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LABOR LAW AND WORKMEN'S COMPENSATION—1960 TENNESSEE SURVEY

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I. LABOR LAW

Labor law is concerned with the rules governing the various phases of the employment relation and the activities of employers and labor organizations *vis-a-vis* such phases. Sometimes such rules are embodied in criminal law or tort law. If the substance of the alleged crime or tort is not directed toward or used in some respects as a regulation of employment or labor relations, it is excluded by the above definition even though some "labor" aspect is prominently identified with the case. For example, during the survey period the Supreme Court of Tennessee decided the case of *Smith v. State*,[1] affirming a criminal judgment resulting from prosecutions of persons active in a labor organization for the crimes of conspiracy to kill and to commit felonious assault. Such a decision falls outside the area of labor law under the foregoing definition, there being nothing to indicate that a regulation of labor relations was involved. This case also illustrates in a negative way the scope of the much-discussed federal pre-emption doctrine in the field of labor relations. It has

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1. 327 S.W.2d 308 (Tenn. 1959).

been made clear in all pronouncements of the United States Supreme Court establishing this doctrine that the state retains its traditional responsibility for the maintenance of order and the protection of life and property and may use its civil and criminal processes accordingly.

During the survey period there was the usual large number of workmen's compensation cases, including what appears to be a rather significant development in the area of law relating to "horseplay."[2] So far as relations between employers and labor organizations are concerned, however, the decisions during the survey period produced little of general significance. The single major pronouncement by the Tennessee appellate courts relating to labor injunctions was subsequently subjected to reversal by the Supreme Court of the United States—a development which has not been infrequent in recent years when problems relating to federal pre-emption were presented.[3]

A. Labor Injunctions

Jakes Foundry Co. v. Tennessee-Carolina Transportation, Inc.[4] involved state court power to punish for contempt truck line employees who ceased performance of duties because of a picket line established at a manufacturing plant. The manufacturer had secured a temporary injunction against several motor carriers requiring the continuation of customary pick-up and delivery service. The injunction, which ran against "defendants, and their agents and servants," was not attacked directly, but a number of carriers and their employees did not obey its terms. When contempt proceedings were instituted, pleas in abatement were filed alleging lack of jurisdiction in the chancery court because of federal pre-emption of the subject matter. The chancellor adjudged the carriers and individual employees guilty of contempt and imposed fines. On appeal, this decree was affirmed in an opinion by Judge Felts.

The opinion treats the situation as essentially similar and controlled by the same court's decision on remand in *Aladdin Industries, Inc. v. Associated Transport, Inc.*[5] The fact that the refusals to cross a picket line were in that instance separate and individual rather than "concerted" as claimed in this case is not a decisive difference, it is stated. "Such a matter might have been urged as a defense in the main suit, but in our opinion, it can not be urged as a defense or excuse for flouting the injunction and defying the Chancery Court as a usurper,

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2. See § II B, *infra* page 1170.
3. Sanders & Bowman, *Labor Law and Workmen's Compensation—1957 Tennessee Survey*, 10 Vand. L. Rev. 1110; *1959 Tennessee Survey*, 12 Vand. L. Rev. 1231, 1233.
4. 329 S.W.2d 364 (Tenn. App. M.S. 1959).
5. 323 S.W.2d 222 (Tenn. App. M.S. 1958), *cert. denied*, 361 U.S. 865, (1959).

as appellants did."[6]

The court apparently reaffirmed its previous *Aladdin* decision in its entirety and refused to find anything in *Amalgamated Association v. Wisconsin Employment Relations Board*[7] which would suggest the contrary. The opinion does not make reference to a permanent injunction and nowhere differentiates between the question of federal pre-emption of the subject matter so as to oust the state court of jurisdiction and the separate problem of the power of the chancellor to punish for contempt for violation of the temporary injunction. Principal reliance upon the case of *United States v. United Mine Workers of America*[8] however, suggests that this latter aspect is the recognized point of major importance in the case.

The aspect last discussed above does not appear to be affected by the subsequent reversal by the Supreme Court of the United States in *Bogle v. Jakes Foundry Co.*[9] This opinion reads as follows:

> On petition for writ of certiorari to the Court of Appeals of the State of Tennessee.
>
> Facts and opinion, Jakes Foundry Co. v. Tennessee-Carolina Transp. Co., Tenn. App., 329 S.W.2d 364.
>
> April 18, 1960. PER CURIAM. The petition for writ of certiorari is granted insofar as it awards a permanent injunction and to that extent the judgment is reversed. Teamsters, Chauffeurs, Helpers & Taxicab Drivers, Local Union No. 327 v. Kerrigan Iron Works, Inc., 353 U.S. 968, 77 S. Ct. 1055, 1 L.Ed.2d 1133; San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775.[10]

This is the fourth consecutive year in which this survey topic has been introduced by a discussion of cases which raise the problem of federal pre-emption with regard to the subject matter of labor relations. Whatever major questions may have existed with regard to this doctrine of exclusive federal control in the area of regulation covered by the National Labor Relations Act would seem to have been dissipated by the decision of the Supreme Court of the United States in *San Diego Building Trades Council v. Garmon*[11] and the action of Congress in eliminating the so-called "no man's land" between federal and state authority in the Labor-Management Reporting and Disclosure Act of 1959.[12] The application of the pre-emption doctrine to the substantive problem presented in the *Jakes Foundry* case is made clear by the per curiam reversal by the Supreme Court of the United States set out above. The uncertain area, at least in

6. 329 S.W.2d 365 (Tenn. App. M.S. 1959).
7. 340 U.S. 383 (1951).
8. 330 U.S. 258 (1947).
9. 362 U.S. 401 (1960).
10. 361 U.S. 459 (1960).
11. 359 U.S. 236 (1959), 13 VAND. L. REV. 416 (1959).
12. 73 Stat. 541 (1959), 129 U.S.C. § 164 (Supp. 1959).

terms of actual effect and practice, is with regard to the application of the pre-emption doctrine in the area of temporary restraining orders or preliminary injunctions. Some of the possibilities in this connection were discussed in the 1959 *Survey*.[13] At the same time the action of the Supreme Court of the United States in denying certiorari in October, 1959, in the *Aladdin Industries* case[14] and the precise limits set down in the Court's reversal of the permanent injunction issued in the *Jakes Foundry* matter on April 18, 1960, show that the state courts can to some degree enforce their authority in the area covered generally by the federal pre-emption doctrine. The practical lesson is that the action of a state court in issuing a temporary or preliminary restraining order cannot be ignored, even though it is later determined that the court has no jurisdiction of the subject matter. This would seem to be a desirable result for reasons that have been indicated in previous survey discussions.

The obvious possibility of manipulation of the permitted area of state court power to avoid the controlling law made applicable to this area by Congress and the Supreme Court of the United States need not be elaborated upon. The general criticism that must be made of the several decisions of the Tennessee appellate courts is that they have at no time demonstrated a thoroughgoing objective analysis of the problem of federal pre-emption over the subject matter of labor relations affecting interstate commerce, nor have they sought to differentiate and classify the respective areas of competence of state courts and federal regulatory agencies. This absence of a clear differentiation between the permissible and the unpermissible areas of state power in a case such as the *Jakes Foundry* situation means that the obligation of all concerned, to understand and follow the controlling law, is made more difficult.

B. Welfare Funds

An important decision of the Supreme Court of the United States during the survey period relating to union welfare funds originated in the United States District Court for the Eastern District of Tennessee.[15] The National Bituminous Coal Wage Agreement of 1950 between numerous coal operators and the United Mine Workers of America provided for a welfare and retirement fund meeting the requirements of section 302(c)(5) of the Taft-Hartley Act,[16] into which each company would pay royalties based on the amount of coal mined or used. The trustees of the welfare fund sued to recover

13. See 12 VAND. L. REV. 1236 (1959).
14. McCrory v. Aladdin Industries, 361 U.S. 865 (1959).
15. Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960).
16. 61 Stat. 157 (1947), 29 U.S.C. § 186(c)(5) (1958).

unpaid royalties from the Benedict Coal Corporation. The company's main defenses were (1) that its duty to pay the royalty to the trustees, regarding them as third party beneficiaries of the collective bargaining agreement, never arose or (2) that it was excused from the performance when the promisee contracting party (the union) violated the agreement by work stoppage. The coal company also cross-claimed against the union for damages sustained from the stoppage.

The jury in the district court found that the trustees were entitled to recover the full amount of the unpaid royalties but that the coal company was entitled to a set-off and to a verdict on the cross-claim for damages in the same amount. Judgment was entered in favor of the coal company against the union on which immediate execution was ordered with the sum collected to be paid into the registry of the court. A similar judgment was entered in favor of the trustees of the welfare fund for the unpaid balance of the royalties, which judgment was to be satisfied only out of the proceeds collected by the coal company under the companion judgment. Separate appeals were prosecuted by the union and the trustees of the welfare fund to the Court of Appeals for the Sixth Circuit. The court of appeals affirmed the district court except with respect to the coal company's damages on its cross-claim, which were adjudged excessive.[17] The union and the trustees then filed petitions for certiorari to the Supreme Court of the United States with regard to the portions of the district court's order left unaffected by the action of the court of appeals. The petition of the trustees of the welfare fund was granted, as was the petition of the union, except that in the latter case the court limited its consideration to the question of whether the stoppage complained of by the coal company violated the collective agreement.[18]

The opinion of the Supreme Court of the United States (by Mr. Justice Brennan) indicates that the court was equally divided with respect to the union's alleged violation of the collective bargaining agreement. The judgment of the court of appeals was therefore affirmed insofar as it sustained the district court's holding that the union violated the collective bargaining agreement.[19]

The Supreme Court majority opinion then considers extensively the question presented in the trustees' suit as to whether or not the coal company might assert the union's breaches of contract as a defense to the trustees' suit for unpaid royalties. The opinion concludes that the holdings below should be modified so that the judgment in the district court in favor of the trustees will allow immediate and un-

17. Lewis v. Benedict Coal Corp., 259 F.2d 346 (6th Cir. 1958).
18. 359 U.S. 905 (1959).
19. 361 U.S. 459 (1960).

conditional execution on the full amount of the trustees' judgment against the coal company. The majority opinion makes clear that the parties by their collective agreement might have expressly provided that the union's breaches of its promise would give rise to a defense against the duty assumed by an employer to contribute to the welfare fund. It is stated, however, that in the absence of such expression in "unequivocal words" such a defense should not be permitted on the basis of a controlling rule of construction. The opinion discusses and distinguishes the theory of set-off, that might be normally available under a third-party beneficiary contract as compared with an agreement such as this with many promisors each of whom has a continuing interest in the fund established. Importance is also attached to the impact of national labor policy upon the interest of the third-party beneficiary under such an agreement by reasons of sections 301 (b) and 302 (c) (5) of the Taft-Hartley Act.

The effect of the case is to underline the point that welfare and pension trusts established under the above statute amount to substantial legal entities separate and distinct from those who contribute proceeds and those who participate in the selection of trustees.[20] While a great many factors entered into the foregoing decision and the full opinion needs to be examined for a judgment as to the weight of these factors, it might be observed that the result is consistent with the article in the National Bituminous Coal Wage Agreement which provides with regard to the welfare fund "title to all the monies paid into and/or owing said Fund shall be vested in and remain exclusively in the trustees of the Fund. . . ." Another way of stating the basic implication of this decision is that the welfare fund is not the union any more than it is the company. It is likely that the implications of this basic line of cleavage will prove more beneficial to affected employees, to the independence of the fund trustees, and to the public generally than the contrary idea which would tend to fuse the union and the welfare fund into single interest. The result in this case also provides an even firmer premise for the detailed regulation of such a fund in the public interest.

Mr. Justice Frankfurter's dissent in this case takes sharp issue with the thought of the majority that the agreement here should be treated differently from ordinary third-party beneficiary contracts or that there is any statutory support for such a different approach.

C. Vacations

In 1957 the Tennessee Supreme Court held in *Textile Workers Union v. Brookside Mills, Inc.*, that employees were entitled to recover vaca-

20. See Note, *The Taft-Hartley Welfare and Pension Trust—an Emerging Legal Entity,* 35 N.Y.U. L. REV. 1181 (1960).

tion pay from the employer even though the company had ceased operations prior to the date set in the contract for the annual determination of this benefit.[21] During the current survey period the case again came before the Supreme Court of Tennessee with certain questions which arose out of the rulings of the chancellor on the remand.[22] Mr. Justice Swepston's opinion first discusses and approves the ruling of the chancellor to the effect that the term "continuous service" in the collective bargaining agreement and seniority under the agreement fall into distinct categories, with the result that the seniority of the particular employee was not to be given any effect in computing the amount of vacation pay. The court also overrules an assignment of error made by Brookside Mills, Inc., complaining of the chancellor's holding that the "continuous service" of a given employee was not broken by layoff and directing the computation of vacation pay accordingly. The court's opinion examines a number of reported court cases allegedly in point, and then observes:

> In the final analysis, however, it seems to us that we come down to this point. The exact situation we have before us is not expressly covered by the contract. The parties agree, however, that vacation pay, as stated in the original opinion, is in effect additional wages or compensation and that the right to receive same is entirely dependent upon the contract. Before this situation arose, the employer paid vacation pay to employees in active employment and *to employees who were temporarily laid off at the time vacation pay for the year became payable and who were expected to be recalled.* That was fair and equitable on the part of the employer and was within the spirit in which all contracts should be interpreted. The employer did not take advantage of a technicality.
>
> Now, after many of these employees, beginning with July 7, 1955, have completed six months or more of continuous service or five years or more of continuous service, is it an equitable construction of the contract to say that they, within the spirit of the contract, were to be denied these additional wages or compensation simply because they were discharged before June 1, 1956? A negative answer is required.[23]

D. Arbitration

The decision of United States District Judge Miller in the case of *Arnold v. Louisville & Nashville Railroad*[24] is important in labor law for its language regarding the necessity of exhausting the arbitration provisions of a collective bargaining contract prior to filing a suit in federal court. This suit was filed in United States district court by plaintiffs who had been discharged subsequent to the merger of the

21. 203 Tenn. 71, 309 S.W.2d 371 (1957). See Sanders & Bowman, *Labor Law and Workmen's Compensation—1958 Survey*, 11 VAND. L. REV. 1285, 1291 (1958).
22. 326 S.W.2d 671 (Tenn. 1959).
23. *Id.* at 674. (Emphasis is the court's.)
24. 180 F. Supp. 429 (M.D. Tenn. 1960).

Nashville, Chattanooga and St. Louis Railway into the Louisville and Nashville Railroad. Claim was made that under applicable federal statutes and the orders of the Interstate Commerce Commission certain money sums were due the plaintiffs. Judge Miller sustains motions of the defendant railroad to dismiss the action for lack of jurisdiction in the federal court.

The opinion sets out the history of the Interstate Commerce Commission's approval of the merger in this case and makes note of the fact that subsequent to the effective date of the merger the defendant railroad and duly authorized representative of its employees executed a memorandum of agreement which made certain provisions for lump sum separation allowances to employees losing their jobs as a result of the merger. The agreement further provided that any dispute arising with respect to protection of employees adversely affected by the merger "may be referred by either party to an arbitration board" for final and binding decision. Judge Miller's opinion points out that there is no jurisdiction in the federal court under 28 U.S.C. § 1336 as an action to enforce an order of the Interstate Commerce Commission for the reason that the rights claimed by the plaintiffs are founded upon the collective bargaining contract rather than the order of the Commission approving the merger. Similarly it is found that the plaintiffs' claims are not based on violations of the Interstate Commerce Act nor do they arise under any Act of Congress regulating commerce so as to come within 49 U.S.C. §§ 8, 9 or 28 U.S.C. § 1337.

The opinion goes on to state in the alternative that even if plaintiffs rights should be regarded as being derived from the order of the Commission and not from the agreement, the court would lack jurisdiction because the plaintiffs had not exhausted the remedies of arbitration prescribed by the Commission itself. The court declares that while the Commission has provided that disputes "may" be submitted to arbitration, it would appear that the provisions are mandatory and not permissive. The court observes that under section 5(2)(f) of the Interstate Commerce Act the Commission has broad discretionary authority but that in this instance it did not undertake to determine the rights of individual members or groups of employees. The memorandum of agreement which was executed by the parties in compliance with the Commission's orders provided for the invoking of arbitration and the finality of arbitration decisions. The court concludes that under the "terms of the Commission's order and the agreement of the parties, the history of orders of this type, the evident purpose to provide an expeditious means of determining individual disputes and judicial construction of similar language," mandatory arbitration was intended by the Commission as well as by the parties

themselves. Such arbitration was a necessary prerequisite to federal court jurisdiction under these circumstances being analogized to the requirement for the exhaustion of administrative remedies.

It was taken as conceded in the case that if the settlement procedures of the Railway Labor Act were applicable to the plaintiffs' claims there would be no jurisdiction in the federal district court.

II. Workmen's Compensation

The Supreme Court of Tennessee was faced, during the survey year, with a number of cases involving Tennessee's Workmen's Compensation Law;[25] several of the cases involved questions of first impression in the interpretation and application of the statute.

A. Persons Entitled to Workmen's Compensation Protection

Generally speaking, only an employee of covered employers or the employee's dependents are entitled to claim the benefits of the workmen's compensation law. Four cases during the current survey year turned on the question of whether the plaintiffs were within the coverage of the statute.

Two minor children brought suit by their mother and next friend to recover compensation for their coal miner father's death in *Tidwell v. Walden.*[26] The operators of a coal mine had been unable to obtain workmen's compensation insurance coverage and had thereupon formed a joint venture, gang-working association, or mutual-income-producing organization, as it was variously referred to by the court. The deceased had initially been employed as a miner by these mine operators but had subsequently been made a full member of the organization. Approximately two weeks after the latter event, he was killed by a slate fall in the mine. The lower court concluded, and the supreme court agreed, that because of his membership in this undertaking, he was not an "employee" within the meaning of the statute.

The supreme court also found that a deceased truck driver was not an employee of the defendant in *Gluck Brothers, Inc. v. Turner.*[27] The court found that at the time of injury the deceased was driving a truck loaded with the defendant's goods. The owner of the truck had been authorized by the defendant to pick up the goods in one city and deliver them in another. The truck was not owned by, insured by, or leased to the defendant, who apparently had dealt only with the owner of the truck in arranging for the transportation of the goods. And on the basis of the facts presented in Chief Justice Neil's opinion

25. TENN. CODE ANN. § 50-1001 (1956).
26. 330 S.W.2d 317 (Tenn. 1959).
27. 330 S.W.2d 311 (Tenn. 1959).

reversing the trial court, the decision would appear to be correct.[28]

The case of *Seals v. Zollo*[29] raised for the first time the issue of whether a peddler is an employee within the meaning of the statute or an independent contractor. The lower court was inclined to the view that "it is part of the political history of this State that 'peddlers' were regarded as being engaged in an independent occupation and liable for a 'peddlers' tax,' "[30] in addition to other factors involved in the case. The Tennessee Supreme Court, however, examined the facts and concluded that the defendant, a manufacturer of ice cream products, retained sufficient control over its ice cream peddlers to make them employees within the meaning of the statute.

The peddlers obtained the defendant's products each morning and returned those unsold in the evening, paying the company the wholesale price of the goods sold, the difference between the wholesale and retail prices being the peddlers' compensation. In reaching the conclusion that the peddlers were employees, the court apparently relied heavily on the company's furnishing the peddlers with the carts they used in the business and on the "positive element of control by the company in that it could go to the point where a peddler was selling ice cream and seize their products and equipment, and thus without cause terminate the contract. The company at no time lost control, either of its product or the pushcart which the petitioner used in the furtherance of the company's business."[31] The case, though obviously turning on the particular facts involved, seems to indicate a strong tendency on the part of the court to regard as employees those salesmen and others furnished valuable or substantial equipment by a company to carry out part of the business objectives of the company.[32]

The fourth case in this general category, *Wanser, Stewart & Vaughn, Inc. v. Teasley*,[33] involved the question of the extent of a survivor's dependency necessary to qualify the survivor for workmen's compensation benefits based on the work-connected injury and death of an employee. The mother of the deceased employee earned a substantial income in her own right but regularly received cash contributions (ten dollars per week), items for their home, and repair and maintenance services around the home. The court, relying on Larson[34] and Schneider[35] held that "under our Act dependency does

28. *Cf.* Still v. Penn. Threshermen & Farmers' Mut. Cas. Ins. Co., 195 Tenn. 323, 259 S.W.2d 538 (1953). See also 1 LARSON, WORKMEN'S COMPENSATION §§ 44, 48, 49 (1952).
29. 327 S.W.2d 41 (Tenn. 1959).
30. *Id.* at 45.
31. *Id.* at 46.
32. See 1 LARSON, WORKMEN'S COMPENSATION §§ 44.34, 45.23 (1952).
33. 325 S.W.2d 540 (Tenn. 1959).
34. 2 LARSON, WORKMEN'S COMPENSATION § 63.00 (1952).

not mean absolute dependency, but rather that the applicant relied on the contributions of the deceased as a means of support and maintenance in accordance with her social position and accustomed mode of life."[36] Since the court views the question of dependency as one of fact and found material evidence to support the findings of the lower court within the test stated, it affirmed the lower court's conclusion that the plaintiff had been partially dependent on her deceased son.

B. Injury by Accident Arising Out of and in the Course of Employment

The test of employment connection, *i.e.,* whether an injury by accident arose out of and in the course of the employment, was the principal question in four cases during the survey year, and two of these involved death from heart trouble.

Johnson v. Aetna Casualty & Surety Co.[37] concerned an employee who was suffering from a heart condition when he arrived at work. After an examination by the company doctor, he returned to work and died a few hours thereafter while doing work involving no unusual strain or exertion. The federal district court found that the exertion of the deceased employee at work contributed to his death and followed Tennessee precedent[38] by awarding compensation.

In the second heart case, *Hagewood v. E. I. Du Pont de Nemours & Co.,*[39] the deceased employee was also suffering when he arrived at work. He was examined by the company doctor and returned to work. About 12 hours after he finished his day's work, he died of a heart condition at his home. The lower court found insufficient evidence to support a workman's compensation claim since there was no showing that the employment contributed to the death, and the Tennessee Supreme Court agreed. And on the basis of the facts presented, both cases appear to have been correctly decided.

The employee in *Oman Construction Co. v. Hodge*[40] was working on a road when he was struck and killed by lightning. As stated by the Tennessee Supreme Court, "The case involves the question of whether or not there is material evidence to support the conclusion that the employment in which the deceased workman was engaged resulted in a special risk of his being struck by lightning."[41] An expert witness testified that the concentration of metal road-building machinery and other metal in the area would make the area more attractive

35. 9 SCHNEIDER, WORKMEN'S COMPENSATION § 1901 (3d ed. 1948).
36. 325 S.W.2d at 543.
37. 174 F. Supp. 308 (E. D. Tenn. 1959).
38. Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182 (1953).
39. 332 S.W.2d 660 (Tenn. 1960).
40. 329 S.W.2d 842 (Tenn. 1959).
41. *Id.* at 843.

to lightning, and compensation was awarded. The decision in the case is in conformity with Tennessee precedent[42] and the general rule[43] and does not seem to restrict the scope of the court's previously criticized opinion in *Jackson v. Clark & Fay, Inc.*[44]

Ransom v. H. G. Hill Co.[45] is a landmark decision which substantially liberalizes the Tennessee rule with respect to the "horseplay" defense in workmen's compensation cases. The injured employee was a truck driver who had completed his regular duties and was in the employer's warehouse yard waiting, as was the custom, for an assignment. His only instructions were not to leave the yard. He approached another employee and asked for a dime, then playfully grabbed him by the seat of his britches. The other employee's effort to escape his grasp caused him to fall and injure himself. On the basis of *Borden Mills v. McGaha*[46] and *Hawkins v. National Life & Accident Ins. Co.*,[47] the lower court denied compensation but the Tennessee Supreme Court, in an opinion by Justice Burnett, reversed.

Perhaps the court's rationale underlying its modification of the horseplay defense can best be presented by quoting at some length from the opinion. The court said:[48]

> In answer to the main defense upon which compensation was denied here that this accident did not arise out of the employment, Larson has this to say at page 355, Section 23.61, which seems to us to answer the question entirely. He says:
>
> > "The essence of the controversy in horseplay cases is the ambiguous nature of claimant's own conduct, which may or may not be called a departure from his employer's business. The 'arising out of employment' issue, once you have concluded that the horseplay itself was no departure from the employment, can usually be easily disposed of. In the great majority of the cases, there is some distinct contribution to the injury by the environment, in the form of air hoses or other instrumentalities; and even when this is not true, the 'arising' test can be simply met by the argument that if the activity itself qualifies as part of the employment, then the harm arises out of the employment of which that activity was a part."
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> And he says further on page 356:
>
> > "If an employee momentarily walks over to a co-employee to engage in a friendly word or two, this would nowadays be called an insubstantial deviation (Citing Schexneider v. General American Tank Car Corp., 5 La. App. 84). If he accompanies this friendly word with a

42. Mason-Dixon Lines v. Lett, 201 Tenn. 171, 297 S.W.2d 93 (1956).
43. 1 LARSON, WORKMEN'S COMPENSATION §§ 8.11-.12 n.44 (1952).
44. 197 Tenn. 135, 270 S.W.2d 389 (1954), discussed in Sanders & Bowman, *Labor Law and Workmen's Compensation—1956 Tennessee Survey*, 8 VAND. L. REV. 1037, 1044-47 (1955).
45. 326 S.W.2d 659 (Tenn. 1959).
46. 161 Tenn. 376, 32 S.W.2d 1039 (1930).
47. 164 Tenn. 36, 46 S.W.2d 55 (1932).
48. 326 S.W.2d at 662-63.

> playful jab in the ribs, surely it cannot be said that an entirely new set of principles has come into play. The incident remains a simple human diversion subject to the same tests of extent of departure from employment as if the playful gesture had been omitted."
>
> Of course in approving these statements of Larson, he does not nor do we undertake to hold that all practicable [sic] jokesters who commit these things of necessity have not, under their actions, in effect abandoned their employment, but so long as the things done are the natural and normal thing of the type of the employees who are kept there, as these were in this lot, it seems to us that they clearly have not left their employment.
>
> When we have the insubstantial deviations such as one employee asking another for a dime and then playfully grabbing the seat of his britches when he walked off and as a result of that slipping and falling, such an insubstantial deviation is not such a deviation as would take the person or cause any accident happening therefrom not to arise out of and in the course of his employment. We think that when these employees are hired and directed by their boss to stay in this lot subject to call, or what not, that the employer knew or had a right to know and suspect that certain incidents of the kind should happen and that this is such a slight or insubstantial deviation that it is not getting away from the employment. We are constrained to hold that an accident of the kind does arise out of the employment.

The case is in line with the general practice of the court to construe the workmen's compensation statute liberally in favor of injured employees, but, as the above quotation indicates, the court has not reversed the horseplay rule. It has, on the other hand, substantially, and happily, modified it. Thus, the case is not definitive, and the other questions involving assaults and horseplay remain to be answered in future cases. In doing this, the courts, and undoubtedly the Bar, will look for guidance to Professor Larson's discussion of the subject.[49]

C. Occupational Disease

The Tennessee court approved a compensation award in *Whitehead v. Holston Defense Corp.*[50] on the ground that a disease related to one of the nine occupational diseases listed in the statutory schedule[51] is compensable even though the disease itself is not so listed. The court also held that an employee is excused from giving the required notice of injury to the employer when the employer knows of the employee's disease and refuses to inform the employee.

D. Employer's Duty To Furnish Medical Treatment

The employer in *Holston Valley Community Hospital v. Dykes*[52]

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49. 1 LARSON, WORKMEN'S COMPENSATION §§ 23.00-23.66 (1952).
50. 326 S.W.2d 482 (Tenn. 1959).
51. TENN. CODE ANN. § 50-1101 (1956).
52. 326 S.W.2d 486 (Tenn. 1959).

sent the injured employee to a doctor rather than offering him a selection of three, as the statute requires.[53] This doctor told him he was well enough to return to work which did not require lifting. Without notice to the employer, the employee then went to another physician who treated him. An award of medical expenses for the second doctor's treatment was affirmed. The court indicated no specific ground for its decision other than that under all the circumstances the award was justified and said the case lay somewhere between *Proctor & Gamble Defense Corp. v. West*[54] and *Atlas Powder Co. v. Grimes*.[55] It is interesting to note that apparently in the instant case, and the *Grimes* case, the doctor had indicated to the employee that further treatment was unnecessary before the employee went to a doctor of his own selection. Thus, as has been said before, "it seems that the court is adopting the view that the employer, through his doctors or otherwise, discontinues at his own risk furnishing the medical aid required by the statute."[56]

E. Employee's Duty To Accept Medical Treatment

The Tennessee Supreme Court emphatically rejected the view that the legislature intended that a hernia or rupture of the diaphragm must be proved compensable in the same way as the statute requires for other hernias[57] in *Sullivan v. Green*[58] since this hernia could not meet the requirement of appearing suddenly. Apparently it could not be seen at all by the naked eye. The employee had refused to submit to an operation which would have required him to lose fifty pounds beforehand, and the court reversed a lower court decision excusing the payment of compensation to him until he submitted to the operation. The court found that the employee's refusal to undergo the operation, which it regarded as more dangerous than other hernia operations, was reasonable and justified under the circumstances. It also stated that since the trial judge had overlooked evidence regarding a material or determinative issue, the court was not departing from its usual rule that it will not review the findings of the trial court if they are supported by material evidence.[59] Thus, although the statute would seem to require an operation, with stated exceptions for an employee with a work-connected rupture to have the right to collect compensation, the court liberally applied the rule of reason in interpreting the requirements of the statute.

53. TENN. CODE ANN. § 50-1004 (1956).
54. 310 S.W.2d 175 (Tenn. 1958).
55. 200 Tenn. 206, 292 S.W.2d 13 (1956).
56. Sanders & Bowman, *Labor Law and Workmen's Compensation—1957 Tennessee Survey*, 10 VAND. L. REV. 1110, 1124 (1957).
57. TENN. CODE ANN. § 50-1009 (1956).
58. 331 S.W.2d 686 (Tenn. 1960).
59. Grissone v. H. K. Ferguson Co., 329 S.W.2d 816 (Tenn. 1959).

F. Extent of Injury

The employee in *Fidelity & Casualty Co. v. Patterson*[60] injured her leg and asserted that the disability extended to the body as a whole rather than being confined to the leg alone since she had become quite nervous and unable to stand for any length of time. The supreme court held that there was substantial evidence to support a compensation award to the body as a whole and refused to reverse the decision of the court below.

Similarly, the court upheld an award in *Claude Henninger Co. v. Bentley*[61] for injury to the body as a whole. The employee had broken his foot and heel on the job and as a result had become nervous, with stomach upsets, and had contracted arthritis.

G. Reopening an Award

The state supreme court refused to permit the reopening of a compensation award granting payment of two weeks' compensation in *Leaver v. Rudy Sausage Co.*[62] The court held that under the statute[63] an award could not be reopened or modified unless it were payable periodically for more than six months. Since this award was payable for two weeks only, the statute itself precluded reopening the case on the allegation of an increase in disability.

However, the court affirmed the granting of a petition for a writ of error coram nobis and supersedeas in *White v. Adams*.[64] In a prior suit for compensation, a pro confesso was entered. The petitioner alleged in the instant case that the attorney for the compensation claimant had said the suit would be dismissed. Since the petitioner alleged a meritorious defense to the prior action and had not brought on the mistake or fraud which had prevented the assertion of the defense, the court held that it was proper to grant the writ.

H. Statute of Limitations

Seven cases during the survey year turned on the application of the workmen's compensation one-year statute of limitation. In *Mathes v. Blue Ridge Glass Corp.*,[65] *Pittman v. City Stores, Inc.*,[66] and *Travelers Ins. Co. v. Jackson*,[67] each of the employees had suffered a

60. 325 S.W.2d 258 (Tenn. 1959). In this case the court also held that the trial court was correct in not awarding compensation for temporary total disability when the only claim in the petition was for permanent and total disability.
61. 326 S.W.2d 446 (Tenn. 1959).
62. 333 S.W.2d 555 (Tenn. 1960).
63. TENN. CODE ANN. § 50-1025 (1956).
64. 325 S.W.2d 236 (Tenn. 1959).
65. 330 S.W.2d 342 (Tenn. 1959).
66. 325 S.W.2d 249 (Tenn. 1959).
67. 332 S.W.2d 674 (Tenn. 1960).

work-connected injury by accident and had brought suit for compensation more than one year from the date of injury. And in all three the Tennessee Supreme Court held that suit was barred. It added in the *Pittman* case that the tolling of the statute is not suspended during the period (over three years in this case) between the injury and an examination and report by medical experts as to the percentage of disability.

The employer in *John Sevier Motor Co. v. Mullins*[68] had paid the employee's medical expenses for almost two years and then the employee instituted suit more than one year after the compensable injury but less than a year after the medical payments ceased. The court affirmed an award on the ground that the payments for medical expenses were compensation within the meaning of the statute and, since they were made voluntarily, they tolled the running of the statute of limitations while they continued. Therefore, the suit was timely filed.

Charnes v. Burke,[69] *American Bridge Div., United States Steel Corp. v. McClung*,[70] and *Adams v. American Zinc Co.*[71] stand for the proposition that the statute of limitations does not begin to run when an employee contracts an occupational disease until he knows or reasonably should know he is suffering a disability because of a compensable disease even though the disease itself began sometime earlier. And the court added in the *Adams* case that the statute may begin to run when there is a partial disability due to the disease even though the degree of disability is not total or complete.

I. Longshoremen's and Harbor Workers' Compensation Act

Dixie Sand & Gravel Corp. v. Holland[72] related to the application of the Longshoremen's and Harbor Workers' Compensation Act[73] to the death of a clean-up man who fell into a navigable river and drowned while inspecting barges moored at his employer's dock. It was not his custom to inspect the barges, but he had volunteered to do so because of the potential danger to the barges posed by the prevailing weather conditions.

The Longshoremen's Act is a federal workmen's compensation statute imposing liability on an employer having any employees in maritime employment for an employee's accidental injury arising out of and in the course of employment upon the navigable waters of the United States.

68. 326 S.W.2d 441 (Tenn. 1959).
69. 326 S.W.2d 657 (Tenn. 1959).
70. 333 S.W.2d 557 (Tenn. 1960).
71. 326 S.W.2d 425 (Tenn. 1959).
72. 255 F.2d 304 (6th Cir. 1958).
73. 33 U.S.C. § 901 (1959).

It had been administratively held[74] that this employee's duties were entirely on land and that the claim for compensation did not come within the provisions of the act. This decision was appealed to the federal district court, which held that the act applied and compensation was due. The Sixth Circuit Court of Appeals vacated this judgment and ordered the district court to remand the case for an administrative determination of whether the employee's death arose out of and in the course of his employment. The court held that this question initially could only be determined administratively, the courts being authorized merely to review the determination. Since there was no express administrative finding on the point and the administrative denial of compensation could have been based on an erroneous view of the coverage of the act, the case had to be remanded for a clarification of the administrative holding. The court intimated, however, that the death was compensable under the act as having arisen out of and in the course of the employment under cirmumstances bringing it within the coverage of the act. It had occurred on navigable waters of the United States and the employer had employees in maritime employment.

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74. The Longshoremen's & Harbor Workers' Compensation Act is administered by the Bureau of Employees Compensation, Department of Labor. Deputy Commissioners of the Bureau determine liability under the Act, and their decisions are subject to judicial review.