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LABOR LAW AND WORKMEN'S COMPENSATION—1957 TENNESSEE SURVEY

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LABOR INJUNCTIONS

The decisions of Tennessee appellate courts during the survey period have dealt extensively with the major area of controversy in current labor relations law—federal pre-emption.[1] The number of Tennessee decisions handed down which relate to injunctions restraining directly or indirectly the activities of labor organizations exceeds that in any recent comparable period. Clarification of the law applicable in the courts of the state to such activities, however, has not been achieved through these decisions. Two were reversed subsequently without opinion by the Supreme Court of the United States,[2] and these two reversals, in turn, present serious questions as to the ultimate effect of the holdings in three additional Tennessee cases of the survey period.[3] The problem is further complicated when consideration is given to the United States Supreme Court's affirmance[4] of a Wisconsin injunction three weeks after the reversal of the Tennessee decisions. One of the Tennessee decisions involved picketing to achieve a purpose deemed contrary to the state's "right-to-work" statute, as did the Wisconsin case.

Even before the Taft-Hartley amendments to the National Labor Relations Act[5] certain types of state regulation of labor relations were considered to be forbidden because incompatible with federal law.[6] In 1947 detailed regulation of certain activities of labor organization

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1. See, generally, *Marmet, Federal Preemption, Free Speech and Right to Work Statutes*, 52 NW. U.L. REV. 143 (1957).
2. Teamsters Union v. Kerrigan Iron Works, Inc., 353 U.S. 968 (1957) (per curiam); Local 429, International Brotherhood of Electrical Workers, AFL v. Farnsworth & Chambers Co., 353 U.S. 969 (1957) (per curiam).
3. Aladdin Industries, Inc. v. Associated Transp., Inc., 298 S.W.2d 770 (Tenn. App. M.S. 1956); Covington Truck Co. v. International Brotherhood of Teamsters, AFL, 298 S.W.2d 561 (Tenn. App. W.S. 1956); National Carloading Corp. v. Arkansas Motor Freight Lines, Inc., 298 S.W.2d 720 (Tenn. 1957).
4. International Brotherhood of Teamsters, AFL v. Vogt, Inc., 354 U.S. 284 (1957).
5. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1952). The official name of this legislation is Labor Management Relations Act, 1947. It has five subchapters, the second of which consists of an amendment of the National Labor Relations Act. The National Labor Relations Act (Wagner Act) was approved on July 5, 1935. 49 Stat. 449 (1935).
6. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945).

were incorporated in the National Labor Relations Act as union "unfair labor practices" subject to the remedies provided in the statute when a labor dispute would affect interstate commerce.[7] In the same statute, provision was made for cession of jurisdiction by the National Labor Relations Board to a state under certain conditions and limitations.[8]

The area of exclusive federal regulation of the subject matter covered by the statute (that is, federal preemption or occupation of the field)[9] was forcibly presented in *Garner v. Teamsters Union, AFL*, in 1953.[10] This case held that Pennsylvania courts had no jurisdiction to enjoin peaceful labor union activity which, because of its purpose, was forbidden as an unfair labor practice under NLRA. *Weber v. Anheuser-Busch, Inc.*,[11] in 1955 made clear that the federal preemption in the labor field included preventive relief against conduct protected by NLRA as well as that forbidden by it. In *General Drivers Union, AFL v. American Tobacco Co.*[12] the United States Supreme Court indicated that, even though the refusal of carrier employees to cross their own picket line resulted in the carrier's failing to provide the service it was obliged to render under state law, exclusive jurisdiction was in the NLRB (so that a state court could not issue an injunction). Intermixed with these and other federal preemption cases have been decisions upholding the continued jurisdiction of the state courts to protect persons and property against violence and to accord damages for unlawful conduct in the area of traditional "police power," even though such conduct is also regulated by federal law.[13]

In *Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc.*[14] the Court of Appeals of Tennessee, Middle Section, held (in an opinion by Judge Felts) that a shipper was entitled to an injunction requiring truck

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7. 61 Stat. 141 (1947), 29 U.S.C. § 158 (1952).

8. 61 Stat. 146 (1947), 29 U.S.C. § 160 (1952). No such cession has ever been reported.

9. See CONSTITUTION OF THE UNITED STATES OF AMERICA, REVISED AND ANNOTATED 246-52 (Corwin ed. 1952).

10. 346 U.S. 485 (1953). There had been other cases between 1947 and 1953 holding state action in the labor relations field to be unauthorized. See, *e.g.*, International Union of United Automobile Workers, CIO v. O'Brien, 339 U.S. 454 (1950).

11. 348 U.S. 468 (1955).

12. 348 U.S. 978 (1955) (per curiam); *cf.* Local 25, Teamsters Union, AFL v. New York, N.H. & H.R.R., 350 U.S. 155 (1956).

A federal court will not entertain a suit to enjoin an employer from pursuing a state court remedy in this preemption area, Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955), except upon the application of the NLRB when the same matter is pending before that agency, Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954). On the removal of state court proceedings to Federal court, see Gilbert, *Removal and Remand Under the Taft-Hartley Act*, 7 Lab. L.J. 745 (1956).

13. International Union, United Automobile Workers, CIO v. Anderson, 351 U.S. 959 (1956) (per curiam); Allen-Bradley Local 1111, United Electrical Workers, CIO v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

14. 296 S.W.2d 379 (Tenn. App. M.S. 1956).

lines to continue to render their customary service and restraining a labor union, its officers and agents from interfering with the carriers and their employees in rendering such service. The refusal of trucking company employees to cross a picket line (established in this instance by another union in a strike against the shipper) was permitted by contract between the trucking company and the union representing its employees. The opinion declares that such a refusal is not "concerted activity" protected under section 7[15] of the NLRA. Since it was also not an unfair labor practice forbidden by section 8(b)[16] of NLRA it was found subject to state law which required service by the carrier and its employees. Apparently the *General Drivers* case was deemed inapplicable because the carrier employees in that case had refused to cross their own picket lines instead of the lawful picket line of another union. The United States Supreme Court's reversal of this Tennessee Court of Appeals decision reads:[17]

> *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Court of Appeals of Tennessee is reversed. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *General Drivers Union v. American Tobacco Co.*, 348 U.S. 978.

The opinion of the Tennessee Court of Appeals, Middle Section, written by Judge Felts, in *Aladdin Industries, Inc. v. Associated Transp., Inc.*,[18] involved a contempt proceeding for the violation of an injunction comparable in many aspects to that in the *Kerrigan* case. The reasoning of the court's opinion was substantially the same. It was declared that there is no federal preemption because the refusal of trucking employees to cross the picket line of another union to render customary service to a shipper and receiver is neither protected nor prohibited by the NLRA. The chancellor's decree finding that certain of the trucking company employees, their union and its officers were guilty of contempt for failing to obey the injunction was affirmed by the court of appeals. The court observed that, even if the injunction was irregular or erroneous, it was bound to be obeyed while it remained in force. In light of the Supreme Court's reversal in the *Kerrigan* case this point becomes of major importance in considering the continued significance of the decision.[19]

Two additional cases involve less directly the obligations of a carrier, its employees and the union representing its employees in crossing picket lines. In *Covington Truck Co. v. International Brotherhood*

15. 61 STAT. 140 (1947), 29 U.S.C. § 157 (1952).
16. 61 STAT. 141 (1947), 29 U.S.C. § 158 (1952).
17. Teamsters Union v. Kerrigan Iron Works, Inc., 353 U.S. 968 (1957).
18. 298 S.W.2d 770 (Tenn. App. M.S. 1956).
19. The court cites Nashville Corp. v. United Steelworkers, CIO, 187 Tenn. 444, 450, 215 S.W.2d 818, 821 (1948). See also United States v. United Mineworkers, 330 U.S. 258 (1947).

of Teamsters, AFL,[20] a trucking company which was being picketed by a union representing the employees of other truck lines sought a mandatory injunction against the other truck lines, union officials and the union to compel the interlining of freight. The chancellor dismissed the bill as to the union and the named union members and officers but ordered the carriers (and their employees) to interline freight with the plaintiff company without regard to any "hot cargo" or other contractual limitations. The defendant motor carriers did not appeal; nor did any of their employees. The union had contracts with these carriers permitting employees to refuse to handle "hot cargo" or cross picket lines.

The Tennessee Court of Appeals, Western Section, in an opinion by Judge Carney, dismissed the appeal of the union and union officers. The court reasoned that these parties had challenged the jurisdiction of the state court below on the theory of federal preemption, and had requested dismissal and that the chancellor had granted the request as to them, without assignment of error being made. Hence, the court found that a final and binding ruling on the court's lack of jurisdiction over the union had been made. The court's second ground for dismissing was that the union's interest as bargaining agent for employees of the truck lines ordered to interline freight is not sufficient to entitle it to appeal from the order.

In *National Carloading Corp. v. Arkansas Motor Freight Lines, Inc.,*[21] an injunction was sought against certain motor truck carriers of freight to compel them to receive freight tendered them for transportation by the plaintiff. A labor union petitioned for leave to become a party defendant, it being alleged that the union represented employees of some of the defendant carriers and that the relief sought by the complainant would compel a violation of bargaining agreements with the union as to the privileges of such employees. The chancellor denied the petition of the union to intervene and the Supreme Court of Tennessee affirmed with an opinion by Chief Justice Neil. It is noted from a stipulation that the union desired to challenge the jurisdiction of the court, and the opinion declares that intervention for such a purpose will not be allowed.

The *Covington Truck* and the *National Carloading* cases illustrate possibilities of complexity in the concept of federal preemption that have not yet received adequate attention either from the Supreme Court of the United States or in decisions such as these. Insofar as preventive relief is to be afforded against labor organization pressures related to the duties of employees of motor carriers, it seems that the exclusive jurisdiction of the National Labor Relations Board has been

20. 298 S.W.2d 561 (Tenn. App. W.S. 1956).
21. 298 S.W.2d 720 (Tenn. 1957).

clearly established in the *General Drivers* and *Kerrigan* cases. This is based on the idea of primary and exclusive jurisdiction over a block of subject matter to the extent indicated in the congressional regulation of labor relations affecting interstate commerce. This area of exclusive jurisdiction presumably will not be affected by state court determinations whether they deal directly or obliquely with the prevention of certain types of activity by labor organizations and their members. In the Tennessee cases just discussed the merits of the central problem would be presented, presumably, if contempt proceedings for violation of court order should be instituted against trucking company employees who claimed the privilege under union contract not to handle "hot cargo" or who refused to cross a picket line. However, even here the question of preemption might be avoided if it is held that the court order must be obeyed until properly set aside on appeal and that it cannot be collaterally attacked.[22]

In *Farnsworth & Chambers Co. v. Local 429, International Brotherhood of Electrical Workers, AFL*,[23] the Supreme Court of Tennessee, in an opinion by Justice Prewitt, upheld an injunction, secured by a company whose business affected interstate commerce, against a union that engaged in "stranger picketing" found to be in violation of the state's "right-to-work" law.[24] The court rejected the contention that the NLRB had jurisdiction over the subject matter to the exclusion of state courts. On May 27, 1957, this decision was reversed per curiam by the Supreme Court of the United States.[25] The reversing memorandum decision merely cited the *Garner* and *Anheuser-Busch* cases.

On June 17, 1957, in *International Brotherhood of Teamsters, AFL v. Vogt, Inc.*,[26] the Supreme Court of the United States upheld a Wisconsin injunction against peaceful picketing deemed to be for the purpose of coercing an employer to put pressure on employees to join a labor organization—thus violating a state statute. The issue of federal preemption is not discussed in the case (there is no reference to any effect on interstate commerce) but attention is given to the problem of free speech limitations on state regulation of peaceful picketing—particularly the "stranger picketing" situation. The opinion by Mr. Justice Frankfurter is of major importance in demonstrating that virtually no substance remains in the free-speech doctrine (apart from blanket prohibitions against picketing) as a restraint on injunctions if the picketing involves pressures designed to achieve an object forbidden by the law of the state (and, it might be added, in an area where state

22. See note 19 *supra*.
23. 299 S.W.2d 8 (Tenn. 1957).
24. TENN. CODE ANN. § 50-208 to -213 (1956).
25. Local 429, International Brotherhood of Electrical Workers, AFL v. Farnsworth & Chambers Co., 353 U.S. 969 (1957) (per curiam).
26. 354 U.S. 284, (1957).

policies are free to operate). The importance of the *Farnsworth* decision in this connection is, apparently, to demonstrate that federal preemption can defeat the state injunction, although "free speech" does not, if the situation is within the general coverage of the Taft-Hartley Act, even though the picketing is aimed at conduct forbidden by the state "right-to-work" law. Taft-Hartley allows such state laws to operate and presumably be effective within their terms.[27] But preventive relief which becomes concerned with the purposes of labor organization activities where interstate commerce is affected apparently must be secured from the NLRB if it is to be available from any source.

In *Pruitt v. Lambert*[28] the Tennessee Supreme Court upheld an injunction against "stranger picketing" deemed coercive against rights under the "right-to-work" statute. The union denied the coercion, stating that it had never insisted on discharge of any employee or upon any employee's joining the union. The opinion of Justice Swepston found violation of the spirit if not the letter of the "right-to-work" statute in the contract proposed by the union, the refusal of which led to union picketing with signs that referred (truthfully) to work under non-union conditions at the location. The opinion declared that the picketing was not merely for the purpose of advertising but was coercive with illegal objectives. No federal preemption issue was involved under the facts as stated in this case; nor in a contempt proceeding for violation of an injunction against mass-picketing which was decided during the survey period.[29]

Workmen's Compensation

Not only the appellate courts of Tennessee but also the legislature considered the workmen's compensation statute during the survey year. The legislature increased the maximum benefits under the statute to $11,000 and the maximum weekly benefits to $32.[30] These had been $10,000 and $30, respectively. Also, nursing services ordered by the attending physician were added to the medical benefits due an employee from the employer,[31] and, perhaps most important to the profession itself, the fees of attorneys were regulated. The employer or his insurance carrier is to pay a court-approved fee on that part of the recovery for the benefit of the employer or carrier in a third party action, and the fee for any excess is to be paid in accordance with the employee's contract with his attorney.[32]

27. 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952). See Mamet, *supra* note 1.
28. 298 S.W.2d 795 (Tenn. 1957).
29. Gunn v. Southern Bell Tel. and Tel. Co., 296 S.W.2d 843 (Tenn. 1956).
30. Tenn. Pub. Laws 1957, c. 270, § 1-3 amending Tenn. Code Ann. §§ 50-1007, 50-1008, 50-1010, 50-1011, and 50-1013 (1956).
31. Tenn. Pub. Laws 1957, c. 234, § 1 amending Tenn. Code Ann. § 50-1004 (1956).
32. Tenn. Pub. Laws 1957, c. 121, § 1 amending Tenn. Code Ann. § 50-1019 (1956).

Two cases reported during the survey year involved suits grounded on an employer's negligence in connection with an employee's injury. The first, *Thurmer v. Southern Ry.*,[33] was an employee's suit under the Federal Employers' Liability Act,[34] which provides for a negligence action for the work-connected injuries of certain railroad employees. The employer cannot defend the suit on the basis of assumption of risk or the fellow servant rule, and a concept of comparative negligence is substituted for the defense of contributory negligence.

In the *Thurmer* case, the Tennessee Court of Appeals for the Eastern Section reversed a directed verdict for the railroad. The employee had been opening a valve when the plug blew out and the escaping steam injured him. The court of appeals held that the jury should have been allowed to determine whether the employer was negligent by failing to discover the defect in the valve, by permitting excessive steam pressure to build up in the pipes while the valve was being opened or by allowing the steam pressure to be on while the employee's duties required him to be near the valve, since there was evidence in the record on which such negligence could reasonably have been found.

Lenoir Car Works v. Littleton[35] was an employee's common law action for damages for the employer's negligence in not protecting him against contracting silicosis while working in the employer's establishment. The jury returned a general verdict for $25,000 for the employee, and the Tennessee Court of Appeals for the Eastern Section affirmed. The employee alleged that his silicosis was diagnosable prior to March 12, 1947. Otherwise, he would have been limited to an action for workmen's compensation.[36] Though the jury answered a special interrogatory by finding that the disease could have been diagnosed as silicosis in 1948, this was set aside on the ground that it was not responsive and did not preclude a finding that the disease was diagnosable as silicosis prior to March 12, 1947. The employee based one count of his action on the statutory provision prohibiting an employer from using any material or process in such a way as to create a condition injurious to the health of employees,[37] but the court found it unnecessary to determine whether an action could be founded on this provision of the Code since the count in negligence was sufficient to sustain a judgment for the employee.

The Employment Relationship: In two decisions reported during the survey year, Tennessee's highest court dealt with questions concerning the employment relationship under the workmen's compensation statute.

33. 293 S.W.2d 600 (Tenn. App. E.S. 1956).
34. 35 STAT. 65, 45 U.S.C. § 51 (1954).
35. 293 S.W.2d 585 (Tenn. App. E.S. 1956).
36. TENN. CODE ANN. § 50-1102 (1956).
37. TENN. CODE ANN. § 50-403 (1956).

Kamarad v. Parkes[38] was defended on the ground that the employee seeking compensation was an independent contractor rather than an employee within the meaning of the statute. The defendant was a lumber company which was constructing a house for the person who apparently engaged the plaintiff, a carpenter, to assist in the construction. The company was found to be engaged in the activity of constructing houses and was furnishing the plans, material, and labor for the one in question. The trial court also found that the company had relied upon the laborer's, furnisher's, and materialmen's lien statute for security and indicated, in waiving the lien, that it was the furnisher of the labor for building the house. The testimony of the company's officials also was to the effect that there was no difference in the relationship between the plaintiff and the other workmen. The trial court further found that the defendant company had exercised control over the construction work and had the right to do so. The Supreme Court affirmed on the ground that there was sufficient evidence to support a finding of the existence of the employer-employee relationship.[39] Apparently the court was willing to imply the employment relationship, necessarily based on a contract of employment, because the defendant accepted the plaintiff's services up to the time of his injury and was accepting them at that time.

Mason-Dixon Lines, Inc. v. Lett[40] provided the court an opportunity to reiterate its now-familiar rule that in determining whether a worker is a casual employee, and hence not covered by the statute, "it is the regularity of the employer's exercise of a given employment that is important. . . ."[41] A casual employee is defined in the statute as "one who is not employed in the usual course of trade, business, profession, or occupation of the employer."[42] The employer in the instant case was engaged in the business of operating a commercial truck line. Also, the company operated a pleasure resort where several employees were regularly retained to maintain it. The deceased employee, whose widow brought this suit for survivors' benefits, had worked at the resort when he was not engaged in his own agricultural activities and was working there when he was killed by a stroke of lightning.

The fact that other employees were regularly engaged in the maintenance of the resort was prima facie evidence that its operation was in the employer's regular course of business. As the court said, "If the employer 'regularly' employs employees in a given class of work, this may be evidence that such work is in the usual course of such

38. 300 S.W.2d 922 (Tenn. 1957).
39. Citing D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 (1947).
40. 297 S.W.2d 93 (Tenn. 1956).
41. Dancy v. Abraham Bros. Packing Co., 171 Tenn. 311, 102 S.W.2d 526, 531 (1937).
42. TENN. CODE ANN. § 50-906(b) (1956).

an employer's trade, business, or occupation."[43] Thus, the irregularity of the deceased employee's employment was unimportant.

The case appears to be in line with prior decisions of the court.[44]

Injury by Accident Arising Out of Employment: For workmen's compensation to be awarded, it must be shown, among other things, that an employee suffered an injury by accident "arising out of" the employment. To arise out of the employment, the injury must be causally connected with the employment by more than mere coincidence.

Mason-Dixon Lines v. Lett, also involved a determination of the causal connection between the employment and the injury. The deceased employee had been watering the resort's lawn by means of aluminum pipes through which water was pumped. During a thunder storm he went outside to turn off the pump. While touching it, he was killed by a lightning stroke conducted through it to his body. The trial court awarded compensation, and the Supreme Court held there was substantial evidence to support the conclusion that the employment of the deceased involved a special risk of being struck by lightning. The court stated, apparently on the basis of judicial notice, that the pump was made of iron or steel. It said that in *Jackson v. Clark & Fay, Inc.,*[45] ". . . this Court noted that acts of God are compensable under the statute when the employee, by reason of his duties, is exposed to a peculiar danger from such act; that is, one greater than persons generally in the community. The rule seems to be general, and is well established. The difficulty is in determining when it is applicable."[46]

In the *Jackson* case, an employee was killed by a tornado while driving a truck, and the court reversed a compensation award. The decision in the instant case seems consistent with what the court appears to regard as the rationale of the *Jackson* case and with the usual rule in cases in which an employee's injury or death results from a stroke of lightning.[47] It should be noticed that the court took judicial notice of the fact that the pump was made of iron or steel. Whether the finding that the pump with the aluminum pipes attached would be unusually likely to attract lightning was based on judicial notice

43. Mason-Dixon Lines, Inc. v. Lett, 297 S.W.2d 93, 96 (Tenn. 1956), quoting from Dancy v. Abraham Bros. Packing Co., 171 Tenn. 311, 102 S.W.2d 526, 531 (1937).

44. Rhyne v. Lunsford, 195 Tenn. 664, 263 S.W.2d 511 (1953); United States Rubber Products v. Cannon, 172 Tenn. 665, 113 S.W.2d 1184 (1938). For discussions of tests in other states to determine whether employment is casual, see 1 LARSON, WORKMEN'S COMPENSATION LAW § 51 (1952) and RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 192-193 (1950).

45. 197 Tenn. 135, 270 S.W.2d 389 (1954). For a discussion of the case, see Sanders and Bowman, *Labor Law and Workmen's Compensation—1956 Tennessee Survey,* 8 VAND. L. REV. 1037, 1044-47 (1955).

46. 297 S.W.2d at 95.

47. 1 LARSON, *op. cit. supra* note 44, §§ 8.11-.12.

or testimony was not indicated. It would not be unusual to take notice of such a fact, but how far the court might go in noticing the attraction of lightning in other circumstances remains to be seen.[48]

The Federal Court of Appeals for the Sixth Circuit upheld a compensation award under the Tennessee statute in *Eureka Cas. Co. v. Phillips*.[49] A coal miner was found dead where he had been working in a mine. On the day of his death, he had mined eighteen tons of coal, an extraordinary amount according to the court, in a shaft forty-five inches high, which necessitated his shovelling while on his knees. He was lying on his back with his hands crossed over his chest and his shovel under some coal. This indicated to the court that he was about to lift the load of coal when he was stricken. The court said that he was stricken either with a brain hemorrhage or heart failure, or by overexertion which aggravated a pre-existing condition so as to cause his death. Relying on Tennessee precedent,[50] the court said that when an employee is found at his post of labor without direct evidence as to the manner of his death, an inference may arise of an accident arising out of and in the course of his employment. This makes a prima facie case of compensation liability, and since the employer did not have an autopsy to determine the cause of death, as he was entitled to do, and introduced no evidence to rebut the inference of a work-connected death, a compensation award was proper under the circumstances.

The Tennessee Supreme Court would not necessarily have reached a different result had it been confronted with the facts in the case,[51] and the result seems to be in accord with the general rule.[52] However, in Tennessee the mere fact that an employee is found dead at his post of duty in a mine seems not to be sufficient to make a prima facie case of a work-connected injury by accident,[53] but the circumstances in the instant case seem sufficient to raise an inference of a connection between the work and the death.[54]

A deceased employee's mother sought survivors' benefits in *Volz v. Southerland*.[55] Although the court said the dependency of the mother was one of the two questions involved in the case, it held that the evidence supported the finding that she was a compensable, partial dependent but neglected to mention what the evidence was. The other

48. On the subject of judicial notice in lightning cases, see 1 LARSON, *op. cit. supra* note 44, § 8.11.
49. 233 F.2d 743 (6th Cir. 1956).
50. Cunningham v. Hembree, 195 Tenn. 107, 257 S.W.2d 12 (1953). The court said Wilson v. St. Louis Terminal Distributing Co., 198 Tenn. 171, 278 S.W.2d 681 (1955), was distinguishable on its facts.
51. See, *e.g.*, Heron v. Girdley, 198 Tenn. 110, 277 S.W.2d 402 (1955); Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).
52. 1 LARSON, *op. cit. supra* note 44, § 10.32.
53. Heron v. Girdley, 198 Tenn. 110, 277 S.W.2d 402 (1955); Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953).
54. See Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).
55. 292 S.W.2d 385 (Tenn. 1956).

question was whether the employee's death arose out of and in the course of his employment.

The deceased was a construction worker engaged in levelling the bottom of a ditch when he was severely burned while using the handle of his shovel to move a bucket with fire in it. He had kindled the fire in the bucket and carried it into the ditch for warmth. He placed it too close to some of the construction material in the trench and was fatally burned in attempting to move it. The employer contended that the injury did not arise out of the employment because "his act was wholly unauthorized and not foreseeable and was for his own private purpose. . . ."[56] But the court disagreed. It found that the evidence was conflicting as to the employee's permission to have this fire in the trench but tended to show that the employer knew or should have known of this practice and had not forbidden it. It also said that it was common knowledge that construction workers kept fires about in cold weather. Thus, such action was not unexpected and indeed might be said to aid the employees in proceeding with the work of the employer. The court indicated that the test is that the accident "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and have flowed from that source as a rational consequence."[57]

In *Sandlin v. Gentry*,[58] the court affirmed the dismissal of a widow's suit. Her husband, an employee, had rebuked a fellow employee and later called him a vile name and struck him. The assaulted employee shot and killed his assailant. The court held that though the altercation occurred on the employer's premises during working hours the encounter was personal between the parties and deceased was the aggressor and guilty of wilful misconduct because the attack was without any excuse. Thus, the death did not arise out of and in the course of employment. As one authority has said, "The great majority of jurisdictions which have considered the question of aggression apart from express statutory defenses have held that the aggressor in an admittedly work-connected fight cannot recover compensation."[59] But in the instant case the court failed to find any connection between the work and the assault and resulting homicide.

Injury by Accident in the Course of Employment: It has been said of the "course of employment" aspect of the work-connection test in compensation cases that:[60]

56. 292 S.W.2d at 387.
57. 292 S.W.2d at 388, relying on Tapp v. Tapp, 192 Tenn. 1, 236 S.W.2d 977 (1951); Davis v. Wabash Screen Door Co., 185 Tenn. 169, 204 S.W.2d 87 (1947); Whaley v. Patent Button Co., 184 Tenn. 700, 202 S.W.2d 649 (1947).
58. 300 S.W.2d 897 (Tenn. 1957).
59. 1 LARSON, *op. cit. supra* note 44, § 11.15(a).
60. 1 *id.* § 14.00.

> An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto.

The same writer adds:[61]

> Under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.

McAdams v. Canale[62] was a case of first impression, and the facts were undisputed. The employer was a sole proprietor who had employed the injured employee to perform a variety of functions. She was employed to purchase phonograph records for use in the business and do the bookkeeping, banking, and typing and secretarial work. She was also to obtain a notary commission so as to be in a position to execute contracts used in the business, and to drive her employer in his car on business missions. Further, it was understood that she would be expected to do personal shopping for her employer and drive him and members of his family on personal trips, which she had done.[63]

The employer had directed her to drive him to an out of town football game, and she was injured in an automobile accident while doing so. Because the trip was not related to the employer's business, the trial court dismissed her compensation action on the ground that the injury did not arise out of her employment. The Tennessee Supreme Court reversed. It said:[64]

> Where, as here, the employee is doing what he or she is directed to do by the employer (in this instance the sole 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.

Although the court seemed to regard the case as involving the "arising out of" factor, the question would properly seem to be whether the injury was incurred "in the course of" the employment, particularly in view of the above-quoted explanation of the phrase.

Statue of Limitations and Notice of Injury: The Tennessee Supreme

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61. 1 *id.* § 20.00.
62. 294 S.W.2d 696 (Tenn. 1956).
63. That travel on the highway can, under some circumstances, be in the course of employment even though there is a regular place of work elsewhere is well-recognized. Cardillo v. Liberty Mut'l Ins. Co., 330 U.S. 469 (1947).
64. 294 S.W.2d at 699. The court relied on a Mississippi case, National Surety Corp. v. Kemp, 217 Miss. 537, 64 So. 2d 723 (1953), *reaff'd,* 217 Miss 560, 65 So. 2d 840 (1953).

Court affirmed an award of compensation for an occupational disease in *Underwood v. Combustion Engineering, Inc.*[65] The employee had first contracted the disease in 1951 and had suffered from it off and on until he became disabled in 1954 when he was found to have suffered a new attack of the disease. The court held that the statute of limitations barred recovery for the injury in 1951 but not for the new attack in 1954 since it began to run from the time the employee became incapacitated for work.

The holding in *Lampley v. St. Paul Mercury Indemnity Co.*[66] was that there was substantial evidence to support the trial court's finding of a reasonable excuse for failure to give the required notice of injury within thirty days after "the first distinct manifestation of an occupational disease."[67] An employee died five days after he ceased work due, according to the doctor's diagnosis at the time, to pneumonia or heart disease. X-rays, examined after the death, showed he had silicosis. This was not discovered by his dependent, uneducated, eighty-year-old father, until approximately five months after the employee's death. The court held that under the circumstances, the father had acted with the prudence of one of his education and age and that there was a reasonable excuse for not giving the required notice within the thirty-day period. The court added that the employer did not appear to have been prejudiced by not receiving timely notice of the injury.

Finality of Awards: An employee was injured and was paid compensation. Then he sued for additional compensation, but his suit was dismissed on the ground that he had received the compensation to which he was entitled. When he later sued again for additional compensation, the court held, in *American Snuff Co. v. Helms*,[68] that the judgment in the prior action was final and barred this second suit even though the full extent of the injury was not discovered until just before this suit was instituted. The workmen's compensation statute would permit the opening of an award within six months after its date[69] but not later. If the award in the prior suit had provided for reopening in the event of a change of condition, the employee could have maintained this suit.[70]

Dependency and Survivors' Benefits: An employee was killed and survivors' benefits awarded his daughter and her minor, illegitimate son as dependents. Subsequently the mother and father of the illegiti-

65. 300 S.W.2d 901 (Tenn. 1957).
66. 300 S.W.2d 876 (Tenn. 1957).
67. TENN. CODE ANN. § 50-1107 (1956).
68. 301 S.W.2d 348 (Tenn. 1957).
69. TENN. CODE ANN. § 50-1025 (1956).
70. Phillips v. Memphis Furniture Mfg. Co., 168 Tenn. 481, 79 S.W.2d 576 (1935).

mate child married and thereby legitimated him. In *Royal Indemnity Co. v. Jackson*,[71] the insurer sued to be relieved from paying compensation to the child since, under the statute,[72] he had come to be conclusively presumed to be dependent on his father. The court, relying on prior authority,[73] held that subsequent events would not be considered to affect the rights of dependents if they were dependents within the meaning of the statute at the time of the employee's injury or death, which is the point in time at which dependency is determined. Though under the statute a child under sixteen-years of age is conclusively presumed to be dependent on the father, dependency in fact on another person may be shown.[74]

The case appears to be in accord with the general approach to the problem and seems sound from a practical standpoint.[75] As one authority has said, "While this may produce occasional results inconsistent with the spirit and purpose of compensation protection, the administrative convenience of crystallizing of rights as of some definite date once and for all probably counterbalances the objection."[76]

Employer's Duty to Furnish Medical Treatment: In *Atlas Powder Co. v. Grimes*,[77] an employee with a work-connected injury was treated by a doctor supplied by the employer but had not fully recovered when the treatment ceased. Without notice to the employer, he selected a doctor of his own choice and underwent an operation. The doctor which the company supplied did not feel qualified to perform the necessary operation or one of the usual diagnostic tests for an injury such as the employee had sustained. The court affirmed a compensation award which included recovery of the medical expenses incurred by the employee for the treatment of his injury. It said that the employer had not complied with the statute by designating three or more doctors for the selection of the employee[78] and that the doctor supplied did not do what was necessary for the employee's injury. In such circumstances, the employee was free to choose his own doctor and hold the employer accountable for the resulting expenses within the statutory limit of $1,500.[79]

71. 300 S.W.2d 893 (Tenn. 1957).
72. TENN. CODE ANN. § 50-1013 (1956).
73. Johnson Coffee Co. v. McDonald, 143 Tenn. 505, 226 S.W. 215 (1920).
74. *Ibid.*
75. 2 LARSON, *op. cit. supra* note 44, § 64.40.
76. *Ibid.*
77. 292 S.W.2d 13 (Tenn. 1956).
78. TENN. CODE ANN. § 50-1004 (1956).
79. The court distinguished the earlier case of Irwin v. Fulton Sylphon Co., 179 Tenn. 346, 166 S.W.2d 610 (1942), on the ground that the applicable statutory provision had been amended so as to make the rule in that case inapplicable. At the time the *Irwin* case was decided, the statute required the employer to furnish medical care and the court had held that the employer was entitled to select a physician to treat an employee. If the employee refused the proferred treatment, the employer was not liable for the cost of treatment procured by the employee. The court also held the last paragraph of TENN.

Atlas Powder Co. v. Grant[80] was the second case during the survey year involving an employee dissatisfied with the medical treatment provided by his employer. The employee had been treated by "about" three of the employer's doctors and did not feel that he had recovered when told that he needed no further treatment. Without notice to the employer, he selected a doctor and underwent an operation which apparently was not entirely successful. The court permitted recovery of the medical expenses incurred by the employee by saying, *inter alia,* that the employee "... cooperated with the company and its physicians, and that when he found out that he was not cured it was then only he sought out the services of an independent physician."[81]

The chief justice, with whom Justice Tomlinson concurred, dissented saying, *inter alia,* "It is my view that the real object of the Workmen's Compensation Law in requiring the employer to furnish medical aid and the employee to accept it was that there should be a consultation between them in order to fix liability where the employee elects to insist upon the services of a doctor of his own selection."[82] The employer had a right to select three or more doctors from which the employee might choose and should have been given that opportunity before the employee could select a doctor independently and hold the employer liable for the resulting expense.

However, it should be noted, though the court did not stress it, that in both the *Grimes* and *Grant* cases the doctors furnished by the employer had indicated that no further treatment was necessary. At that point the employees obtained medical treatment on their own. Thus, 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.

Extent of Injury: In *Whitaker v. Morton Frozen Foods, Inc.,*[83] the employee was awarded compensation for fifty per cent permanent partial disability of one of his arms, and the court affirmed. The third finger of the hand had been severed and the fourth finger almost severed. As the result of an operation, the "cupping" of the palm of the hand and wrist was limited and the employee was unable to pick up anything heavy or make a fist with the hand. The court said that though the medical evidence was contradictory, there was substantial evidence to support the award. The injury might have been limited

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CODE ANN. § 50-1004 (1956) inapplicable. That paragraph limits the employer's liability for medical expenses to $100 if in an emergency or on account of the employer's failure or refusal to provide the required medical services or care they are provided by the employee or his dependents. The court stated that the legislature must have felt that the provision had another meaning, but no hint was given as to that other meaning.

80. 293 S.W.2d 180 (Tenn. 1956).
81. 293 S.W.2d at 182.
82. *Id.* at 184.
83. 300 S.W.2d 610 (Tenn. 1957).

to the fingers or hand but for the operation, but "it is settled law in this State that an employee may recover workmen's compensation for a new injury, or aggravation of his injury resulting from medical or surgical treatment."[84]

Proof of Disability: One doctor in *Morrison v. James*[85] testified that an employee was suffering from a work-connected injury and another indicated that his disability could have resulted either from a work-connected injury or a cause having no connection with his employment. The court held that in such circumstances, the finding of the trial court will not be upset on review since the trial court could reasonably have drawn either of two inferences from the evidence.[86]

In *Hamlin & Allman Iron Works v. Jones,*[87] the employee testified in detail about his physical condition and then gave his conclusion as to the extent of his disability. This was corroborated by his wife, but two physicians testified they could find nothing wrong with him. A compensation award was affirmed by the court, which said, "It has long been the rule in this State that a lay witness may testify to his own physical condition or that of another person provided that the witness first states the detailed facts and then gives his opinion or conclusion."[88]

Computation of Awards: The court held in *Willoughby v. Warstler & Egly Bakery, Inc.,*[89] a case of first impression, that in computing the compensation due an employee for a permanent partial injury under the schedule, it was proper to deduct from the award the amount paid the employee for temporary partial disability. While the amount paid for temporary total disability may not be credited against the compensation provided in the schedule because of a specific statutory provision,[90] there is no statutory prohibition against deducting temporary partial disability payments from the amount provided for permanent partial disability.

Oden v. Foster & Creighton Co.[91] involved an employee who suffered temporary total disability for nine days from the date of the injury. Under the statute, he could not receive compensation for the first seven days of disability, and the eighth and ninth days were Saturday and Sunday. The workweek began on Monday and ended on Friday. The court held the employee was nonetheless entitled to two days of compensation for the temporary total disability by virtue of the

84. 300 S.W.2d at 613, citing Revell v. McCaughan, 162 Tenn. 532, 39 S.W.2d 269 (1931).
85. 298 S.W.2d 714 (Tenn. 1957).
86. Citing Lynch v. La Rue, 198 Tenn. 101, 278 S.W.2d 85 (1955); R. W. Hartwell Motor Co. v. Hickerson, 160 Tenn. 513, 26 S.W.2d 153 (1930).
87. 292 S.W.2d 27 (Tenn. 1956).
88. 292 S.W.2d at 29, citing Norton v. Moore, 40 Tenn. 480 (1859); Stephens v. Clayton, 22 Tenn. App. 449, 124 S.W.2d 33 (M.S. 1938).
89. 298 S.W.2d 727 (Tenn. 1957).
90. TENN. CODE ANN. § 50-1007(c) (1956).
91. 298 S.W.2d 711 (Tenn. 1957).

statute.[92]

The court held in *Kamarad v. Parkes*,[93] discussed above, that compensation may be awarded in a lump sum only with the consent of the parties.[94] Thus, the trial court erred in commuting a compensation award, other than for medical benefits, to a lump sum over the employer's objections.

Procedure: In *Adams v. Patterson*,[95] the court held that since an appeal from a lower court's judgment or decree in a workmen's compensation case is in the nature of a writ of error,[96] a motion for a new trial must be made and overruled in the lower court before an appeal can be taken.

92. TENN. CODE ANN. § 50-1007(a) (1956).
93. 300 S.W.2d 922 (Tenn. 1957).
94. Citing as controlling, TENN. CODE ANN. § 50-1023 (1956); Knoxville Knitting Mills Co. v. Galyon, 148 Tenn. 228, 255 S.W. 41 (1923); American Zinc Co. v. Lusk, 148 Tenn. 220, 255 S.W. 39 (1923).
95. 301 S.W.2d 362 (Tenn. 1957).
96. TENN. CODE ANN. § 50-1018 (1956).