently made

51. *Id.* at 629, 354 S.W.2d at 778.

52. The basic structure of the Federal Employees' Compensation Act is discussed in Small, *The General Structure of Law Applicable to Employee Injury and Death*, 16 VAND. L. REV. 1021, 1033 (1963). The act has not had the general reputation of being adequate and effective, but other fringe benefits of federal employees, such as health and disability insurance plans, have been so liberal that pressure for improvement of FECA has been negligible.

53. 180 Tenn. 191, 173 S.W.2d 142 (1943).

54. 165 Tenn. 563, 56 S.W.2d 742 (1933).

out. In the more recent case of *Woods v. City of LaFollette*,[55] an insurer attempted to rely on *Cornet* after having issued a policy whose premium schedule included an entry for policemen. Since the injured policeman had been told of the existence of the compensation insurance, an argument of estoppel could be made out against the insurer, and the claimant was permitted to recover. In the opinion, the court discussed *Cornet* at some length, distinguishing it on the ground that the insurance contract in *Cornet* contained terms "in part made up of the Workmen's Compensation Law of this state. If parties choose to enlarge the terms of the contract so as to include policemen they have a legal right to do so."[56] In *Woods* it was decided the parties had included policemen in the policy and that the insurer was therefore estopped from regarding policemen as employees. The reasoning is unworthy of the court. If the reason the claimant in *Cornet* was denied relief was that he was not an employee within the meaning of the act, then the claimant in *Woods* was in no better position. The benefits of the act accrue to "employees" and only to "employees" within the terms of the act; if an individual is not an employee he has no standing to bring an action under the law, and it is questionable whether he should be allowed to acquire employee status by any principle of estoppel. This is a very different use of estoppel from that in the *Dudley* case discussed in the preceding paragraph. There the insurer was held estopped to deny that an election of coverage, clearly possible under the statute, had been made. In *Woods* the insurer was held estopped to deny that the policy covered an individual who, according to the *Cornet* decision, could not be covered as a matter of law. The decision in *Cornet* was well written and fluent; it was nonetheless wrong. It carried over from another area of law a distinction between employee and officer that has no relevance for compensation law. The case should be flatly overruled, so that in future situations courts, counsel, and claimants will not have to avoid the injustice of its application by a questionable resort to principles of estoppel.[57]

55. 185 Tenn. 655, 207 S.W.2d 572 (1947).

56. *Id.* at 661, 207 S.W.2d at 574.

57. At the risk of being unduly repetitious it should be emphasized that the writer does not mean estoppel was wrongly applied in *Woods*. The argument is that the use of estoppel is debatable when a mistake of law is involved, as revealed by the divergence of opinions on cases of this sort. See PATTERSON, ESSENTIALS OF INSURANCE LAW 502, 520 (2d ed. 1957). Moreover, it is an invitation to the drawing of unduly fine distinctions between the rights of similarly situated parties. See 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4645 (1962), for illustrations of this. Let us suppose, for instance, that the policeman in *Woods* had not been told of the insurance. Should he then be denied recovery since he would not have "relied" on its existence? The possibility of such an argument reveals how slender a reed estoppel may be in these cases. A flat overruling of *Cornet* would have had the advantage of greater certainty and clarity.

4. *Casual Employment.*—Section 50-906(b) excludes "any person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer." This provision is somewhat different from that of most states; the more usual wordings are "casual *and* not in the usual course" or "casual *or* not in the usual course."[58] Tennessee's statute makes "casual" and "not . . . in the usual course of trade" synonymous. Under this provision the problem is not the frequency with which the employee is in the service of the employer, but the regularity of the employer's participation in the type of business activity for which the employee was hired.[59] The cases applying this subsection have usually involved employees engaged in activities which might be regarded as "sidelines" for their employers. The approach of the court has been to determine (1) whether the sideline activity has been engaged in to such an extent by the employer that he is actually in two businesses, or (2) whether the activity, though peripheral, is so closely related to the employer's principal business that it may be regarded as an incident of that business.

Two relatively recent cases illustrate this two-pronged approach. In *Mason-Dixon Lines v. Lett*,[60] the plaintiff's decedent was not employed in decedent's main line of business—trucking—but in maintenance of a commercial resort operated as a sideline activity by defendant. The court found that the resort had been operated by defendant with sufficient regularity that it was part of defendant's regular business activities. In *Smith v. Lincoln Memorial University*,[61] claimant was a member of a summer painting crew refurbishing buildings on the campus. Granting that painting is not a part of the educational process that is the main function of a university, the court went on to point out that maintenance of this sort is essential to the carrying on of the university's educational program. Therefore claimant was not a casual employee.[62]

5. *Domestic Servants and Farm Employees.*—Section 50-906(c) excludes domestic servants and farm employees from coverage. There have been relatively few cases interpreting the provision, but those indicate that the agricultural exemption is quite broad, extend-

58. A discussion of these provisions appears in 1 LARSON § 51. In spite of the different wording of the Tennessee statute, the results in the cases do not seem very different from those arrived at under the more usual phrasings.

59. Mason-Dixon Lines v. Lett, 201 Tenn. 171, 177-78, 297 S.W.2d 93, 96 (1956).

60. *Supra* note 59.

61. 202 Tenn. 238, 304 S.W.2d 70 (1957).

62. "Behind all these decisions lies one simple thought: maintenance, repair, painting, cleaning and the like are 'in the course' of business because the business could not be carried on without them, and because they are an expectable, routine and inherent part of carrying on any enterprise." 1 LARSON § 51.23, at 765.

ing so far as to exclude workers in commercial nurseries. This subsection does not include a provision for affirmative elective coverage, as do the subsections excluding employers of fewer than five persons and governmental units. Nonetheless, in *Eidson v. Hardware Mutual Casualty Co.*,[63] the supreme court held that an agricultural employee could bring an action on a compensation policy taken out by his employer since the premiums paid by the employer were based in part on the wages paid to this and other farm employees. The court cited its earlier decision, *Woods v. City of LaFollette*,[64] for authority. The *Woods* case was based on estoppel. The court's statement of the theory of the *Eidson* decision is this:

> In the present case, both the employer and the employee are insisting that the insurance was under the Workmen's Compensation Act, and since the employer is not a party defendant, it is only the Insurance Company that is resisting that conclusion. We see no valid reason why, when an insurance carrier insures an employer and the policy expressly covers farm employees, . . . that the Insurance Company should not be held to comply with its contract. It is not necessary for us to decide on this record whether the taking out of insurance by the employer, without the knowledge of the employee, had the effect of placing the employment contract under the Workmen's Compensation Act.[65]

Under this decision the *Cornet-Woods* distinction between estoppel and nonestoppel situations is carried over to categories of employment excluded under the statute without provision for elective coverage. If an employer chooses to take out insurance on any category of excluded employee he may do so and thereby provide benefits for these employees, whether the statute explicitly provides for elective coverage or not. The propriety of so broad an expansion of protection under the act is fairly debatable.[66] For the court to say that the employee is not receiving benefits under the statute but under the insurance contract is unrealistic, for it neglects the fact that by its terms a workmen's compensation insurance policy measures the insurer's liability by the terms of the statute.[67] However, the legislature has left *Eidson* and similar decisions undisturbed and this may be regarded as accepted law in Tennessee.

6. *Charitable Employees.*—In *Smith v. Lincoln Memorial University*,[68] the defendant college argued that its employees were excluded

63. 191 Tenn. 430, 234 S.W.2d 836 (1950) (Neil, C.J., dissenting).
64. See fhe discussion of *Woods and Cornet, supra* p. 1133-34.
65. 191 Tenn. at 438-39, 234 S.W.2d at 840.
66. Jurisdictions have differed on the proper result. See Annot., 103 A.L.R. 1523 (1936).
67. For instance, one would suppose a claimant in the position of the claimant in *Eidson* would be given the benefit of the recent increases in benefits provided by statute.
68. 202 Tenn. 238, 304 S.W.2d 70 (1957).

from the act because the employer was an eleemosynary institution. The court held that such institutions are not exempt from liability under the compensation act, since they would fall within the general definition of employer given in section 50-902(a) and are not specifically excluded under section 50-906. The decision is a fair construction of the act, applying the familiar rule *expressio unius est exclusio alterius,* and is in accord with a majority of holdings from other jurisdictions.[69]

III. The Concept of Compensable Injury

The remainder of this brief article is concerned with the concept of compensable injury. The definition of injury given in section 50-902(d) is:

> any injury by accident arising out of and in the course of employment and shall include certain occupational diseases arising out of and in the course of employment which cause either disablement or death of the employee resulting from the occupational diseases named in section 50-1101.

There are several elements in this apparently simple definition. There must be an injury; it must be by accident or result from an occupational disease; it must arise out of the employment; and it must arise in the course of employment. These elements normally receive independent consideration in the cases, but the overall purpose of all the elements is similar: to require that an injury be connected with employment to be compensable under the compensation act. It has been forcefully argued by Professor Larson[70] and others[71] that this is true in regard to the "arising out of" and "in the course of" requirements. Very nearly the same argument can be made concerning the requirement of "accident." The most obvious case of employment connection is surely that in which there is a recognizable trauma within the employment context. The least obvious is the situation in which a generalized condition has resulted from prolonged exposure to a hazardous condition. Lung trouble in a miner, for instance, may be the result both of fumes inhaled during working hours and of excessive smoking off the job.

Therefore, it is submitted that all the elements of the definition are oriented toward the one requirement of employment connection. This requirement is both a liberalizing provision (since it is less restrictive than the proximate cause requirements of tort law) and a restrictive provision (since it does limit the coverage of the statute to the em-

69. See 1 Larson § 50.40.

70. 1 Larson § 29.00.

71. See, *e.g.,* Malone, *Some Recent Developments in the Substantive Law of Workmen's Compensation,* 16 Vand. L. Rev. 1039, 1046-47 (1963).

ployment situation, so that compensation does not act as social insurance). The definition is thus a compromise, and as is usually the case with compromise provisions, there is an internal tension within the section that plagues decision makers who must attempt to achieve a just and fair balance between the liberalizing and restrictive elements. It can fairly be said that the Tennessee courts have done well in this balancing of elements. While there are inconsistencies and unfortunate language here and there, the cases which will be taken up in the ensuing pages are for the most part reconcilable in theory and fair in result.

IV. "INJURY"

A. *General Definition*

What is an injury? The controlling definition in recent cases is surely that adopted by the court (from a Massachusetts decision) in its 1961 decision in *Brown Shoe Co. v. Reed*:[72] "In common speech the word 'injury' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or lessened facility of the natural use of any bodily activity or capability."[73] Note the elements of the definition: There must be a lesion or change in the system, *i.e.*, there must be an observable difference between the condition of the claimant as a functioning human being before the occurrence and after the occurrence of the injury. And there must be harm, pain, or lessened facility; in terms of the compensation act one would suppose that this could be summarized by saying that the injury must cause the claimant to be less marketable as a worker.[74] This definition of injury is obviously a flexible and adaptable one; one feels confident in predicting it will remain a satisfactory general guide for many years. With it in mind, let us turn to certain specific types of injury which have caused the courts some difficulty.

B. *Aggravation of Pre-existing Ailments*

"Injury" includes aggravation of ills which an employee already has, even though the original malady may not have been compensable. The *Friddell* case[75] involved an employee with a diseased appendix.

72. 209 Tenn. 106, 350 S.W.2d 65 (1961), 29 TENN. L. REV. 477 (1962).

73. *Id.* at 113, 350 S.W.2d at 68.

74. Zeigale's Case, 325 Mass. 128, 89 N.E.2d 264, 265 (1949): "Compensation is awarded not for the injury as such but rather for an impairment of earning capacity caused by the injury."

75. Great American Indem. Co. v. Friddell, 198 Tenn. 360, 280 S.W.2d 908 (1955); see also Eslinger v. Miller Bros., 203 Tenn. 688, 315 S.W.2d 261 (1958) (aggravation of arteriosclerosis).

After he fell from a ladder at work, the condition degenerated and eventually the appendix ruptured. Compensation was allowed. In two 1962 decisions,[76] employees with imperfect backs were held to be injured when their back conditions became aggravated because of work. The reasoning of all three cases appears sound. In each instance, there was a change for the worse in the employee's condition—not much of a change, perhaps, but a change. And before this change the employees, even though medically disabled, were able to work; after the aggravation of their disabilities they could no longer do so.

Kellon v. American Bakeries Co.,[77] also decided in 1962, appears at first blush to be contrary to these decisions. In that case the claimant was a young man with a congenital back defect. From the facts given in the opinion, it seems that he was discharged from the Navy on account of it and that he had back trouble with some regularity. While working for defendant, he one day felt an unusually sharp pain in the lower back while lifting a tray. After staying away from work for a week (presumably because of the back trouble) he came back to the job and remained with it until discharged for poor quality of service. A week or so later, the back pain became severe and after medical consultation claimant brought a compensation action for disability resulting from aggravation of his condition. The court held that he had sustained no injury. The opinion does not spell the reasons out in full, but apparently the court felt that claimant's pain was not due to any change in the back, but simply to the fact that his back was medically imperfect. In other words, he was the possessor of a back as saleable on the labor market before the tray-lifting as after it. Thus, while it is possible to disagree with the decision on the facts, it is reconcilable with the general theory enunciated in *Brown Shoe*. There may have been a lesion or change in the back (although the court does not concede this) but it did not result in harm in the sense of the compensation act.

C. *Mental Ailments*

The word injury is "broader than the mere reference to some objective physical break or wound to the body and includes the consequences therefrom such as mental ailments or nervous conditions."[78] Necessarily so, one would think, for were mental conditions not to be covered, the courts would be faced with the extremely difficult prob-

76. Ameriean Mut. Liab. Ins. Co. v. Baxter, 210 Tenn. 242, 357 S.W.2d 825 (1962) (the discussion of this point might arguably be dictum); Combustion Eug'r Co. v. Blanks, 210 Tenn. 233, 357 S.W.2d 625 (1962) (tubereulosis of back).

77. 210 Tenn. 184, 357 S.W.2d 56 (1962).

78. Buck & Simmons Auto & Elec. Supply Co. v. Kesterson, 194 Tenn. 115, 119, 250 S.W.2d 39, 40-41 (1952).

lem of differentiating between the harm done by an accident to a man's physical structure and the harm done to his mental system. The symptoms of the two types of injury are sometimes nearly identical. For example, consider the case of *Bush Brothers v. Williams*,[79] in which the claimant suffered from severe pains in the back and legs and was unable to do any work requiring bending or stooping. Medical testimony confirmed the reality of this disability, even though x-rays and other tests did not show (and perhaps could not be expected to show) a ruptured disc to account for the pain. If mental and nervous injury were not covered by the Tennessee act, a complex situation would result in which such cases might be defended on the ground that the injury was actually mental rather than physical.

Two decisions within the last decade have recognized the propriety of allowing recovery for traumatic and post-traumatic neurosis, rejecting the argument that such a condition is a "disease" and is not covered under the act because it is not listed in the occupational disease section.[80] Both cases also underscore the importance of medical testimony establishing the reality of the neurosis. It is hardly surprising that the court should expect a considerable body of proof, since in such cases there is a distinct possibility of malingering.

D. *Subsequent Consequential Injury*

Subsequent consequences cases are no great problem if the consequential harm can be demonstrated to be closely enough related to the original work-connected injury. *Mallette v. Mercury Outboard Supply Co.*[81] illustrates one of the more common situations, aggravation by negligence of a hospital employee. The claimant's back was injured in a fall. While he was recuperating in a hospital, an orderly who was bathing him negligently aggravated the back injury. In such a case the relation between the original work-connected harm and the later injury is clear and the court had no difficulty in holding for the claimant. The same result follows even more clearly when the aggravation results from the treatment of an attending physician.[82]

In *DuPont v. Kessler*,[83] the facts were just enough different to call

79. 197 Tenn. 334, 273 S.W.2d 137 (1954).

80. McKenzie v. Campbell & Dan Mfg. Co., 209 Tenn. 475, 354 S.W.2d 440 (1962); Buck & Simmons Auto & Elec. Supply Co. v. Kesterson, *supra* note 78.

81. 204 Tenn. 438, 321 S.W.2d 816 (1959).

82. Whitaker v. Morton Frozen Foods, Inc., 201 Tenn. 425, 300 S.W.2d 610 (1957) (operation for hand injury limited claimant's ability to grip); Fidelity & Cas. Co. v. Roberts, 198 Tenn. 386, 280 S.W.2d 918 (1955) (use of stainless steel wire to sew up incision prevented claimant from performing manual labor). *But see* McCarty v. Musgrave Pencil Co., 199 Tenn. 582, 288 S.W.2d 444 (1955) (failure to give proper notice made hernia non-compensable; resulting heart attack held non-compensable also).

83. 208 Tenn. 224, 345 S.W.2d 663 (1961).

for an opposite result. Claimant suffered from mitral stenosis, a progressive heart ailment caused by rheumatic fever in childhood. At work one day, claimant experienced a brief but very painful edema attack. Because of the attack, claimant was taken to a hospital for treatment. There, doctors decided to try an operation to improve claimant's general heart condition. The operation was a failure and probably left the claimant in worse shape than before. The supreme court held that any aggravation caused by the operation was not compensable, since the operation was aimed at correcting the underlying condition rather than relieving the pain brought on by edema; the edema, it was testified, would have cleared up in a matter of hours without the operation. The decision was obviously a close one. The mitral stenosis was the true cause of the operation, not the edema; yet at the same time it is probable the operation would not have been performed but for the edema attack brought on by overexertion at work.

Jones v. Huey[84] illustrates the second type of fact situation in which benefits are asked for injury subsequent to the original employment injury: a claimant is hurt because his original injury has left him unable to function normally. In *Jones*, the claimant had while working for defendant sustained a back injury which brought about his discharge. Claimant then obtained a job on a farm. While operating a tractor there, he was killed, probably due to his inability to operate the tractor properly with a bad back. The supreme court quite properly held the decedent's independent decision to seek work on a farm while admittedly not able to do the work there probably meant that his later injury was too far removed from the original harm to be compensable.

V. "By Accident"

The phrase "by accident" has not troubled the Tennessee courts as much as it has those of some other jurisdictions.[85] The definition used by our courts is a common one: "an unlooked for mishap, an untoward event, which is not expected or designed."[86] It is virtually the same as the definition of the same word used in insurance policies,[87] so that insurance cases may be of some relevance when doing research in

84. 210 Tenn. 162, 357 S.W.2d 47 (1962).

85. See 1 Larson § 37; 4 Schneider, Workmen's Compensation Text § 1240 (1945).

86. Brown Shoe Co. v. Reed, 209 Tenn. 106, 114, 350 S.W.2d 65, 69 (1961); see also Sears-Roebuck Co. v. Starnes, 160 Tenn. 504, 26 S.W.2d 128 (1929) (term incapable of precise definition).

87. See Patterson, Essentials of Insurance Law 243-54 (2d ed. 1957), for a discussion of the problems raised by the language of accident provisions of insurance contracts.

compensation problems.

The states have divided on the effect of adding to the word "accident" the little preposition "by." Some jurisdictions have held that this means the cause of the injury must be unlooked for, not just the injury itself.[88] Thus these states have declined to allow compensation for heart attacks that resulted from the normal work activity of an employee, since the cause of the attack was not in any way unusual or untoward. Tennessee, however, has long since refused to attach any importance to this tenuous distinction. Our courts have allowed recovery for injuries which resulted from accidental causes—such as the fall in the *Fridell* case[89]—and for injuries which were unexpected results of ordinary activities—such as a heart attack caused by the normal exertion of a milk deliveryman.[90] One fairly early decision under the Tennessee statute offers an interesting comment to the effect that the words "injury" and "accident" are virtually synonymous for workmen's compensation law.[91]

One aspect of the accident requirement does continue to plague the court: the requirement that the cause or the resulting injury be fairly traceable to a definite time and place. At one time some courts enforced this requirement with extreme strictness, but this has been tempered with the years. In *Brown Shoe Co. v. Reed*,[92] the injury resulted from a series of small repeated traumas: each time claimant used his left hand to operate a trimming machine a severe strain was placed on his arm. "This repeated movement, several hundred times daily, day after day, caused the slipping and irritation of the ulnar nerve and eventually caused neuritis of the nerve, pain and atrophy."[93] It was held that being able to pin the cause of the atrophy down to this particular type of repeated strain was sufficient to meet the accident requirement, possibly on the ground that each repetition was an accident.

The definiteness requirement is less easily met when there is no trauma, not even a slight oft-repeated one, to which the injury can be traced. The greater difficulty can be illustrated by comparing two

88. See, *e.g.*, Wieda v. American Box Board Co., 343 Mich. 182, 72 N.W.2d 13 (1955), which has now been effectively overruled by Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957).

89. Discussed *supra* at note 75.

90. Nashville Pure Milk Co. v. Rychen, 204 Tenn. 575, 322 S.W.2d 432 (1958); see also Johnson v. Aetna Cas. & Sur. Co., 174 F. Supp. 308 (E.D. Tenn. 1959); Huey Bros. Lumber Co. v. Kirk, 210 Tenn. 170, 357 S.W.2d 50 (1962); Boyd v. Young, 193 Tenn. 272, 246 S.W.2d 10 (1951).

91. Franse v. Knox Porcelain Corp., 171 Tenn. 49, 100 S.W.2d 647 (1937). The opposite is said in Pittman v. City Stores, Inc., 204 Tenn. 650, 656, 325 S.W.2d 249 (1958).

92. 209 Tenn. 106, 350 S.W.2d 65 (1961).

93. *Id.* at 114, 350 S.W.2d at 68.

well-known decisions. Claimant in *Hartford Accident & Indemnity Co. v. Hay*[94] worked around a stable and was there exposed to germs which caused blastomycosis, a rare skin ailment. The insurer defended in part on the grounds that it was not possible to trace the origin of the injury to a sufficiently definite time and place because of its non-traumatic character. The court held that "an accidental injury is not necessarily of traumatic origin, strictly speaking. If it be an injury not reasonably to be foreseen, unexpected and fortuitous, it is an accidental injury whether occasioned by heat, germs, or more abrupt or perceptible physical force."[95] Recovery was allowed. Claimant's petition in *Gabbard v. Proctor & Gamble Defense Corp.*[96] alleged that claimant had sustained an injury as a result of breathing fumes at work over a period of eighteen months. The court upheld a judgment of dismissal on the ground that there was no accidental injury since no definite time and place could be set for the inception of the ailment. The court distinguished *Hay* on the grounds that the onset of the illness was clearly marked by the scratching of a pimple. The difference between the two cases, then, is chiefly that the effect of the injury in the one case became apparent with some suddenness, even though the cause of the injury could not be pinned down closely, while in the other case both cause and effect were non-traumatic and gradual.

Why does the court impose the requirement of definiteness in regard to time and place? Professor Larson suggests that "the underlying practical reason for insisting on a definite date is that a number of important questions cannot be answered unless a date . . . is fixed, such as which employer and [*sic*] carrier is on the risk, whether notice of injury and claim is within the statutory period, whether statutory amendments were in effect, which wage basis applies, and many others."[97] Among the many others is certainly the problem of determining whether recovery for a generalized non-traumatic injury should be sought under the accidental injury or occupational disease provisions.[98] As can be seen, these factors relate for the most part to procedure and pleading. The courts will look askance on a pleading which does not offer it guidance with which to answer the questions Larson suggests. Under *Brown Shoe Co.* a pleading should be sufficient to avoid this attack if it can show either (1) a single trauma or short series of traumas which caused the injury, even though the injury may

94. 159 Tenn. 202, 17 S.W.2d 904 (1928).
95. *Id.* at 208, 17 S.W.2d at 905-06.
96. 185 Tenn. 464, 201 S.W.2d 651 (1947).
97. 1 LARSON § 39.10, at 568.
98. In *Brown Shoe*, for instance, one defense entered was that claimant had not suffered an injury by accident, but had contracted an occupational disease not listed as compensable by the Tennessee statute. This distinction becomes of less significance, of course, if coverage of diseases is broadened. See *infra* p. 1155-57.

manifest itself gradually;[99] or (2) a limited period of exposure to germs, heat, or the like leading to the injury (certainly less than eighteen months of breathing);[100] or (3) an injury which, though caused by a prolonged exposure or repetition of traumas, manifests itself with sufficient suddenness so that a reasonable employee would give notice to his employer;[101] or (4) a gradual injury which can be traced to a single type of movement or activity required by the work and less generalized than a normal bodily function like breathing.[102]

VI. "ARISING IN THE COURSE OF EMPLOYMENT"

A. *The General Problem*

The requirement that an injury arise in the course of employment means simply that it should arise while the employee is *where* his employment causes him to be, at a time *when* he would be considered by a reasonable man to be at work, and while he is engaged in an *activity* at least partly connected with his work. Both this requirement and the requirement that an injury arise "out of" employment are designed to insure that the injury is connected with the employment closely enough to be considered a consequence of the hazard created by the employment relation. But the two requirements are still treated by the Tennessee court as nominally independent. As was said in the *Canale* case, "arising out of the employment" refers to the origin of the injury, while "in the course of employment" refers to the time, place and circumstances.[103]

Fortunately, most injuries occur while the employee is on the premises of the employer, during working hours, and while he is engaged in activity beneficial to the employer. But peripheral cases continue

99. This is the most obvious case, and the most usual. Injuries resulting from falls are good examples. See, *e.g.*, Pittman v. City Stores, Inc., 204 Tenn. 650, 325 S.W.2d 249 (1958).

100. T. J. Moss Tie Co. v. Rollins, 191 Tenn. 577, 235 S.W.2d 585 (1951) (sunstroke); King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 296 S.W. 3 (1927) (heat prostration).

101. Brown Shoe Co. v. Reed, *supra* note 92.

102. This is the most difficult category, for such injuries are closely akin to occupational disease. Obviously, general deterioration due to aging as well as to work, is not compensable. Knight v. Berkline Corp., 210 Tenn. 318, 358 S.W.2d 323 (1962). But what of an employee who while operating a bandsaw is continuously struck lightly in the chest and who develops pericarditis? In such a case there is gradualness both in cause and in effect. The Tennessee court allowed recovery, Benjamin F. Shaw Co. v. Musgrave, 189 Tenn. 1, 222 S.W.2d 22 (1949), on the basis of repeated traumas, each acting as an additional injury, so that the case would arguably fit the third listed category, but for the fact that the injury did not manifest itself quite so definitely in terms of time.

103. McAdams v. Canale, 200 Tenn. 655, 661, 294 S.W.2d 696, 699 (1956); see also Sandlin v. Gentry, 201 Tenn. 509, 300 S.W.2d 897 (1957).

to arise, some of them recurring often enough to deserve some mention here.

B. *Problems of Place*

In a number of cases, attorneys have attempted to persuade the Tennessee courts that the "premises" of the employer should be extended to include adjacent sidewalks, streets, and parking lots commonly used by employees while coming to or going from work.[104] In general, recovery has been denied in such cases, even though the employer may own the sidewalk or parking lot.[105] Thus, as soon as the employee steps out the plant door, he is no longer in the course of his employment. However, there are exceptions. Principally they involve means of ingress and egress, whether owned by the employer or not, which employees are required or expected to use as the only practical means of traveling to work, and in connection with which there is some recognizable hazard. In the *Mallette* case,[106] for example, an employee was allowed to recover for injuries received from a fall on a steep flight of steps leading from the bank of a lake to the employer's marina, since there was no other way of getting to the marina.[107]

Employees other than traveling employees are not considered to be within the course of employment while on the highways going to and from work except in particular circumstances. The circumstances that do call for coverage occur when the employer has control over, or is interested in, the time and manner of transport. Thus, employees injured while being transported to work in an employer's truck are entitled to compensation, since the employer controlled the journey.[108] In *Tallent v. M. C. Lyle & Son*,[109] a workman had, at his employer's urging, made arrangements to carry a number of his co-workers back

104. This approach has been described as the "so close" rule. It obviously raises the question: "How close is so close?" See Annot., 159 A.L.R. 1395 (1945) (parking lots).

105. James v. Sanders Mfg. Co., 203 Tenn. 274, 310 S.W.2d 466 (1958) (sidewalk); Bennett v. Vanderbilt Univ., 198 Tenn. 1, 277 S.W.2d 386 (1955) (parking lot); Smith v. Camel Mfg. Co., 192 Tenn. 670, 241 S.W.2d 771 (1951) (sidewalk some 6 to 20 feet from factory door). While these cases evoke considerable sympathy, the court has probably done well to maintain a strict attitude. The "so close" view is fraught with uncertainty. See the argument in 1 LARSON § 15.22.

106. Mallette v. Mercury Outboard Supply Co., 204 Tenn. 438, 321 S.W.2d 816 (1959).

107. See also Moore v. Cincinnati, N.O. & T.R.R.R., 148 Tenn. 561, 256 S.W. 876 (1923) (employees used hazardous route leaving railroad yards); Patten Hotel Co. v. Milner, 145 Tenn. 632, 238 S.W. 75 (1921) (employees habitually used adjoining alley for rest breaks with encouragement of employer); Washington County v. Evans, 156 Tenn. 197, 299 S.W. 780 (1927) (road construction worker still "on premises" after leaving work site proper while on portion of uncompleted road).

108. Vaughn v. Standard Sur. & Cas. Co., 27 Tenn. App. 671, 184 S.W.2d 556 (M.S. 1944).

109. 187 Tenn. 482, 216 S.W.2d 7 (1948).

and forth to the job. One afternoon when he left the work site to go get his car started, it would not operate properly. While trying to get the car running, the employee injured his hand. He brought a claim for compensation. The court held the claimant to have been within the course of his employment, since in a number of ways (such as carrying employees to the claimant's car at quitting time in a company car) the employer had indicated he was interested in the transportation arrangement.

Employees hired to travel, such as traveling salesmen, are a category apart. *Gregory v. Porter* enunciated the general rule that "when the duties of an employee require travel, injuries received as a result of such hazards incident to such travel are compensable."[110] Thus from the time a traveling employee leaves his home to go on a business trip until he returns home he is within his scope of employment so long as he remains on the employment route, even while he is resting and eating. Only when he leaves the employment route to deviate on a personal errand is he not covered.[111] And if he returns to the employment route after having deviated, he is back within the scope of employment again.[112]

A dual purpose trip is just what the name implies: a trip taken partly for business purposes and partly for personal reasons. The Tennessee court has adopted the doctrine of *Marks v. Gray*[113] to determine whether an employee is within the course of his employment on such trips.[114] Under this doctrine, " 'if the business of the master creates the necessity for the travel, the servant is in the course of his employment although he is furthering at the same time some purpose of his own.' "[115] To phrase it another way: If the business purpose of the trip is at least a concurrent motivation of the trip, the journey will be considered a business trip. If the business motive is only a subordinate cause for the journey, the employee will be considered at work only when he is actually at the particular place required by the business. The rest of his journey is considered personal.[116]

110. 204 Tenn. 582, 585, 322 S.W.2d 591, 592 (1959).

111. Lumbermen's Mut. Cas. Co. v. Dedmon, 196 Tenn. 94, 264 S.W.2d 567 (1951) (employee not covered while engaged in personal shopping excursion during business trip); see also Timmerman v. Kerr Glass Mfg. Co., 203 Tenn. 543, 314 S.W.2d 31 (1958) (deviation not covered even though with employer's consent).

112. Martin v. Free Serv. Tire Co., 189 Tenn. 327, 225 S.W.2d 249 (1949); West Tenn. Nix-A-Mite Sys., Inc. v. Funderburk, 208 Tenn. 381, 346 S.W.2d 250 (1961).

113. 251 N.Y. 90, 167 N.E. 181 (1929).

114. Patton v. L. O. Brayton & Co., 184 Tenn. 592, 201 S.W.2d 981 (1947).

115. *Id.* at 597, 201 S.W.2d at 984.

116. The business purpose need not be dominant, as some courts have unfortunately stated. 1 LARSON § 18.20.

C. *Problems of Time*

Tennessee decisions on what constitute working hours are fairly routine. It has been held that lunch hours and rest breaks are work time when employees remain on the employer's premises in a lunchroom or snack bar operated by the employer.[117] In one case it was held that restaurant employees who stepped out of the kitchen into an adjoining open space for their rest breaks to get away from the heat were still in the course of employment, since the employer knew and approved of the practice.[118] On the other hand, an employee who goes out to eat supper at a private restaurant is not within the scope of employment while off the premises, even though the employer reimburses the cost of the meal.[119]

In *City of Gallatin v. Anderson*,[120] an off-duty policeman was injured when he made an arrest for an offense committed in his presence. The court held that since the policeman was on call twenty-four hours a day for this sort of purpose, he was at work while making the arrest. Presumably the same rationale should apply to other on-call employees.[121]

D. *Problems of Activity*

What activities are within the scope of employment? First, it is clear that any activity required by the employer under the contract of hire is in the scope of employment, even though it may not be of direct business benefit. In the *Canale* case,[122] the contract of hire contemplated that the claimant would not only act as a secretary and bookkeeper, but that she would from time to time serve as her employer's driver because his ability to operate an automobile had been restricted by an accident. Claimant was injured while driving the employer on a trip whose purpose was personal to the employer. The court stated that "where, as here, the employee is doing what he or she is directed to do by the employer . . . it seems reasonable that an injury which arose during the course of this employment that the employee was directed to do should be compensable."[123]

Second, it would seem clear that any activity which may be regarded as reasonably or normally incidental to working is within the course

117. Kaylor v. Magill, 181 F.2d 179 (6th Cir. 1950); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).

118. Patten Hotel Co. v. Milner, *supra* note 107.

119. Greenfield v. Manufacturers Cas. Co., 198 Tenn. 452, 281 S.W.2d 47 (1955).

120. 209 Tenn. 392, 354 S.W.2d 84 (1962).

121. See Lumbermen's Mut. Cas. Co. v. Dedmon, 196 Tenn. 94, 264 S.W.2d 567 (1951) (*semble*); 1 LARSON § 24.20.

122. McAdams v. Canale, 200 Tenn. 655, 294 S.W.2d 696 (1956).

123. *Id.* at 662, 294 S.W.2d at 699; see 1 LARSON § 27.40. As to the converse—forbidden activities—see *infra* at 1151.

of employment if engaged in within the employment context. In this category would fall such activities as eating,[124] rest breaks,[125] horseplay, and the like.[126] While an employee may not in the strict sense be "working" at such moments, he would be thought of in common parlance as being "at work." The principal limitation on this category is that the activity take place within the employment context. It is necessary for an employee to eat in order to work, but his eating will not be regarded as a work activity unless it is done under the control or at the direction of the employer, *e.g.*, in a company lunchroom or, in the case of a traveling employee, along the employment route.

Third, an activity other than normal work sponsored by the employer may be within the course of employment if the employer directs, strongly encourages, or actively participates in the activity. There is little authority in Tennessee for this category, although it has been frequently discussed elsewhere.[127] However, an early Tennessee case intimated that employees playing basketball on a court provided by their employer were probably in the course of employment[128] so that it appears likely the Tennessee courts will extend coverage to these activities when confronted by a proper case. The problem, of course, is whether the employer has been active enough in his sponsorship or encouragement of the activity so that it can fairly be said that the activity is an incident of being an employee.[129]

Fourth, acts done by an employee in an emergency are within the scope of employment if the emergency arises in the course of the employer's business and if the employee's acts are reasonable in light of the necessities of the situation. In the *Dudley* case,[130] a city water department employee was pressed into service in aid of firemen, and while so aiding them was killed. It was held that his acts were a reasonable response to an employment emergency and thus covered under the act.

E. *The Importance of "Arising"*

The requirement of the statute is that an injury *arise* in the course of employment, not that it *manifest* itself then. A particularly stressful and tense day at work may well bring on a heart attack which does not take place nntil the worker has arrived at home. Nonetheless, if the origin of the attack can be traced to the work situation, it is com-

124. Kaylor v. Magill, *supra* note 117.
125. Kingsport Silk Mills v. Cox, *supra* note 117.
126. Ransom v. H. G. Hill Co., 205 Tenn. 377, 326 S.W.2d 659 (1959).
127. See 1 LARSON §§ 22.00, 27.00.
128. Kingsport Silk Mills v. Cox, *supra* note 117, at 474, 33 S.W.2d at 91.
129. See, *e.g.*, Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 128 N.E.2d 699 (1955) (industrial league softball competition).
130. Travelers Ins. Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d 142 (1943).

pensable.[131] On the other hand, it cannot be denied that Tennessee, like many other states, has been reluctant to allow compensation in such cases unless the evidence offered by the claimant is more than usually convincing.[132] Attorneys involved in such cases should take particular care in the preparation and presentation of medical evidence of causation.

VII. "Arising Out of Employment"

A. *Basic Theories of Causation*

There are three general rules or theories of causation[133] which have been urged in compensation cases: proximate cause, added peril, and

131. See, *e.g.*, Howell v. Charles H. Bacon Co., 98 F. Supp. 567 (E.D. Tenn. 1951), *aff'd*, 197 F.2d 333 (6th Cir. 1952); see also the materials on consequential injuries, *supra* p. 1140-41.

132. See, *e.g.*, Hagewood v. DuPont, 206 Tenn. 238, 332 S.W.2d 660 (1960) (heart attack at home); Nashville Bridge Co. v. Todd, 199 Tenn. 311, 286 S.W.2d 861 (1955) (heat stroke on way home); Lynch v. LaRue, 198 Tenn. 101, 278 S.W.2d 85 (1954) (seven years from electric shock to cerebrovascular disease).

133. The problem of classifying the cases in this area is difficult. Research in most law books can be done by either of two methods: the "legal topic" method, using a table of contents with such headings as "power distinguished from authority;" or the descriptive word method, using an index which includes such words as "theatres," "cancer," and the like. Similarly, there are two methods of attempting to categorize and explain the "arising out of" cases under the compensation act. One is to formulate a single theory of causation broad enough to serve as the major premise for all the decisions. The second is the humbler route of grouping the cases more narrowly according to the similarity of certain of their more significant facts and creating distinctive fact pigeonholes into which each case may be consistently fitted. Both methods are necessary to an understanding of the cases, yet neither is entirely satisfactory. The reason lies in the nature of those generalizations we call "legal rules." They have not been handed down from a mountain-top. These rules are abstractions, generalizations built up from long successions of cases whose rationales are sufficiently similar to justify being synthesized into a single general principle. Thus the process by which a rule is created is much like the process of inductive logic; and the factors from which the rule of a case of first impression is induced include the words of a statute, the purposes of a legislature, the nature of the industry being goverued, the sympathetic appeal of a cause, and so on. The rule of that case becomes itself a factor in the process of formulating the rule of the next similar case. The process continues until there exists a rule capable of being set out in bold type in a treatise. After a rule is created in this manuer, it is used in opinions as the basis of a deductive pronouncement, frequently in the form of a syllogism. At this point, the rule seems almost to have acquired a life of its own, independent of the cases which gave birth to it. This deductive form of statement provides an appearance of certainty which is an important characteristic of law. Yet to some extent, the appearance is deceiving, for few legal rules are so fixed and immutable that they are not coustantly being re-shaped aud reformed so that in any given appellate case there is a process of inductive logic from which a rule is derived, and a process of deductive logic from which a conclusion is derived to dispose of the particular cause before the court. This is particularly true in an area of law as relatively recent in origin as compensation law. In order to understand the precedent which exists, therefore, one must be able to understand how injuries caused by "stress" and injuries caused by "lightning," for example, may be synthesized into a single "rule," and must at the same time be able to understand how the "rule" has been created out of statutory language and thorny cases.

actual cause. The supreme court has specifically rejected the proximate cause test in its opinions,[134] but the temptation to carry over some language from the proximate cause cases has been great. As a result, the court has at times required that an accidental injury in order to arise out of the employment be one that, viewed after the fact, might have been contemplated.[135] The similarity of such a requirement to the foreseeability concept of proximate cause is obvious—and would be unfortunate, had not the court explicitly stated that the two are not the same.

The rule which has been adopted in terms is the "added peril" or "increased risk" doctrine.[136] In order for a claimant to recover under this theory, he must show that his injury was caused by a hazard which is (to some extent, at least) peculiar to the conditions of his employment. If strictly applied this theory might unduly narrow the range of compensability. But the Tennessee court has not applied the doctrine in this fashion, as can be seen by even a hasty examination of a recent horseplay case.[137] Nonetheless, claimant's petition should be drawn with regard to what can be proved on trial to be a "hazard of employment" rather than a "hazard of general human existence." To do otherwise is to court defeat.[138]

The liberality in favor of claimants which has been prevalent in Tennessee decisions may indicate that the added peril approach has been stretched to its limit and that the court will in the foreseeable future adopt actual cause as its test. That is, it may require a showing only that the employment in fact exposed the claimant to the risk, whether or not it was also a risk to others in the community. *Carter v. Hodges*[139] can be so interpreted, but on the basis of existing precedent it is doubtful that Tennessee is willing to go this far, at least in name.[140]

134. White v. Whiteway Pharmacy, Inc., 210 Tenn. 449, 455, 360 S.W.2d 12, 15 (1961); Tapp v. Tapp, 192 Tenn. 1, 6, 236 S.W.2d 977, 979 (1950).

135. "In order to hold this case compensable under our statute each of two questions must be answered in the affirmative. . . . The second of these two questions . . . is: Could such an injury reasonably have been contemplated if it had been thought of at the time of the employment as a risk incident to [the claimant's] duties?" Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 137, 270 S.W.2d 389, 390 (1954) (Burnett and Prewitt, J.J., dissenting). *But see* W. S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 581, 347 S.W.2d 493, 495 (1961).

136. See Mason-Dixon Lines, Inc. v. Lett, 201 Tenn. 171, 176, 297 S.W.2d 93, 95 (1956).

137. Ransom v. H. G. Hill Co., *supra* note 126 (employee slipped while skylarking with a fellow employee during period of inactivity).

138. Reedy v. Mid-State Baptist Hospital, 210 Tenn. 398, 359 S.W.2d 822 (1962) (*semble*) (inadequate showing of aggravation by employment; claimant's doctor testified the cause of her disability was a prior injury).

139. 175 Tenn. 96, 132 S.W.2d 211 (1939); see W. S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 581, 347 S.W.2d 493, 495 (1961).

140. See Oman Constr. Co. v. Hodge, 205 Tenn. 627, 629-30, 329 S.W.2d 842, 843 (1959).

B. *The Hazards of Employment*

Accepting the added peril approach, liberally applied, as the Tennessee rule, what constitute hazards of employment? Dangerous machinery, explosives, slick floors, and the like furnish obvious examples; the great bulk of injuries are brought about by such causes and offer no problem. The outer limits of compensability are much less obvious, and some consideration should be given to a few of the major categories of "tough" cases.

The "act of God" cases are difficult to resolve. Two decisions in the past decade have allowed recovery to claimants who were struck by lightning while at work.[141] The likelihood of being struck was held to be a risk of the employment in each case because the injured employee was working with metal. The court took judicial notice that lightning is attracted by metal. Yet a few years before in *Jackson v. Clark & Fay*[142] the court denied compensation (two justices dissenting) to an employee injured when a truck in which he was being transported was hit by a tornado. It would seem more than arguable that being required to be in the open by employment, and thus exposed to the fury of the tornado, is very nearly the same as being required to work near lightning-attracting metal.

The assault cases can be resolved more easily. If the assault takes place on employment premises and has its origins in the employee's work, resulting injury is compensable. In *Dickey Manufacturing Co. v. Moore*,[143] for example, claimant and another employee got into an argument over the quality of claimant's performance on the job. A fight ensued and claimant was hurt. Since the assault was employment-oriented, the injury was held compensable. It should be noted, however, that the court intimated that even if injury grows out of a fight over work disputes, an aggressor is not allowed to recover in this state.[144]

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141. Oman Constr. Co. v. Hodge, *supra* note 140; Mason-Dixon Lines, Inc. v. Lett, *supra* note 136.

142. *Supra* note 135. The case is cited in both *Hodge* and *Lett*. It is interesting to note that although the court is careful to distinguish *Jackson* rather than overrule it, the the opinion in *Hodge* was written by Mr. Justice Prewitt, who dissented in the earlier case. As to a possible distinction, see 1 LARSON § 8.20.

143. *Supra* note 135; see also Jim Reed Chevrolet Co. v. Watson, 194 Tenn. 617, 254 S.W.2d 733 (1952); Turner v. Bluff City Lumber Co., 189 Tenn. 621, 227 S.W.2d 1 (1950) (same result on similar facts). See also *infra* at 1152.

144. 208 Tenn. at 583-84, 347 S.W.2d at 497. The point was raised in terms of Sandlin v. Gentry, 201 Tenn. 509, 300 S.W.2d 897 (1957). In that case it is not entirely clear whether the court held against the claimant both on the grounds of the aggressor defense and of willful misconduct or only on the latter basis. The limits of "willful misconduct" have received little discussion in Tennessee. Disobedience of an order does not necessarily constitute such conduct, Kingsport Foundry & Mach. Works, Inc. v. Sheffey, 156 Tenn. 150, 299 S.W. 787 (1927); but blatant disregard of an order resulting in obvious exposure to increased risk may, Leonard v. Cranberry Furnace Co.,

At the other end of the assault scale is *White v. Whiteway Pharmacy.*[145] Claimants' decedent was killed at work by her husband, a former co-employee, because she had been having social engagements with another man. Since a motive could hardly be more personal than this, the death was held non-compensable even though the weapon used belonged to the employer.

Horseplay cases involve assaults in the form of bantering pokes, pinches, and punches. The Tennessee courts permit recovery so long as "the things done are the natural and normal thing of the type of employee who are kept there."[146]

Two illustrative cases involving positional risk indicate that the courts of the state have not yet settled on a firm approach to such problems. In *Carter v. Hodges*[147] a traveling salesman who normally stayed in a hotel during his trips was killed by a hotel fire. The death was held compensable. In *Thornton v. RCA Service Co.*,[148] claimant was assaulted by a drunk or insane stranger who entered the restaurant where claimant was eating while on a business trip. Compensation for the resulting injury was denied. To reconcile the cases on the grounds that hotel fires are a more recognized menace than assaults by drunks appears logically unjustifiable. Hopefully the supreme court will take the next opportunity to clear up the confusion resulting from these and other holdings. In each case an employee was unknowingly put in a place of danger by his work. Either such injuries are compensable or they are not.[149]

It has already been pointed out that Tennessee allows compensation for aggravation of pre-existing conditions. In such cases the courts try to determine only whether the employment has substantially contributed to the worsened condition; they will not ordinarily attempt to determine how much of the resulting condition was caused by the

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150 Tenn. 346, 265 S.W. 543 (1924). See also note 146 *infra.*

145. 210 Tenn. 449, 360 S.W.2d 12 (1962).

146. Ransom v. H. G. Hill Co., 205 Tenn. 377, 385, 326 S.W.2d 659, 663 (1959). In this case an employee who grabbed the seat of another's trousers and tripped as a result was allowed compensation for the injury thus caused. The defense attempted to rely on claimant's aggressor status, citing Hawkins v. National Life & Acc. Ins. Co., 164 Tenn. 36, 46 S.W.2d 55 (1932). The court indicated that this defense is limited to cases of more aggravated conduct than could legitimately be termed horseplay.

147. 175 Tenn. 96, 132 S.W.2d 211 (1939).

148. 188 Tenn. 644, 221 S.W.2d 954 (1949).

149. *Compare* Whaley v. Patent Button Co., 184 Tenn. 700, 202 S.W.2d 649 (1947) (compensation allowed for injury resulting when discharged insane former employee shot at random through factory window) *and* Carmichael v. J. C. Mahan Motor Co., 157 Tenn. 613, 11 S.W.2d 672 (1928) (compensation to garage employee shot by air rifle negligently handled by ten-year-old boy loafing on premises) *with* Scott v. Shinn, 171 Tenn. 478, 105 S.W.2d 103 (1937) (soft-drink deliveryman injured by robbers at lunchroom which he was about to enter; compensation denied).

original disability and how much by the work.[150] A recent amendment to the code allows employees to waive rights to compensation for aggravation of certain existing disabilities, notably heart conditions and occupational diseases.[151] There has not yet been enough time to evaluate the long-range effect of the amendment, but one can speculate that it may prove troublesome to distinguish how much of an injury has been caused by aggravation and how much is really a new injury.

Among the most troublesome cases on causation are those in which an employee is found injured and (because of his death, amnesia, or ignorance) it is impossible to uncover the precise circumstances surrounding the injury. Claimants in such cases must, of course, rely on circumstantial evidence.[152] In this connection, there exists a "rule of reasonable inference" with regard to causation: "Where an employee is found at his post of labor [during the time that he is usually employed and] without direct evidence of the manner of his death, an inference may arise of an accident springing out of and in the course of his employment."[153] The rule will not be applied, however, when more than one reasonable inference as to the cause of death exists.[154]

150. The cases are numerous. The following are illustrative: Combustion Eng'r Co. v. Blanks, 210 Tenn. 233, 357 S.W.2d 625 (1962) (tuberculosis); Hney Bros. Lumber Co. v. Kirk, 210 Tenn. 170, 357 S.W.2d 50 (1962) (aneurysm); Martha White Bakeries, Inc. v. Vance, 204 Tenn. 491, 322 S.W.2d 206 (1959) (cirrhosis); Eslinger v. Miller Bros., 203 Tenn. 688, 315 S.W.2d 261 (1958) (arteriosclerosis). The same rule applies to organic weakness or predisposition to injury. Bnsh Bros. & Co. v. Williams, 197 Tenn. 334, 273 S.W.2d 137 (1954). This basis for recovery may be used even though not pleaded originally. Norton v. Standard Coosa-Thatcher Co., 203 Tenn. 649, 654-55, 315 S.W.2d 245, 247 (1958).

151. TENN. CODE ANN. § 50-1109 (Supp. 1963).

152. Heron v. Girdley, 198 Tenn. 110, 121, 277 S.W.2d 402, 407 (1955) (employee fonnd dead of heart attack in poorly ventilated mine; compensation allowed); see also Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953).

153. Eureka Cas. Co. v. Phillips, 133 F. Supp. 630, 632 (E.D. Tenn. 1955), *aff'd*, 233 F.2d 743 (6th Cir. 1956); see also Cunningham v. Hembree, 195 Tenn. 107, 257 S.W.2d 12 (1953). Having thus made out a prima facie case, plaintiff has satisfied his burden of going forward with the evidence; the defendant must then present affirmative evidence in rebuttal. Shockley v. Morristown Produce & Ice Co., 158 Tenn. 148, 154-55, 11 S.W.2d 900, 902 (1928).

154. See, *e.g.*, Wilson v. St. Louis Terminal Distrib. Co., 198 Tenn. 171, 175, 278 S.W.2d 681, 683 (1955) (rule could not be applied to heart attack victim who had not been engaged in physical exertion since disease would be as reasonable an inference as accident); Reed v. Langford, 197 Tenn. 587, 276 S.W.2d 735 (1955) (hotel desk clerk found dead of gunshot wound; employer hotel's guests included whores, gamblers, drunkards, and touts; compensation denied). The *Langford* case seems clearly wrong. See 1 LARSON § 11.33. One is tempted to inquire of the *Wilson* case: How much more would really be known (rather than inferred) by the court if the employee had been engaged in exertion? The preferable approach would seem to be not to say that where there are conflicting possible inferences, no inference can be drawn, but to say instead that where two inferences can be drawn and the medical testimony more strongly supports one, the court will adopt the stronger inference. Howell v. Bacon Co., 98 F. Snpp. 567 (E.D. Tenn. 1951). The latter ap-

C. *Importance of Medical Testimony*

Because the supreme court limits its review in compensation cases to determining whether any substantial evidence exists to support the finding of the trial court, and because it will consider lay testimony on medical matters as part of that evidence,[155] some attorneys have grown skeptical of the importance of thorough preparation of medical evidence. Although this is understandable, it is unfortunate. The position of the supreme court is not unreasonable. By limiting its review in these cases, the court encourages the final disposition of cases in lower courts, thereby eliminating the expense and time involved in appeals. Accepting an injured party's testimony on how he feels and what he is able to do is eminently justifiable in light of the difficulty in assessing such matters medically on any sort of absolute scale.[156] Moreover, it is probable that employers and insurers would often have superior sophistication in regard to medical testimony and would be able to overwhelm worthwhile claims were trial judges bound to make judgments wholly on the basis of the weight of expert testimony. Yet all of this does not make it any easier for a defense attorney who has carefully prepared his medical proof and brought specialists to trial to accept a contrary verdict based on the statement of a general practitioner that he believes the injury might well have been caused by an employment accident.

Perhaps it is some consolation to defense lawyers in this uncomfortable position that the courts have been more stringent in requiring medical testimony in regard to cause than in regard to the extent of injury. True, an opinion of a physician that the employment might possibly have caused an injury is admissible,[157] but it has also been held that testimony of that sort is not enough by itself to support a verdict for the claimant.[158] And the recent decision in *Reedy v. Mid-*

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proach would seem to have a strong analogy in tort law, where *res ipsa loquitur* may be applied even though "many inferences are possible, and none of them is so clear that the court can say that it is compulsory." PROSSER, TORTS § 43, at 212 (2d ed. 1955). It must be pointed out, however, that should the court allow an expansion of this rule, it would be necessary to modify the procedural effect of *Shockley*. The role of the judge in compensation cases as trier of both law and fact makes the tort analogy less satisfactory.

155. See, *e.g.*, Bush Bros. & Co. v. Williams, 197 Tenn. 334, 273 S.W.2d 137 (1954).

156. See, *e.g.*, Buck & Simmons Auto & Elec. Supply Co. v. Kesterson, 194 Tenn. 115, 250 S.W.2d 39 (1952).

157. Combustion Eng'r Co. v. Blanks, 210 Tenn. 233, 238, 357 S.W.2d 625, 627 (1962); Benjamin F. Shaw Co. v. Musgrave, 189 Tenn. 1, 9-10, 222 S.W.2d 22, 25 (1949). *But cf.* Sanders v. Blue Ridge Glass Corp., 161 Tenn. 535, 541-42, 33 S.W.2d 84, 85 (1930).

158. Mason & Dixon Lines v. Gregory, 206 Tenn. 525, 537-39, 334 S.W.2d 939, 945-46 (1960); Lynch v. LaRue, 198 Tenn. 101, 104, 278 S.W.2d 85, 86 (1955). Such testimony must be accompanied by other evidence permitting the inference to be made.

State Baptist Hospital[159] stands as testimony that trial judges will not necessarily be so liberal in their application of the statute as to weigh an injured claimant's testimony as to causation more heavily than that of doctors.

VIII. Occupational Disease

There are two basic statutory alternatives available in connection with occupational diseases. The basic coverage provision is section 50-1101, which lists as compensable nine specific categories of disease. All employers subject to the remainder of the workmen's compensation law are covered by this provision. If an employer wishes, however, he may elect under sections 50-1103 and -1104 to be covered for all occupational diseases, rather than just those listed. Experience since 1947 indicates that such elections will probably be rare. Some may be expected, however, because an employer might prefer to pay a greater number of compensation claims of limited amount than be subject to the risk of a smaller number of tort claims for which larger damages might be awarded. Few cases have reached the appellate courts yet under either provision. Those which have suggest only a few points of major interest.

First, it should be pointed out that the list of diseases is not entirely exclusive. In the case of *Whitehead v. Holston Defense Corp.*,[160] the court was asked to allow recovery for an employee suffering from pulmonary fibrosis, not one of the named diseases. In answer to defendant's objection on this basis, the court replied:

> While it is true the Legislature listed nine occupational diseases as compensable, yet a liberal interpretation of this section does not require that the disease from which an employee suffers must be proved to that degree of scientific exactness as to classify it as one of these listed occupational diseases. Medical science, great and important as it is in serving humanity, is not an exact science. Moreover men of science have not as yet given a name to every human ailment. Some diseases are so closely related to certain classified diseases that they must be denominated as "occupational". . . . [W]hen the statute provides " 'occupational disease,' means one (1) of the scheduled diseases arising out of and in the course of employment", the legislative intent was to include such related physical ailments in causative effect as being compensable.[161]

Thus, not only the listed diseases but also those generically close to

This other evidence may be slight. See Powers v. Beasley, 197 Tenn. 549, 276 S.W.2d 720 (1955).

159. 210 Tenn. 398, 359 S.W.2d 822 (1962); see also American Cas. Co. v. Ball, 366 S.W.2d 773 (Tenn. 1963) (insufficient medical proof that hip and side injury caused cancer).

160. 205 Tenn. 326, 326 S.W.2d 482 (1959).

161. *Id.* at 332-33, 326 S.W.2d at 484-85.

those listed are compensable.[162]

Similarly, it has been held that diseases not listed but which are the result or outgrowth of a listed disease are compensable. In *Maryland Casualty Co. v. Miller*,[163] claimant suffered from panniculitis, which she claimed was the outgrowth of occupationally caused dermatitis. Dermatitis is among the listed diseases, panniculitis is not. Although troubled by the conflicting medical testimony on whether the dermatitis could have caused the later condition, the supreme court determined that there was sufficient evidence of causation and allowed a verdict for claimant to stand. The importance of medical testimony to demonstrate the connection between a listed disease and one not listed is too obvious to require discussion.

The second principal problem area with occupational disease is being able to distinguish between those injuries and accidental injuries arising out of repeated traumas. In *Brown Shoe Co. v. Reed*,[164] the injury involved was neuritis and atrophy resulting from repeated traumas to the ulnar nerve. Defendant urged that this was essentially a disease rather than an accidental injury and that, not being listed in section 50-1101, it was non-compensable. The reasoning of the court in answering this argument was that

> generally an occupational disease in addition to the definition in the statute is a disease that comes from common experience as visited upon persons engaged in a particular occupation, in the usual course of events, as a painter affected with lead colic or lead poisoning; phosphorous poisoning common to those who work in the manufacture of fireworks and things of that kind.[165]

In other words an occupational disease is one which results from the nature, rather than merely from the conditions, of the work. This distinction is elusive and could prove troublesome. In time, it is likely that Tennessee will enlarge the coverage of its occupational disease statute; this would have the effect of making the distinction of little practical significance except in relation to pleadings and perhaps notice requirements. The difficulties in regard to pleadings have been obviated by a holding that a claimant may present evidence tending to show the existence both of disease and of accidental injury, amending the pleadings if necessary.[166]

The third major problem with the occupational disease provisions

162. See also Tennessee Tufting Co. v. Potter, 206 Tenn. 620, 628, 337 S.W.2d 601, 602 (1960).

163. 210 Tenn. 301, 358 S.W.2d 316 (1962).

164. 209 Tenn. 106, 350 S.W.2d 65 (1961).

165. *Id.* at 119, 350 S.W.2d at 71.

166. Norton v. Standard Coosa-Thatcher Co., 203 Tenn. 649, 315 S.W.2d 245 (1958); see also Cunningham v. Hembree, 195 Tenn. 107, 112, 257 S.W.2d 12, 14 (1953).

concerns the stringency of the proof-of-causation requirement. Section 50-1101 lists six standards which must be met in order for a claimant to have borne the burden of proof on this issue. The third standard listed is proximate cause. The other five would all seem less rigorous than this one provision, so that one is struck with the question: Why, if proximate cause is to be the standard, did the legislature feel it necessary to list other standards, less rigorous than this[167] or which would be regarded as part of a proximate cause test? The only case which has yet discussed the causation requirement at length was in a federal rather than a state court. It spoke more of "direct cause" than of proximate cause.[168] The Virginia courts, interpreting an almost identical statute, have set forth one doctrine which may be adopted in Tennessee: If the proof shows that it is at least as likely some cause other than employment brought on the disease, the plaintiff has not successfully borne his burden of proof.[169] Larson has suggested that the approach of this sort of statute is quite similar to the older "peculiar risk" (added peril) test for accidental injuries.[170]

167. The sixth standard listed, for instance, seems less rigorous to this writer.
168. Lyons v. Holston Defense Corp., 142 F. Supp. 848 (E.D. Tenn. 1956).
169. Van Gueder v. Commonwealth, 192 Va. 548, 65 S.E.2d 565 (1951).
170. 1 LARSON § 41.32.