Labor Law and Workmen's Compensation – 1958 Tennessee Survey

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Labor Injunctions

The federal Labor-Management Relations (Taft-Hartley) Act sets forth as a basic right the freedom of choice of covered employees with respect to unionization and the establishment of collective bargaining.\(^1\) While protecting certain concerted activities, this statute makes it unlawful, among other things, for a labor organization to strike or picket for certain proscribed objectives.\(^2\) In this area of regulation (i.e., the purposes of labor combinations and economic pressures) the federal machinery is exclusive to the extent that the necessary relationship to interstate commerce is present and exceptions to coverage are inapplicable.\(^3\) While the Supreme Court of the United States has made it clear that the federal pre-emption doctrine does not prevent state court injunctions against violence and disorder associated with a labor dispute,\(^4\) such courts do not have jurisdiction to regulate by means of the injunction peaceful strikes and picketing by labor organizations when the doctrine is applicable.\(^5\) In consequence, one authority has said:

Since virtually all businesses affect interstate commerce, this means that today the law of strikes and picketing is the almost exclusive province of the National Labor Relations Board.\(^6\)

Independently of the foregoing premises based upon federal occupation of the field, state court injunctions against peaceful picketing have been declared invalid at times as infringements of constitutionally protected "free-speech."\(^7\) This doctrine waxed and waned between

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\(^{6}\) AFL v. Swing, 312 U.S. 321 (1941); Local 802, Teamsters Union v. Wohl, 315 U.S. 769 (1942).
1940 and 1950. Its present status is indicated by a 1957 decision of
the Supreme Court of the United States which shows that no "free
speech" is involved when the picketing has for its object the violation
of the otherwise valid public policy of the state as expressed in a
statute or as formulated by its courts. At the same time it was de-
clared that the states cannot enact blanket prohibitions against picketing.
Organizational picketing deemed to have the purpose of bringing
about the infringement of a state's "right to work" statute can be en-
joined in the state court without violating the fourteenth amendment
to the Constitution of the United States. It should be made clear,
however, that the relaxation of this constitutional limitation on the ex-
ercise of state authority does not supply a basis for state court jurisdic-
tion to issue an injunction where the federal pre-emption doctrine is
applicable.

Three Tennessee decisions during the survey period sustained de-
crees enjoining all picketing in a particular situation. Apparently the
basis of decision in these three cases was the conclusion that there
was unlawfulness or lack of sufficient justification in the purpose of
the labor union's activity. As will be shown in the discussion below,
it would appear that the fact situations involved in these cases would
not be subject to the coverage of the National Labor Relations Act.
The federal pre-emption doctrine was urged in one of the cases
but found by the court to be inapplicable. "Free speech" as a limita-
tion on the authority of the court to issue an injunction was not dis-
cussed in the three opinions. In one case the dissenting justice felt
that the doctrine should have been applied so as to hold that the
chancellor was in error in enjoining peaceful picketing for advertising
or persuasive purposes.

In Flatt v. Barber's Union the majority of the court, after rehear-
ing, found no error in the chancellor's issuance of a permanent in-
junction against picketing of complainant's place of business. The
precise scope of the decree involved is not set forth in the opinion
and there is apparent disagreement between the majority and dissent
as to the factual basis upon which the decision rests. Chief Justice
Neil for the majority found that the union and its associated members
were attempting to put the complainant completely out of business
unless he complied with their demands and that the signs carried by
the pickets were to prevail upon the public to cease patronizing the

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8. Cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) with the
cases cited in note 7 supra.
    reversing 299 S.W.2d 8 (Tenn. 1957).
complainant on the ground that he was a non-union barber. He treats as irrelevant the statement by the union that its efforts were made to get the complainant to raise standards and prices. The majority opinion suggests without explanation that the conduct of the defendants was contrary to the Tennessee "right to work" statute.\textsuperscript{13} The most important aspect of the opinion for future guidance would seem to be its extensive reliance upon the 1939 decision in \textit{Lyle v. Local 452, Amalgamated Meat Cutters}.\textsuperscript{14} This case had been expressly overruled by the Tennessee Supreme Court in a 1948 decision which permitted the union to picket for organization or recognition even though it represented no employees in the unit.\textsuperscript{15} In the \textit{Flatt} case Mr. Justice Swepston, dissenting, insisted that in a trial on bill and answer the facts stated in the answer must be taken as true. He then pointed out the fact that the union's answer denied any intention to force complainant to join the union but only sought to have complainant and the three barbers employed by him observe minimum union standards and prices. While agreeing that picketing may be enjoined if the objective of the picketing is held by a state court to be against the policy of the state, he declared that the state policy embodied in statute or common law must not itself be violative of the federal constitution. He then asserted that the protection of peaceful picketing is still covered by the right of free speech and that the court cannot say that strictly peaceful picketing by strangers can be enjoined because of the public policy formerly announced in the 1939 decision.

The elusiveness of the factual basis underlying the majority opinion prevents a proper evaluation of the decision. Isolated sentences might suggest that the object of the picketing in this case was to destroy the freedom of choice of employees protected by the "right to work" statute, or that the illegal objective would be found in a purpose to impair competition and enhance prices, or that the illegal object was the economic ruin of the complainant. If this last is taken to be the holding, it might amount to saying that peaceful picketing is illegal if it is successful.\textsuperscript{16} On the other hand an objective to bring about a violation of the "right to work" statute or to secure increases in prices could be taken as contrary to the policy of a state. A major difficulty is encountered, however, in attempting to relate the facts of this particular case to the violation of a formulated policy either in the statutory or pre-existing common law of the state. The Supreme Court of the United States refused to review this decision.

\textsuperscript{13} \textit{Tenn. Code Ann.} § 50-208 (1956).
\textsuperscript{14} 174 Tenn. 222, 124 S.W.2d 701 (1939).
\textsuperscript{15} Ira A. Watson Co. v. Wilson, 187 Tenn. 402, 215 S.W.2d 801 (1948).
\textsuperscript{16} Even the intentional infliction of resulting harm which is imposed incidental to the pursuit of some acceptable economic goal has been treated as privileged at times. See generally, \textit{Restatement, Torts} §§ 775-96 (1939).
In two other picketing cases the illegality of the object as a basis for the injunction was made clear. In *City of Alcoa v. Int'l Bhd. of Electrical Workers*\(^7\) there was a strike and picketing in an effort to compel the municipality to recognize the union and enter into collective bargaining with it. The chancellor permanently enjoined the defendants from striking and picketing the premises of the complainant but after the hearing on the entry of a permanent injunction modified the decree so that the defendants might contact, talk to, negotiate and bargain with the complainant.

The opinion of Justice Burnett first disposes of the contention that the state court lacked jurisdiction because of the doctrine of federal pre-emption. It is observed that this doctrine has never been applied where the dispute involved the employer-employee relations of a municipal corporation and municipal employees. Reference was then made to the definition of the term "employer" in the National Labor Relations Act\(^8\) to the effect that the term shall not include any state or political subdivision. The court then turned to its recent decision in *Pruitt v. Lambert*\(^9\) to support the proposition that even peaceful picketing can be enjoined where it is for a purpose in violation of statutory or common law principles. The court examined decisions from a number of other jurisdictions which uniformly held that public employees have no right to strike against or picket a municipality for the purpose of securing a collective bargaining agreement. Mr. Justice Burnett's opinion examines the suggestion that a different rule should apply to municipal functions performed in a proprietary capacity as opposed to a governmental capacity. He concluded that it is immaterial whether the particular employees were employed in connection with a private proprietary function of the city.

Essentially the same holding had been announced by the western section of the Tennessee Court of Appeals in its earlier decision, *Weakley County Municipal Elec. Sys. v. Vick*\(^20\). This opinion by Judge Bejach stresses the point that the authority of a county in operating its municipal electrical system to enter into a collective bargaining contract with its employees is not affected by the designation of the activity as proprietary as opposed to governmental. The court further found that there was a complete absence of authority to enter into such an arrangement and that a strike for the purpose of securing a contract would be for an illegal purpose even though there were no previous Tennessee cases bearing on the specific question. This opinion devotes much attention to the absence of any statutory authority in

\(^{7}\) 308 S.W.2d 476 (Tenn. 1957).


\(^{9}\) 298 S.W.2d 795 (Tenn. 1956).

the particular governmental agency in concluding that an illegal purpose is involved.

Collective Agreements

Finchum Steel Erection Corp. v. Local 384, Int'l Ass'n of Bridge Workers\(^1\) involved a common law action for damages for inducing a breach of contract with a third party. The plaintiff's declaration charged that it had entered into an agreement with Rohm & Haas Company to furnish union labor in fabricating and erecting certain structural steel for it. Later the plaintiff asked for and obtained from the business agent of Local 384 a number of union iron workers necessary to complete its contract with Rohm & Haas. An altercation developed on the job and most of the union employees left, after which the defendant Local 384 refused to furnish other union labor or to issue work permits to non-union workers. The declaration then stated that Rohm & Haas was compelled to abandon its contract with plaintiff and complete the job with another contractor. Among the grounds for the defendant's demurrer to the declaration was a claim that the contract between the plaintiff and Rohm & Haas Company requiring exclusive use of union employees was void and unenforceable under the law and public policy expressed in the Tennessee "right to work" statute as well as contrary to the National Labor Relations Act. The opinion of Chief Justice Neil affirms the action of the trial court in sustaining defendant's demurrer. It is noted that while plaintiff's claim was in tort there is a statute\(^2\) which makes it unlawful to induce or procure the breach of a lawful contract. It is then declared that a comparable requirement exists at common law and that the contract in question is unlawful because it is in violation of the "right to work" statute.\(^3\) "If any contract, either expressly, or by clear inference, undertakes to exclude employment of either union or non-union workers it violates the public policy of this State."\(^4\) After this determination, Chief Justice Neil concluded that it is not necessary to consider the claim that the contract is invalid by reason of the Taft-Hartley Act.

In Textile Workers Union v. Brookside Mills, Inc.\(^5\) it was held that employees were entitled to recover vacation pay from their employer even though the company had ceased operations prior to the date set in the contract for the annual determination of this benefit. In this case the collective bargaining agreement provided that all employees who on June 1, 1950 and June 1 of each succeeding contract year

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21. 308 S.W.2d 381 (Tenn. 1957).
22. TENN. CODE ANN. § 47-1706 (1956).
24. 308 S.W.2d at 384.
25. 309 S.W.2d 371 (Tenn. 1957).
have continuous service with the employer will be paid vacation pay according to prescribed schedules of length of service and percentage of earnings. Up until 1956 vacation payments under this contract had been made to employees in active employment and to those temporarily laid off at the time the vacation benefit became payable. During this same period the employer had not paid vacation pay to those who had been discharged or who had voluntarily quit or whose services had otherwise been terminated prior to the time of the vacation pay. The employer began a gradual closedown of operations and release of employees in the latter part of 1955. The closedown was completed in March, 1956, and on May 24, 1956, the employees, including those previously released, were formally notified of their termination and the fact that the company would not resume operations. The individual complainants in the suit for vacation pay were employees who were terminated because of the employer's decision to discontinue operations.

The chancellor held that the complainants were entitled to recover vacation pay under the collective bargaining agreement and this decision was affirmed by the Tennessee Supreme Court with an opinion by Justice Swepston. The opinion rejects the contention that an individual must have been an employee on June 1, 1956, and have continuous service as of that date in order to be eligible for the contract benefits. The court declared that the contract provision was ambiguous and asserted that where there is room for construction the contract should be construed so as to meet the justice and equities of the circumstances of the parties to the contract. The court found the "spirit" of the parties reflected in the previous practice of paying vacation pay to employees who were temporarily laid off at the time vacation pay for the year became payable and the absence of payment for those persons whose services were terminated through fault or voluntary action of the individual. It is then concluded that the complainants whose employment had been terminated in connection with the employer's shutdown were due to recover vacation pay from approximately the first of the preceding July until the date of their discharge.

American Lava Corporation v. Local 222, Int'l UAW\(^\text{26}\) involved the enforcement of the arbitration provisions of a collective bargaining agreement. The per curiam decision affirmed the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, which directed the employer to comply with the terms of the collective agreement and submit a dispute relating to the payment of a Christmas bonus to arbitration. The employer had

\(^{26}\) 250 F.2d 137 (6th Cir. 1958).
denied that the district court had jurisdiction of the action for specific performance of the arbitration provisions of the collective agreement and had contended that the dispute in question was not subject to arbitration. The employer's argument in this connection was based primarily on the contract provision to the effect that wages and rates of pay shall not be subject to the arbitration provisions of the contract. The contract also provided, however, that any employee benefits existing prior to the effective date of this agreement should continue without change unless such benefits are covered by this agreement. The court of appeals opinion concludes that the disputed Christmas bonus was not included within the phrase "wages and rates of pay" but that it was an employee benefit existing prior to the effective date of the bargaining agreement. It was subject therefore to the grievance and arbitration provisions of the contract. Being a matter for arbitration within the terms of the bargaining contract, it was declared that the district court had jurisdiction to decree specific performance. The decision makes no reference to the important Lincoln Mills decision in which the Supreme Court of the United States permitted a case such as this to be brought under section 301 of the Taft-Hartley Act and discussed the law applicable to such a suit in the federal court.

Internal Union Affairs

In Bryan v. Int'l Alliance members of a union of motion picture operators from outside the Chattanooga area brought suit against the local union in that city, the parent international union and others for a decree to require the defendant local to enroll the complainants names on its membership rolls. The chancellor entered a decree requiring the Chattanooga local to admit the complainants (foreign members) to full membership in that local. The court of appeals for the eastern section sustained the assignments of error made by the defendants and entered judgment dismissing the complainants' bill. Judge Hickerson's opinion concludes that in general the complainants cannot sustain their bill on the merits because they did not exhaust the remedies provided within the framework of the parent and local union for the determination of such disputes. Reference is made to provisions of the constitution and by-laws of the parent union which sets forth the manner in which an aggrieved member shall appeal from any action of a local union or other body or tribunal of the union. It was admitted in this case that the complainants had not followed the procedure so provided but the contention was made that it would have been useless and futile for them to have prosecuted

their complaints in this manner. The court recognizes that there is an exception to the general rule requiring exhaustion of internal remedies before going to court where it can be shown that the proceeding would be useless and futile. However, the court said:

'Useless and futile,' as that term is used in the decisions, does not mean that complainants can resort to the Courts because all the union officials and members told them, informally, that there was no merit in their contentions and charges against Local 259. If we were to adopt that rule, disgruntled foreign members could demand any status they might choose of the local and parent union, without regard to the merit or lack of it in their contentions, then resort to the Courts without proceeding within the framework of the unions on the ground that all union members and officials with whom they discussed their problems told them there was no merit in their claims.

The decision not only illustrates the usual rule requiring a union member to exhaust internal remedies within the organization before going to the courts but the wide latitude given in the matter of control over membership.

**Workmen's Compensation**

Workmen's compensation is a remedy given an employee against his employer for an injury by accident arising out of and in the course of his employment. The employer is liable without regard to the question of fault, but his liability is limited. In addition, the fellow servant, assumption of risk, and contributory negligence doctrines are abolished as defenses to employee actions. However, not all employees are covered by the Tennessee workmen's compensation statute, and certain railroad employees are provided an altogether different remedy by federal law. If an employee is not covered by a workmen's compensation statute or the federal statute, he is left to his traditional common law remedy for work-connected injuries.

**Common Law Actions:** The defendant in Bowaters So. Paper Corp. v. Brown was a paper mill owner who had contracted with a firm to make certain changes and alterations in the mechanical system of its plants. The plaintiff was an employee of the firm making the alterations and was injured while working at the defendant's plant. Although entitled to workmen's compensation, he sued the defendant as a negligent third party.

The federal court of appeals affirmed a rejection of the defense that the plaintiff was an employee of the paper mill and therefore restricted to his workmen's compensation remedy. The court found

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29. 306 S.W.2d at 67-68.
31. 253 F.2d 631 (6th Cir. 1958).
that the contractor was engaged in an independent business, furnished its own labor and tools, was paid on a cost-plus basis for the job, and hired and fired its own employees, including the plaintiff. The court also found that the defendant had no right to control the employees of the contracting firm. On the basis of these considerations, it held that the firm was an independent contractor and that the defendant was a third party liable for its negligence contributing to the plaintiff's injury. This technique of considering all the facts in the case of an alleged independent contractor relationship is in accord with the Tennessee practice.

**Federal Employers' Liability Act:** The Federal Employers' Liability Act is not a workmen's compensation statute, but it gives certain employees of interstate rail carriers an action in negligence against their employers for job injuries. The act abolishes the defenses of fellow servant and assumption of risk and substitutes a concept of comparative negligence for the contributory negligence defense.

The employee in *Southern Ry. Co. v. Welch* was injured while moving rails on rollers one day when the condition of the rails made it unusually difficult to roll them. His foreman usually assigned him help on such days without requiring him to request it, but such help had not been provided on the day the injury occurred.

The federal court of appeals affirmed a judgment in his favor by ruling that the employer owes an obligation to provide sufficient help and that this duty cannot be delegated. Whether the duty had been met was regarded as a jury question. Although the employee was not required to ask for help when he needed it, the trial court reduced the amount of his recovery on the basis of the comparative negligence concept because of his failure to request assistance in performing his job. This, too, was affirmed.

**Workmen's Compensation—Covered Employment:** In *Smith v. Lincoln Memorial Univ.*, the university defended a compensation action on the grounds that it was not an employer within the coverage of the Tennessee statute and, if it were, the plaintiff's employment was casual since it was not within the university's usual course of business and was temporary. The injured employee had worked as a painter for the university for several months every year for thirty years and was injured while working.

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32. The court relied on the Tennessee Supreme Court’s definition of independent contractor in *Barker v. Curtis*, 199 Tenn. 413, 287 S.W.2d 43 (1956).
35. 247 F.2d 340 (6th Cir. 1957).
36. 304 S.W.2d 70 (Tenn. 1957).
The Tennessee Supreme Court affirmed an award of compensation holding that the university, though an eleemosynary institution, was an employer within the definition in the statute.\textsuperscript{37} It reached the conclusion through application of the maxim \textit{expressio unius est exclusio alterius}. The legislature had expressly excluded certain employers and employments from coverage,\textsuperscript{38} and the court reasoned that by providing broad general coverage with specific exemptions, the legislature had intended to cover all those not expressly excluded. This holding seems proper and clearly places Tennessee with the majority of states whose courts have had occasion to consider the question.\textsuperscript{39}

The court also found that the employment was not casual. It occurred regularly though briefly. Further, maintenance work was regarded as being in the usual course of the university's business inasmuch as it would not be possible to operate the school, i.e., conduct the business, without maintenance personnel. This construction of "usual course of business" appears to be in accord with the purposes of the statute and the majority view on the point.\textsuperscript{40}

\textit{Injury by Accident Arising Out of Employment: Drinnon v. Pope}\textsuperscript{41} was the only case during the survey year primarily involving the question of whether the employee's condition was one arising out of his employment. The requirement that an accidental injury arise out of the employment is one of the two tests of the necessary connection between the employment and the injury. An injury is said to arise out of employment when there is a causal relationship between the injury and the employment.\textsuperscript{42}

The plaintiff had suffered, but had recovered from, a non-compensable lung hemorrhage several years prior to his employment by the defendant. Although he was not suited to heavy work, he was engaged in relatively heavy work when a second lung hemorrhage occurred. The trial court found that he had completely recovered from the second hemorrhage and was fully as able to work as he was before the accident. Therefore, it awarded compensation for temporary

\textsuperscript{37} "... 'Employer' shall include any individual, firm, association or corporation, or the receiver, or trustee of the same, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay. If the employer is insured, it shall include his insurer, unless otherwise herein provided." TENN. CODE ANN. § 50-902 (1956).
\textsuperscript{38} TENN. CODE ANN. § 50-906 (1956).
\textsuperscript{39} 1 LARSON, WORKMEN'S COMPENSATION LAW § 50.42 (1952). An earlier case involving this same university had left the broad question of coverage at least partially open. Lincoln Memorial Univ. v. Sutton, 163 Tenn. 298, 43 S.W.2d 195 (1931).
\textsuperscript{40} 1 LARSON, WORKMEN'S COMPENSATION LAW § 50.44(c) (1952).
\textsuperscript{41} 308 S.W.2d 424 (Tenn. 1957).
\textsuperscript{42} For more detailed treatment of the work-connection test, see HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 72-182 (1944); 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 6.00-36.00 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT §§ 1542-1543 (3d ed. 1948); 7 SCHNEIDER id. at §§ 1617-1693 (3d ed. 1950).
total disability until his recovery but denied an award for permanent total disability.

The supreme court affirmed this decision. It found inapplicable the rule that an employer takes a workman in his then existing condition and assumes the risk of having a weakened condition aggravated by some injury which might not hurt a normal or healthy person and is liable for compensation if the injury aggravates a previously weakened condition. The employee was unsuited to doing heavy work after the hemorrhage, but he had been unsuited to such work prior to and during the period of his employment. Thus he was in no worse condition after the injury than before, and his disability was not causally related to his employment. It was not the second hemorrhage which made him unsuited to heavy work, it was the probability that hemorrhages would occur if he performed heavy work.

On the basis of the facts with which the court was confronted, it is difficult to argue with the decision. And the court seems to indicate that had the second hemorrhage permanently affected or impaired the employee's condition the result would have been different.

Injury by Accident in the Course of Employment: One case during the survey year turned on the question of whether accidental injuries occurred in the course of the employees' employment. An accident is usually said to occur in the course of employment when it takes place within the period of employment at a place where the employee may be expected to be.

In James v. Sanders Mfg. Co. the employee fell on the public sidewalk in front of her employer's establishment while crossing the sidewalk to her car. At the time, she was carrying a typewriter to continue her work at home, as was her custom. The court affirmed the sustaining of a demurrer to the employee's petition.

The fact that the employee was on her way home to continue her work was not regarded as controlling. She was doing that voluntarily, and the court had previously held that an employee's injury did not arise in the course of her employment while she was on her way to eat her evening meal after being requested to return to the employer's establishment to work at night. Since that case involved facts tending even more strongly to require a compensation award, this holding in the instant case is not surprising.

43. Swift & Co. v. Howard, 186 Tenn. 584, 212 S.W.2d 388 (1948).
44. For a discussion of this general problem, see 1 Larson, Workmen's Compensation Law § 12.20 (1952).
46. 310 S.W.2d 466 (Tenn. 1958).
The court, however, relied primarily on its rejection of the rule that the sidewalk adjacent to the employer's premises is so close to the premises as to be considered a part thereof. It again refused to deviate from its view that absent a showing of special circumstances, an injury to an employee on the public sidewalk next to the employer's premises is not one arising in the course of employment.\textsuperscript{48} For instance, the court found that the employee had not alleged that the sidewalk was hazardous. Thus, the court apparently has not completely closed the door on the possibility of developing exceptions to its announced general rule, but the door would seem to be only slightly ajar at best.

Third Party Liability: The employee in \textit{Sturkie v. Bottoms}\textsuperscript{49} was injured while driving with a fellow employee in the course of his employment. He instituted a common law action against the fellow employee but entered a settlement agreement with him. Then he sued for the recovery of workmen's compensation from his employer. The Tennessee court held that under the workmen's compensation statute the fellow employee was not a third party against whom a common law tort action would lie.\textsuperscript{50} However, the statute provides that if an employee recovers by judgment, settlement, or otherwise from some person other than the employer, the employer is subrogated to the extent of the recovery.\textsuperscript{51} Thus, the employer was entitled to a credit for the amount recovered from the fellow employee.

The court also held the doctrine of judicial estoppel inapplicable since the employer benefitted by the recovery from the other employee and the plaintiff employee's mistaken prior contradictory statement in the action against the other employee had been explained.\textsuperscript{52}

This case should be compared with \textit{Garrison v. Graybee}\textsuperscript{53} also decided during the survey year. In the latter case, the employee had collected workmen's compensation for aggravation of his injury through medical treatment and then had instituted this suit against the doctor for malpractice. The doctor's plea in abatement was sustained in the lower court, but the supreme court found merit in the employee's assignment of error even though on the basis of the pleadings the doctor was an employee of the employer and therefore a fellow employee of the plaintiff. The court stated that an employee

\textsuperscript{49} 310 S.W.2d 451 (Tenn. 1958).
\textsuperscript{50} Citing Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 328 (1954). On this question in general, see 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 71-77.30 (1952).
\textsuperscript{51} TN. CODE ANN. § 50-914 (1956).
\textsuperscript{52} Citing D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 (1947).
\textsuperscript{53} 308 S.W.2d 375 (Tenn. 1957).
could now maintain an action against a person other than the employer for his injuries and that:

The case of Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 323, should be distinguished from the case at bar. In that case the plaintiff and the defendant were servants of the same corporation, engaged in the same or similar duties at the time of the accident. In the case at bar the plaintiff was a carpenter, while the defendant was a skilled physician, or supposed to be, and his services had no relation to the employer's business. It was wholly foreign to any work that was being performed by the plaintiff or any other employee. It does not control the question under consideration.

The Tennessee court is following a minority rule in holding that a fellow employee is not a "third party" who may be held liable for an employee's injury. The court's interpretation of the statute is not necessary and is somewhat strained, though there is some merit in the result obtained. However, to say that fellow employees may be held liable for their torts on the basis of the differences in the services they perform for their common employer is certainly questionable at best. But for the fact that the decision in the Sturkie case was handed down exactly two months after that in the Garrison case without its being mentioned, the view might be propounded that the Tennessee court was prepared to veer away from its general rule on the liability of fellow employees as third parties. The cases, as has been indicated, may be harmonized, but the rational basis for the distinctions between them is indeed tenuous.

**Duty to Furnish Medical Treatment:** The employee in Proctor & Gamble Defense Corp. v. West had received a compensable injury to his back, and the employer had furnished medical treatment until the doctors said the employee could return to work. A number of months later the employee incurred additional medical and hospital bills without prior consultation with the employer. The court held that the statute contemplates consultation between employer and employee before the employee may incur medical and hospital expenses for which the employer will be liable. In unusual circumstances, however, the employer may obtain medical aid at the employer's expense without consulting him in advance.

**Duty to Accept Medical Treatment:** The employee in Edwards v. Travelers Ins. Co. had a compensable ruptured intervertebral disc,
and was ordered by the lower court either to undergo a major operation, a laminectomy, or suffer the suspension of future compensation payments. The supreme court reversed on the ground that his refusal was reasonable and that the statute did not require that he accept this medical treatment. The court noted that it had previously reached similar conclusions and that the legislature had not amended this part of the statute thereafter.

The test in Tennessee, and in general, apparently involves a determination of whether the employee's refusal to submit to an operation is reasonable. Among the factors considered are the risk to the employee's life and health as well as the views of medical experts as to the necessity for or probable success of the operation. The fact that the operation may be medically classified as "major" also has considerable weight, but does not seem to be controlling.

**Computation of Award:** The problem in *Bryant v. McAllister* was whether the time a regular employee lost by reason of being laid off because of a lack of work or materials should be included in the number of weeks used to compute his average weekly wages for compensation purposes. The court held that time lost through the employer's cessation of operations would not be counted in computing the average weekly wage. It said that the questions to be considered are:

> At whose instance did the employee lose time from work? Was it the employee's voluntary act or was it the act and choice of the employer for his benefit and convenience?

This appears to be in accord with the Tennessee precedents and a reiteration of a rule criticized earlier.

**Retroactive Effect of Statutory Amendments:** An employee was injured prior to the 1953 amendment to the statute which included injury to the body as a whole in the schedule injuries. He sued for compensation on the basis of the amendment but was denied compensation by the federal district court on the ground that the amendment.

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66. 308 S.W.2d 412 (Tenn. 1957).
67. Id. at 414–415.
ment was not intended to be retroactive since, in the absence of a contrary legislative intent, statutes are presumed to operate prospectively rather than retroactively.70 The court could find no expression of such an intent in this case, and the approach of the court seems to be in line with the view of the Tennessee Supreme Court.71

Scope of Review: In two cases, the court reaffirmed its rule that on review it will not disturb the lower court's findings of fact if they are supported by any material evidence since the trial court is to determine the credibility of witnesses and the weight to be given testimony.72 This same rule was followed by the federal court of appeals in a case based on the Tennessee statute.73 The Tennessee court also held that the findings of the trial judge will not be disturbed if they are based on reasonable inferences which can be drawn from undisputed facts.74

Notice of Injury: London & Lancashire Indem. Co. v. Starcher75 concerned an employee who became disabled while digging ditches and doing heavy lifting. He was taken from work to a doctor, and his sub-foreman and foreman were told of these events. His doctor also talked with his foreman about his condition and requested that the employer pay his bills. An operation revealed a ruptured peptic ulcer which was held to be a compensable injury. Although no written notice of the injury was given the employer, the court held that the trial court had not abused its discretion by holding the employee excused from giving the notice since no prejudice resulted to the employer.76

Nor was the trial court regarded as having abused its discretion in excusing the employee in Tripp v. Hodge77 from giving the required

71. McCracken v. Rhyne, 196 Tenn. 72, 264 S.W.2d 226 (1953).
72. General Shale Products Corp. v. Casey, 303 S.W.2d 736 (Tenn. 1957) (court affirmed employee's recovery of compensation for silicosis on basis of testimony of general practitioner even though other doctors testified he did not have the disease); Crawford v. Borden Mills, Inc., 303 S.W.2d 729 (Tenn. 1957) (court affirmed recovery of compensation by employee on the basis of her testimony even though it was contradicted by other witnesses).
73. Mead Corp. v. Gunning, 248 F.2d 878 (6th Cir. 1957).
74. Knoxville Scenic Studios, Inc. v. Hensley, 308 S.W.2d 368 (Tenn. 1957) (An employee recovered compensation after falling eleven feet from a truck and landing on his knee. He had a small lump or growth on the back of the knee and his leg stiffened and the growth enlarged after the fall. Two doctors testified that it was possible that the fall contributed to the condition which necessitated the removal of the leg.).
75. 304 S.W.2d 87 (Tenn. 1957).
76. Citing Tenn. Products Corp. v. Gravitt, 182 Tenn. 54, 184 S.W.2d 164 (1945).
77. 304 S.W.2d 496 (Tenn. 1957). The court also held in this case that the employer could receive no credit for the approximately 10 weeks the employee worked for another employer after the injury. The injury to the employee's back was, according to the schedule, to be apportioned to the body as a whole and compensation was due for the proportionate loss of use of the body as a
written notice of injury. He was a restaurant employee who had
injured his back at work and was carried from work directly to the
hospital. The employer was regarded as having actual notice of the
injury since the manager of the restaurant knew about it. The court
also mentioned that the employee could neither read nor write but
seemed to place no particular emphasis on this.

Jurisdiction and Venue: The employee in T. H. Mastin & Co. v. Love-
day\textsuperscript{78} was injured in one county and sued his employer's insurer for
compensation in another county, his place of residence. The insurer
was a foreign company with no designated agent in the state for
service of process, and, according to the statute, the State Insurance
Commissioner was the proper person to receive service of process in
the absence of such a designation.\textsuperscript{79} The court held that the suit was
properly instituted in these circumstances since the employer had
not been made a party. It distinguished an earlier case\textsuperscript{80} on the
grounds that there the insurer had designated an agent in the state
for service of process and the employer had been joined in the action
and maintained an office in the county where the cause of action arose.

whole. Scheduled injuries are conclusively presumed to result in the loss of
earning capacity and therefore no credit for post-injury earnings could be
allowed.\textsuperscript{78} 308 S.W.2d 385 (Tenn. 1957).
\textsuperscript{79} TENN. CODE ANN. §§ 56-308, 56-320 (1956).
\textsuperscript{80} Brown v. Stone & Webster Eng'r Corp., 181 Tenn. 293, 181 S.W.2d 148
(1944).