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Paul H. Sanders

James G. Bowman Jr.

LABOR LAW AND WORKMEN'S COMPENSATION—1955 TENNESSEE SURVEY

PAUL H. SANDERS* AND JAMES GILMER BOWMAN, JR.†

STRIKES

In *Stokeley Van Camp, Inc. v. United Packinghouse Workers of America*,[1] the company and the union had entered into a collective bargaining agreement under which there were to be no strikes or lockouts pending the use of the grievance and arbitration procedures provided in the contract. The chancellor enjoined members of the union from participating in a strike, and in such incidental activities as mass picketing, and threatening and intimidating persons seeking to enter and leave the plant. The company's bill and affidavits indicated the existence of a strike with mass picketing and threats of violence. The union did not file counter affidavits. Its answer denied the statements of the company in the bill and asserted that the acts complained of were brought on by company officials and not by the union. The chancellor ordered the injunction made permanent after the defendant union filed a motion to dissolve it.

In an opinion by Justice Prewitt, the Tennessee Supreme Court affirmed the decree of the chancellor. The union and its members were considered to be "in no position" to be granted a dissolution of the injunction "on account of the fact they have not complied with their contract," the court citing an American Law Reports annotation.[2] There is no further elaboration of the appropriateness of the injunctive remedy under the circumstances and no information as to the basis upon which the appellant union sought to have the decree below reversed.

Insofar as this decision affirms the use of an injunction against mass picketing and threats of violence, it may be regarded as routine once it is assumed that a sufficient showing was made of the need for equitable relief to prevent the recurrence of such conduct.[3] However, the decree enjoins the members of the union from "participating in the strike." The scope of this language, if it is to be taken literally, coupled with the contractual basis upon which it rests, could make the decision one of major significance, particularly when viewed against recent decisions having to do with federal pre-emption of the regulation of labor relations.[4] A prohibition of the right to strike under the

* Professor of Law, Vanderbilt University.
† LL.B. Vanderbilt University; LL.M. Harvard University.

1. 274 S.W.2d 2 (Tenn. 1954).
2. 2 A.L.R.2d 1278, 1280 (1948).
3. See Sanders and Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 862 (1954).
4. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955), collects and discusses

circumstances is involved. The state court here granted preventive relief in an order which is an undoubted regulation of labor relations as such. The decree is much broader than that needed to preserve order and to protect persons and property from violence—traditional state police powers which, as all the recent federal pre-emption cases have recognized, remain undisturbed by this developing line of authority. The name of the plaintiff in the case suggests a sufficient relationship to interstate commerce to bring it within the general jurisdiction of the National Labor Relations Board.[5] If, under these circumstances, the conduct attributable to the union was an unfair labor practice as set out in Section 8(b) of the National Labor Relations Act,[6] then, under the rule of the much-discussed decision of the Supreme Court of the United States, *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (AFL)*,[7] the state court would be without jurisdiction. Further, if the union conduct, instead of being prohibited as in the *Garner* case, was protected activity under some provision of the Taft-Hartley Act, the state court would lack jurisdiction under the rule of the more recent *Anheuser-Busch* case.[8] A strike in violation of a contract not to strike fits neither of these categories in any precise sense—at least it is not prohibited under the federal law as an unfair labor practice by a labor organization.[9] The federal policy against such strikes, however, is illustrated by those decisions of the National Labor Relations Board which have refused to require reinstatement of employees discharged for engaging in such strikes.[10]

Another aspect of the pre-emption question, in a situation such as that in the *Stokeley Van Camp* case, is presented by Section 301 of the Labor Management Relations Act (Taft-Hartley)[11] which permits suits to be brought in the federal courts for violation of contracts between an employer and a labor organization representing employees of an industry affecting commerce, without respect to the amount in controversy or the citizenship of the parties. Injunctive relief in the federal courts against a union striking in violation of a no-strike agreement remains unavailable to an employer despite Section 301 because of the restrictions of the Norris-LaGuardia Anti-Injunction Act.[12] The differences of opinion between the justices of the United States Supreme Court making up the majority in the recent *Association of*

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the other important decisions on this point.

5. 49 STAT. 450, 453 (1935), 29 U.S.C.A. §§ 152(6)-(7), 160(a) (1947).
6. 61 STAT. 140 (1947), 29 U.S.C.A. § 158(b) (Supp. 1954).
7. 346 U.S. 485 (1953).
8. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).
9. *But cf.* Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV. 233, 234 (1951).
10. Granite City Steel Co., 87 N.L.R.B. 894 (1949); *cf.* Dorsey Trailers, 80 N.L.R.B. 478 (1948).
11. 61 STAT. 156 (1947), 29 U.S.C.A. § 185 (Supp. 1954).
12. Bakery Sales Drivers Local Union No. 33 v. Wagshal, 333 U.S. 437 (1948); see Rice, *supra* note 9.

Westinghouse Salaried Employees v. Westinghouse Electric Corp.[13] suggest that further decisions must come before light is thrown on the character of the substantive rights being enforced under Section 301. Though not addressing themselves to the pre-emption problem, the *Westinghouse* opinions do not indicate that state courts are ousted of jurisdiction over suits to enforce collective bargaining contracts. The possible variations in contract interpretation, as well as in remedies, between states and between state and federal courts suggest grave practical problems for the future, and the pre-emption question will probably be an aspect of the litigation which will develop.

There is nothing in the *Stokeley Van Camp* case, however, to suggest that the question of federal pre-emption was injected at any level of discussion. Remaining for consideration are the legal principles upon which the union's conduct was found unlawful and an injunction, appropriate. The case is in line with the normal common-law rule with regard to the legality of a strike under similar circumstances.[14] The separate question, as to the appropriateness of granting equitable relief against striking, is thought by many authorities to require a more detailed analysis of many pertinent factors than are referred to in the court's opinion in this case.[15] The ineptness of injunctive decree as a means of remedying unfortunate labor relations problems is no less today than it was when so many legislative bodies sought to limit the use of this device in labor cases.[16] Issuance of orders without adequate hearing and consideration of all factors involved characterized a situation widely regarded as abusive.[17] For these reasons, as well as others, it would appear that, to the extent that our state courts have an area for valid action which will not run afoul of exclusive federal regulation of this subject matter, they should weigh carefully all the factors that inform the judgment as to the proper use, if any, of the sweeping remedy of injunction as a means of regulating labor relations problems.

Suits by Labor Organizations

Apart from the *Stokeley Van Camp* case, there were no other decisions during the survey period which involve "labor law" in the sense of being concerned with joint relations between employers and labor organizations.[18] In *Smith v. Archer*,[19] the Supreme Court of

13. 348 U.S. 437 (1955).
14. See 2 A.L.R.2d 1278, 1280 (1948); *cf.* RESTATEMENT, TORTS § 795 1939).
15. RESTATEMENT, TORTS §§ 933-43 (1939).
16. See Section 20 of the Clayton Act, 38 STAT. 738 (1914), 29 U.S.C.A. § 52 (1947), and the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C.A. §§ 101-15 (1947), which became the prototypes of many state laws of similar import.
17. See generally, FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930).
18. *But see* Hobbs v. Lewis, 270 S.W.2d 352 (Tenn. 1954); Hartley v. Liberty Mut. Ins. Co., 276 S.W.2d 1 (Tenn. 1954).
19. 270 S.W.2d 375 (Tenn. 1954).

Tennessee affirmed a dismissal for misjoinder of parties plaintiff where officers of a local union had filed a declaration for libel, individually, as such officers and on behalf of the members of the local. The court treated the case, in an opinion by Justice Tomlinson, as presenting a question of permissible joinder of the individual claim of each officer and the union's claim "as an association," or as the court said, "whether the three may sue jointly for the alleged libel of each." Proceeding on the assumption that such joinder is not permissible unless the cause of action is joint and the well-established principle that in defamation the wrong, if any, is several, the court concludes that "principle, logic, applicable rules of law, textwriters and persuasive precedent require us to decide that the joinder of these three plaintiffs, in this action for libel, for their separate injuries is not permissible."[20] The case treats the union as an entity or rather as a "person" for purposes of a libel action. Does this mean that the union could sue in its own behalf for an alleged libel? The decision appears to be entirely in keeping with traditional thought as to the nature of a libel action and permissive joinder of causes of action.[21] From the labor relations standpoint, however, some concern should be expressed as to the state of the law if it effectively blocks court action to enforce the rights of labor organizations and their members in the only way that would likely prove feasible for the enforcement of such rights. The courts cannot be expected to solve the basic problems of labor relations, but can be expected to fashion our legal institutions so as to encourage a belief that the law is not only supreme, and to be obeyed, but that it is equally available and impartial in its approach to all problems regardless of which group, or class or interest invokes its processes. From this standpoint it would be rather important to determine whether this decision carries the implication that the union could sue for libel as a person in its own behalf.

UNEMPLOYMENT COMPENSATION

In *Moore v. Commissioner of Employment Security*,[22] the Tennessee Supreme Court reversed the chancery court and dismissed the suit of a claimant for unemployment compensation. The claimant had quit night work because he considered it injurious to his health and, in registering at the employment office, had indicated his willingness to work only a day shift. His claim for unemployment compensation was denied ultimately by the Board of Review in the Department of Employment Security because of the statutory requirement that a

20. 270 S.W.2d at 377.
21. See *infra*, Morgan, *Procedure and Evidence—1955 Tennessee Survey*, for reference to the same case. That "traditional thought" on this aspect of joinder is not the best thought is reflected by the flexible provisions set out in FED. R. CIV. P. 18, 20, 23.
22. 273 S.W.2d 703 (Tenn. 1954).

"claimant" be "able . . . and . . . available for work."[23] In reversing the chancellor and upholding the decision of the Board of Review, the Supreme Court, in an opinion by Justice Burnett, quoted extensively from a recent Minnesota decision,[24] which rejected a limitation on availability for personal reasons as opposed to reasons connected with the work. Apparently the Tennessee decision likewise rejected the idea that a claimant could be eligible for unemployment insurance even though he had good personal reasons for limiting his availability to certain hours. However, in the *Moore* case the claimant presented no medical evidence that his shift work was the cause of his alleged nervousness and inability to eat. Limitations on working hours for good personal reasons are not treated as making a claimant "unavailable" for work under the practices prevailing in a majority of the states,[25] although most of the reports of litigated cases are probably to the contrary. Since the record in this case fell far short of establishing any good personal reasons requiring the claimant to avoid shift work, the opinion cannot necessarily be treated as rendering such reasons immaterial in determining "availability."[26]

WORKMEN'S COMPENSATION

The volume of litigation in this area continues to be heavy, twenty-four decisions of the Supreme Court of Tennessee being published during the survey year. Legislative and private studies of the overall effectiveness of the system have been more intensive during this same period, and it is possible that these studies will result in major changes in the procedural aspects of the statutory framework.[27]

The Employment Relationship: Two of the reported decisions during the survey year raise a question as to the existence of the employment relationship, a basic requirement of liability.[28] In *Rote v. Walls*[29] the petitioner at the time of the accident was working as a carpenter on a house being built by defendant partners, engaged in the business of building houses. The defendants appealed from an award of compensation by the trial judge contending that the petitioner was the

23. TENN. CODE ANN. § 6901.28 C (Williams Supp. 1952).
24. Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 61 N.W.2d 526 (1953).
25. See ALTMAN, AVAILABILITY FOR WORK 283 (1950); U. S. BUREAU OF EMPLOYMENT SECURITY, DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 40-65 (1949).
26. For extensive discussion of the more important legal aspects of unemployment insurance, see the several articles appearing in the symposium on that subject. *A Symposium on Unemployment Insurance*, 8 VAND. L. REV. 179-494 (1955).
27. See HOLLY AND MABRY, PROTECTIVE LABOR LEGISLATION AND ITS ADMINISTRATION IN TENNESSEE (1955); Note, *Some Problems Arising Under the Workmen's Compensation Law of Tennessee*, 8 VAND. L. REV. 616 (1955).
28. See Sanders and Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 864-66 (1954).
29. 274 S.W.2d 1 (Tenn. 1954).

employee of an independent contractor. The Supreme Court, in an opinion by Justice Prewitt, affirmed, stating that the preponderance of the proof showed that the petitioner was an employee and that the alleged independent contractor was himself a mere employee of the defendants. The opinion gives no inkling of what the proof consisted to support either of the contentions. It can be assumed that the court is following the usual "right to control" test[30] but in the absence of any reference to significant facts underlying the court's conclusion no guidance is received from the decision.

Kempkau v. Cathey[31] involves the question of the "borrowed employee." Cathey was regularly employed as a truck driver in the delivery of building materials by Kempkau, but did not work on Saturday afternoons. One Saturday afternoon the general foreman of Kempkau borrowed one of the employer's trucks and arranged with Cathey to drive it in moving some furniture of the general foreman's domestic servant. After moving the furniture and taking another helper home, Cathey was killed in an accident while returning the truck to Kempkau's usual place of business. The general foreman was not paid for the Saturday afternoon but Cathey's hours were paid for by Kempkau. The general foreman also paid a sum to Cathey for the afternoon's work. An award of compensation to Cathey's widow and minor dependent children in a suit against Kempkau was reversed by the Supreme Court in an opinion by Justice Swepston. Cathey was "loaned" to the foreman and Kempkau's payment of wages to him for the period is not controlling. The fact that Cathey had completed his activities for the foreman and was returning Kempkau's truck to its usual place of storage is not significant, the opinion states. The relationship of master and servant is suspended until the servant or property loaned is returned to the point where the same is available to the use of the master.

A leading authority in this field says that a special employer will not be liable for accidental injury or death to the "borrowed" employee unless all of these three tests are met:

"(a) the employee has made a contract of hire, express or implied, with the special employer;

(b) the work being done is essentially that of the special employer; and

(c) the special employer has the right to control the details of the work."[32]

If the relationship with the special employer satisfies the above conditions, then the general employer will be relieved of liability

30. See Sanders and Bowman, *supra* note 28, at 864-66.
31. 277 S.W.2d 392 (Tenn. 1955).
32. 1 LARSON, WORKMEN'S COMPENSATION § 48.00 (1952).

under the workmen's compensation statutes unless it can be said that at the same time the conditions are also satisfied with the general or another (a dual) employer.[33] Judgment might well differ as to the application of these principles in the instant case. The Supreme Court's decision seems to indulge little or no presumption in favor of the retention of employment status with the general employer. The inference of the trial judge is set aside and the relationship established as a matter of law. The approach is essentially the same as that used in determining "deviations" from the employer's business. To treat the existence of the relationship under all the circumstances as leaving no room for the drawing of an inference by the trial judge as to the status of the truck driver driving his regular employer's truck back to its regular location while receiving his regular pay from that employer seems unduly restrictive.

Injury by Accident Arising Out of Employment: The statutory requirement in workmen's compensation that the covered employee suffer injury by accident "arising out of" employment expresses the causal connection that must exist between the employment and the injury. There must be a rational connection between the work and the injury by something more than mere coincidence. This general problem, more than any other, has arisen in the reported cases during the survey period.

In *Jones v. Corder*[34] the employer owned and operated a taxi service. He defended a compensation suit, by deceased taxi driver's divorced wife for the benefit of the employee's son, on the ground that the fatal accident did not arise out of and in the course of employment. There was some evidence that the employer required that he be notified before a taxi driver undertook to drive a passenger to Nashville and that an extra driver be carried on such a trip. Without giving any such notification, the employee agreed to carry a passenger from his residence to Nashville. The driver then asked his girl friend to accompany him on the trip but he never received her answer. Apparently, he intended to pick up his passenger and then drive to the girl's home which was on the same highway, but beyond the residence of the passenger. On a direct route to the passenger's abode, but before reaching it, the driver was killed. The Supreme Court affirmed a compensation award. The court, in an opinion by Chief Justice Neil, treated the questions presented as issues of fact and held that the employee was within the scope of his employment in agreeing to make the trip, was where his duty required him to be at the time of the accident, and was acting for the benefit of his employer. The proposed trip for the girl was said to be incidental and inconsequential to the employee's main purpose of transporting a passenger for hire.

33. *Ibid.*
34. 196 Tenn. 478, 268 S.W.2d 359 (Tenn. 1954).

This case does not appear to present any unusual feature. The employee was where his employment required him to be. As a taxi driver, the hazard of injury from automobile accidents might be considered significantly greater than that encountered by the general public. The court was not impressed with the argument that the employee had perhaps undertaken the trip in violation of the rules of the employer, though the rule that the employer be notified of plans to drive to Nashville would not necessarily be designed as a safety rule for the employee. A different case might have been present had the accident occurred between the passenger's house and the girl's. The court must have felt that the cab driver was to pick up the passenger *before* going to his girl's house or else discussion of the case of *Free v. Indemnity Insurance Co.*[35] might have been injected. There, a straight line route of travel was divided into segments because of personal errands to be accomplished along the route. If this employee had been going to the girl's first, compensation might have been denied by analogy to the *Free* case.

In *Jackson v. Clark & Fay, Inc.*[36] employees had been hired in Memphis, Tennessee, to do masonry work at an Arkansas plantation. The employer arranged for meals and lodging for the employees in a nearby Arkansas town. Transportation from Memphis and to and from the plantation to the Arkansas town was furnished by the employer. Because of rain the employee in question had been instructed to quit work earlier than usual and was being driven in the employer's truck to the town when a tornado struck the truck on the highway, and he died from the resulting injuries. A compensation award was reversed by the Tennessee Supreme Court, in an opinion by Justice Tomlinson, on the grounds that the death arose out of an act of God and could not be attributed by law to the employment. Justices Burnett and Prewitt joined in a strong dissent to the court's reasoning that this tornado was a hazard common to the community and to highway travellers and was not a foreseeable hazard incident to the employment. The dissenting justices urged this definition of the phrase "arising out of": "An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects."[37] Hence, they felt that there was a sufficient connection between the employment and the accident since the employment required the employee to be where he was at the time of injury. Further, since he was required to travel, the risks of the road should be regarded as incidental to the employment. Thus, they would in-

35. 177 Tenn. 287, 145 S.W.2d 1026 (1941). See 1 LARSON, WORKMEN'S COMPENSATION § 19.23 (1952).
36. 270 S.W.2d 389 (Tenn. 1954).
37. *Id.* at 395, quoting from Caswell's Case, 305 Mass. 500, 26 N.E.2d 328, 330 (1940).

clude this situation under the "street risk exception" to the general rule of no liability for hazards common to the general community. There would seem to be much merit to these arguments, which embody what is known as the "positional risk" doctrine.[38]

The majority of the court apparently would require that there be some peculiar or increased risk involved before compensation would be due. To impose liability affirmative answers would be demanded to these questions (the second considered to be embraced within the first):

> "Was the danger of being injured by a storm while traveling to and from his work in a truck along a public highway a danger peculiar to Jackson's work, rather than a danger common to the neighborhood through which the storm happened to be raging at the time it struck the truck which was traveling through that neighborhood?
>
> "Could such an injury reasonably have been contemplated if it had been thought of at the time of the employment as a risk incident to Jackson's duties?"[39]

The court concluded that "acts of God are held compensable when the employee, by reason of his employment, is subjected to a hazard from such act of God not common to the general public, but peculiar to the nature of the employment and to the conditions under which that employment is required to be performed."[40] There was no peculiar hazard here, so no liability attached because of the accident. This is the "peculiar or increased risk" doctrine and perhaps the majority rule.

By definition or common understanding, an act of God is not reasonably foreseeable. It is sudden, unexpected, rare and unusual. Therefore, the widow here would seem to be precluded from relief before she started asking for it. How far does the approach of the majority restrict the street risk exception?[41] Certainly it seems reasonable, as the dissenters point out, that but for the employment the employee here would have been in Memphis at the time of the tornado —or at least not on this road. Also, by instructions from his employer he was there earlier than usual. If the court did not choose to rely on these factors and to award compensation but rather went the whole way and denied it on the act of God grounds (the accident was not reasonably foreseeable), it appears unlikely that it will try to distinguish other circumstances in other cases of a similar nature. Compensation could have been awarded here on the limited grounds indicated without opening the gates to a flood of liability awards in storm cases. If the court requires reasonable foreseeability in these cases, and an act of God is not foreseeable by definition, then no

38. 1 LARSON, WORKMEN'S COMPENSATION §§ 8.20, 10.00 (1952).
39. Jackson v. Clark & Fay, Inc., 270 S.W.2d 389, 390 (Tenn. 1954).
40. *Id.* at 392.
41. See 1 LARSON, WORKMEN'S COMPENSATION § 9.00 (1952).

injury resulting from an act of God would be compensable. However, the court indicates that acts of God are compensable if the employee is "subjected to a hazard from such act of God not common to the general public, but peculiar to the nature of the employment and to the conditions under which that employment is required to be performed."[42]

A demurrer to a widow's petition for compensation was sustained in the case of *Reed v. Langford*,[43] and this action was affirmed by the Supreme Court. According to the allegations of the complaint, the deceased husband was employed as a night clerk and janitor in a hotel. He was found dead at a place inside the hotel where his work required him to be. He was said to have died from a non-self-inflicted gunshot wound. There were no witnesses to the shooting, the assassin had never been discovered, and the reason for the shooting was unknown. It was further averred that the hotel was frequented by persons of dubious character and was often visited by the police. The employee was a retired carpenter who had been employed, before going to work at the hotel, as a guard at the state penitentiary, where according to the petition, the owner of the hotel was confined at the time of the accident. The Supreme Court, in an opinion by Justice Swepston, followed the precedent of *Farris v. Yellow Cab Co.*,[44] and stated that "where an employee is found at his post of labor during the time that he is usually employed and there is no direct evidence of the manner of his death, an inference may arise of an accident arising out of and in the course of his employment but that if the facts alleged give rise to more than one reasonable inference as to the cause of death the rule cannot apply."[45] The court held that it would be reasonable to infer that the death either was connected with the employment or with the deceased's previous occupation as a prison guard. Hence, the petition did not state a cause of action.

A leading authority states: "When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death most courts will indulge a presumption or inference that the death arose out of the employment."[46] In the case of unexplained assaults, the cases are more evenly divided.[47]

In the *Reed* case nothing was alleged which would definitely connect the death with the employment in the view of the court. Taking the allegations as true, it would seem that the hotel was frequented by police characters and others usually regarded as "beyond the pale."

42. *Supra* note 39, at 392.
43. 276 S.W.2d 735 (Tenn. 1955).
44. 189 Tenn. 46, 222 S.W.2d 187 (1949).
45. *Supra* note 43, at 737.
46. 1 LARSON, WORKMEN'S COMPENSATION § 10.32 (1952).
47. 1 *id.* § 11.33.

Such persons might tend to be somewhat violent and violence might well be directed against them by others. Therefore, it is probable that death resulted from employment. Also from the fact that the employee worked at night in a public place in a disreputable neighborhood, it might be argued that his employment placed him in a more exposed position than he would otherwise face. It has been considered that the primary question is one of whether the employment situation placed the employee where the danger of attack, work-connected or otherwise, is increased. If so increased, it should be for the employer to show either that the danger was not increased or that the attack would have occurred wherever the employee might have been found. Larson states that the question should be whether the employment brought deceased in contact with the risk that caused the injury.[48] This is not the reasoning adopted by the court in the instant case.

Heron v. Girdley also declares that "finding a person dead at his post of duty itself does not alone raise a prima facie case."[49] In this case an award of compensation to a widow for the unexplained death of her husband was affirmed. The deceased was found dead in the room where he dug coal in a mine, and there were no witnesses to his death. It appeared from the evidence that he suffered from and died as a result of myocarditis, high blood pressure, and hypertension, in other words, a heart attack. There was circumstantial evidence that he had engaged in physical labor prior to his death—he had pushed an empty mine car over a rise in the mine floor. It was also shown that the air in the mine was "bad" in that it did not meet government specifications and did not circulate as rapidly as it should have. The court reasoned in an opinion by Ridley, Special Judge, that the circumstances of the death could be proved by circumstantial evidence, and that it was sufficiently shown that the deceased had performed manual or strenuous labor immediately prior to death. There was medical testimony that this exertion would contribute to death from a heart attack and that was sufficient to bring about liability. The court also indicated that the fact that there was medical testimony that the "bad" air would contribute to or accelerate the death, and that this or the exertion, would have been enough alone to invoke liability. In combination, they made the most reasonable inference to be drawn that of a death arising out of employment.

The result of this case is in accordance with the usual rule. As stated by the court, "where the deceased is found dead at his post of duty and manual labor or physical exertion is proven a prima facie case may, under the circumstances of each case, be made out that death was due to an accident arising out of and in the course of the employment of the deceased."[50] The mere fact that he was found dead

48. *Ibid.*
49. 277 S.W.2d 402, 407 (Tenn. 1955).
50. *Id.* at 408.

in the mine apparently was not enough to make a prima facie case. Considering the immediate cause of death (heart attack), the evidence of physical exertion, and that "bad" or "tight" air would increase the likelihood of death from such a cause, sufficed to prove a prima facie case. The court held that the medical evidence was not speculative and that the exertion or strain had been sufficiently proved by circumstantial evidence in that the mine car had been left at the entrance to the room where deceased worked in the mine and was found after his death to have been pushed along the tracks into the room and over a rise or bump in the floor. Further the deceased was lying on the tracks between the entrance and the car. A predisposing weakness or condition in the employee would not prevent the subsequent accident from "arising out of" the work if some work exertion actually precipitated it.[51]

In *Mid-South Publishing Co. v. Raybon*[52] a widow sued to recover compensation for the death of her husband. On April 29, 1951, the deceased suffered severe burns (some third degree) from an accident which was conceded to arise out of and in the course of his employment with the publishing company. He was hospitalized for about two weeks and then confined to his home under the treatment of a physician in the employ of the insurance carrier. He never returned to work after the accident. In September, 1951, he developed a swelling in his foot and leg (thrombo-phlebitis) requiring a series of operations. He died in February, 1952, from heart failure brought on immediately by the strain of pumping blood through the swollen leg. The record contained a statement of the attending physician to the effect that the leg condition would not have developed if the employee had not been burned as he was. The Supreme Court, in an opinion by Chief Justice Neil, affirmed the trial court's judgment in favor of the widow, finding that the death was indirectly, if not directly, caused by the severe burns whose relation to the employment was unquestioned.

In *Parrott v. Parrott*[53] another chain-of-consequences case is presented, resulting in the affirmance of an award of compensation to a widow. Deceased was a sawyer whose duties included lifting headings and blocks weighing from 40 to 150 pounds. He became sick about an hour after going to work on April 1, 1953, and his condition was diagnosed as brain hemorrhage. After hospitalization he was allowed to return to his home with instructions to rest. He did no work until approximately October 7, 1953, when he started driving a truck, a job requiring no heavy lifting. He became unconscious while driving the truck on November 7, 1953. He was taken to a hospital and died on November 12, 1953, from hemorrhage of the brain. Medical testimony

51. Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953).
52. 268 S.W.2d 355 (Tenn. 1954).
53. 278 S.W.2d 83 (Tenn. 1955).

at the trial included a statement that the likelihood of two hemorrhages occurring from the initial disabled place is greater than at another point, that a person who has had one hemorrhage is more than likely to have another one, and that heavy lifting or exertion would bear on this condition.

The Supreme Court, in an opinion by Justice Prewitt, affirmed the judgment for the complainant:

> "In the present case the deceased was engaged in carrying heavy blocks and while it does not appear that he had a block on his shoulder at the time he suffered the attack, it does appear that he had been carrying heavy blocks regularly, and we may infer that this strain of carrying these heavy loads was one of the contributing causes to the hemorrhage."[54]

The process of reasoning here is from the fatal hemorrhage to the hemorrhage six months before and from that to the strain resulting from heavy lifting connected with the employment in the past.

Under the Tennessee cases, an accidental injury can "arise out of" employment where it is contributed to by the usual, or even less than usual, exertions associated with the work.[55] Unusual exertion surrounded the first heart attack involved in the case of *Powers v. Beasley*.[56] The employee was engaged in carrying poles weighing 250 to 300 pounds on a hot day when he had the first attack. He never returned to work and died six months later from a second attack. The Supreme Court affirmed a judgment for compensation to the widow in an opinion by Justice Tomlinson. Substantial evidence in support of the trial judge's finding that the death was substantially contributed to by the first attack was found in the testimony of a physician to the effect that the first attack so impaired the employee's heart as to make it less capable of withstanding the second.[57]

Lester v. Bays Mountain Construction Co.[58] is a federal court decision in which Tennessee workmen's compensation law was applied in a diversity of citizenship case. The employee was caught between an upright steel beam and the employer's truck, and he suffered contusions on the upper right portion of his body. First aid was administered but the injury was not considered serious, and the employee continued working. At the time the employee had high blood pressure and heart and kidney trouble. He died of heart failure and kidney disease nine months later. The medical evidence in the trial of the case was to the effect that there was no connection between the accident and the death. The United States District Court in Knoxville,

54. *Id.* at 84.
55. Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182 (1953); Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953); see Sanders and Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 867-70 (1954).
56. 276 S.W.2d 720 (Tenn. 1955).
57. *Id.* at 722.
58. 121 F. Supp. 25 (E.D. Tenn. 1954).

Judge Taylor, dismissed the complaint. Plaintiff failed to carry the burden of proof on the "arising out of" element. Plaintiff had to show the accident caused or aggravated the condition causing death. The medical evidence had to be relied on as to the best evidence available. Here there was no evidence that the original injury was in any way connected with the cause of death. The case highlights the vital significance of medical testimony in questions of causation. While in two cases during the survey year the Tennessee Supreme Court did not feel that it was bound to follow the medical testimony with regard to severity of injury and extent of disability, those cases are distinguishable from the instant case because of the relative competence of the non-medical witness in the particular area in contrast with the tracing of causation.[59]

In *Harriman Manufacturing Co. v. Shadden*,[60] the petitioner hurt his back while engaged in heavy lifting for the defendant company on August 7, 1952. He was returned to work by the company physician after about three weeks and then quit within a few days. Approximately two months later he was examined and employed by another employer where he also engaged in heavy lifting. He remained in this employment a little over two months. After visits to several doctors and differences of opinion as to the nature of his ailment, the employee was operated for a ruptured disc in May, 1953. An award for permanent partial disability was affirmed by the Supreme Court. There was no showing of any injury subsequent to the one in question and "the evidence gives the petitioner a good reputation for honesty." Hence, there was material evidence to support the trial court's finding that the injury arose out of and in the course of the first employment, and the Supreme Court's reviewing function was limited to ascertaining whether or not such material evidence existed.

In *Lynch v. La Rue*,[61] compensation was denied because of lack of causal connection between an accident and a cerebro-vascular disease developing seven years later. The employee received an electric shock from a work-connected accident in 1945 which rendered him unconscious for a time and produced headaches. He was discharged as "completely recovered" by the company doctor six weeks later and went to work for another employer. Except for appendix, tonsil and hemorrhoid operations, he worked regularly until September, 1952. Around that time he began to suffer prolonged severe headaches, blackout spells and drowsiness. His malady was diagnosed as cerebro-vascular disease. He was operated on and continued under treatment at the time he brought the action against the 1945 employer. The

59. Bush Bros. & Co. v. Williams, 273 S.W.2d 137 (Tenn. 1954); Armstrong Constr. Co. v. Sams, 270 S.W.2d 561 (Tenn. 1954).
60. 273 S.W.2d 12 (Tenn. 1954).
61. 278 S.W.2d 85 (Tenn. 1955).

Supreme Court, in an opinion by Justice Tomlinson, affirmed the dismissal of his petition for compensation by the circuit court. None of the medical testimony was to the effect that the 1945 electric shock caused the 1952 illness, although two such witnesses said that such connection was possible.

> "It is elementary that an award cannot be predicated solely upon the testimony of medical experts who are not willing to go any further than to say it 'is possible' or 'could be' that there is a causal connection between the accident and the injury for which compensation is sought. However, such testimony is not entirely without value if there be other evidence from which the trial judge may reasonably infer that the injury did result from the accident that the experts say 'could be' the cause of the injury."[62]

The opinion states that there was such other evidence in this case—the testimony of the injured employee that the shock was the only head injury he had ever suffered in his life. However, the evidence also permitted the reasonable inference that there was no casual connection. Under these circumstances, the reviewing court will not disturb the findings of the trial judge that the claimant had failed to carry the burden of proof that the injury arose out of and in the course of his employment.

Bush Bros. & Co. v. Williams[63] and *Armstrong Construction Co. v. Sams*[64] are notable for the limitations placed on the need for medical testimony in establishing such factors as extent and permanency of disability. In each instance the judgment of the lower court awarding compensation for permanent total disability was affirmed. In the *Bush* case the employee testified that he injured his back while lifting a heavy piece of pipe which resulted in his continuing inability to perform physical labor, the only work he was qualified to perform. The testimony of company doctors who examined and treated him indicated a lumbo sacral strain, which in all probability resulted from a congenital weakness in the back, and the employee's ability to perform his work by wearing a brace. The Supreme Court, in an opinion by Justice Swepston, found substantial material evidence of both causation and disability. The predisposition to a weak back would not be any reason for denying compensation. The trial judge was not bound to accept the statements of the doctors about the ability of the claimant to go back to work by wearing a brace. "[H]e was entitled to determine from all of the evidence in the case, both expert and non-expert, the extent of the disability, that is whether partial or permanent, and if partial, what amount."[65] In the *Armstrong* case there were medical witnesses on each side but the only one who was an orthopedic specialist testified for the employer that claimant had

62. *Id.* at 86.
63. 273 S.W.2d 137 (Tenn. 1954).
64. 270 S.W.2d 561 (Tenn. 1954).
65. *Supra* note 63, at 139.

not suffered a total and permanent injury. This factor was accorded no significance in the opinion of the Supreme Court by Chief Justice Neil. The testimony of lay witnesses, as well as all the medical witnesses, was looked to in finding support for the lower court's findings.

Injury by Accident in the Course of Employment: The "in course of employment" element in workmen's compensation is concerned with examining the employee's relationship to his employment in terms of time, place and conduct when the accidental injury is incurred. *Jones v. Corder*,[66] already discussed, is of equal significance under this heading. In that case, however, a discussion of this phase would simply parallel the causal connection aspect.

Bennett v. Vanderbilt University[67] establishes some new law in the state on this aspect of workmen's compensation. The decision places Tennessee with the minority of jurisdictions in holding that an injury on a parking lot maintained by the employer is not in the course of the employment. The employee was walking to her car in the employers' parking lot, located across the street from her place of employment, where without cost she was permitted but not required to park. She tripped over a timber placed in the lot to separate lines of cars, suffering serious injury. In an opinion by Justice Swepston, the Supreme Court affirmed the action of the trial judge in dismissing the petition for compensation. Although the precise point had not been decided before, the opinion treats the decision in *Smith v. Camel Mfg. Co.*[68] as stating the controlling principles. That case did not involve an accident on any premises or property of the employer but on a public sidewalk. In it the Supreme Court of Tennessee had rejected the "so close" concept as bringing a person within the course of his employment for purposes of the statute. This rejection of the "so close" concept in the *Camel Manufacturing* case was coupled with this dictum: "unless there were some special considerations as the requirement of use of a special road or way, of if the manner of travel or the way of travel was within the contemplation of the contract of employment."[69] The court treats this as stating a general rule on "going and coming" from an employee's home to the place where he actually performs the duties of his job. In its broader implications this decision would appear to be against a rather overwhelming weight of authority in its conception of "premises."[70] Specifically, as to injuries on parking lots owned and maintained by the employer for his employees, the usual rule would treat these as injuries on the premises of the employer.[71] "If the employee works for a college, the premises is the

66. 196 Tenn. 478, 268 S.W.2d 359 (Tenn. 1954).
67. 277 S.W.2d 386 (Tenn. 1955).
68. 192 Tenn. 670, 241 S.W.2d 771 (1951).
69. *Id.* at 678, 241 S.W.2d at 774.
70. See 1 LARSON, WORKMEN'S COMPENSATION §§ 15.10, 15.14, 15.41 (1952).
71. 1 *id.* § 15.14.

entire campus."[72] The minority view on parking lots with which the Tennessee court agrees is developed in a number of Michigan cases cited in the opinion. No point is made in the opinion of the location of the lot across a city street or the fact of its use by other than employees.

Misconduct and Refusal of Medical Examination: Hoodenpyle v. Patterson[73] involved the application of that section of the Tennessee Workmen's Compensation Statute which disallows compensation for injury or death due to the employees wilful misconduct.[74] The employee in this instance was working as a coal miner in a "room" where it had been noted that a part of the roof was in dangerous condition. He was killed by the fall of a large rock from the roof. The general foreman testified that on the day before the accident he had instructed the deceased not "to shoot any more coal" in that part of the room or load any more coal under the loose rock without timbering it up. The foreman in charge on the day of the accident testified that he told the deceased at 2:30 p.m. to get his tools and go home because of the roof condition, and that deceased said he would and brought his tools toward the entry. At quitting time, thirty minutes later, deceased was found dead under the rock at the back of the "room" near a car which had been partly loaded. The trial judge found for the widow, and the Supreme Court affirmed. Justice Tomlinson's opinion points out that the affirmative evidence was that the employee had violated no instructions of his supervisor on the day prior to the accident, and on the day of the accident the evidence as to his stated intention and the taking of his tools toward the entry permitted the inference that he was not loading coal at the time of the accident. There was testimony to the effect that it was impossible to say what deceased was doing when killed. The element of deliberateness in the statutory requirement of "wilful" misconduct as opposed to accident, negligence, inadvertence or mere thoughtless act, coupled with the burden of proof on the employer invoking such a defense, results in the court seeing no basis for disturbing the findings of the trial court.

Pee Wee Coal Co. v. Hensley,[75] raises but does not decide whether or not an injured employee's mental illness would excuse non-compliance with the statutory provision, which states he "must submit" to a physician's examination when "requested" by the employer.[76] The lower court had found total and permanent disability for the claimant coal miner upon whom a very heavy slab had fallen. It had found a refusal on part of the injured employee to submit to medical examina-

72. 1 *id.* § 15.41.
73. 277 S.W.2d 351 (Tenn. 1955).
74. TENN. CODE ANN. § 6861 (Williams 1934).
75. 268 S.W.2d 367 (Tenn. 1954).
76. TENN. CODE ANN. § 6875 (Williams 1934).

tion after a certain date but rejected a defense on this ground since his mental condition was such that he was incapable of making a decision to refuse or accept. The Supreme Court affirmed in an opinion by Justice Tomlinson but did not find it necessary to decide whether compensation payments are suspended by the refusal of a mentally ill employee to submit to a requested medical examination:

> "The declining of an *offer* of such further medical attention as 'the petitioner deemed necessary or wished' is not *the refusal of a request* for further medical examination. An offer is not a request. Therefore, this defense interposed by the answer did not authorize the suspension of the payments required by the statute if Hensley were otherwise entitled thereto. This requirement of the statute is contrary to common law. It 'must, therefore be strictly construed, so as not to impose upon the plaintiff any further obligation than is expressly required.' "[77]

Third Parties and Subrogation: In *Majors v. Moneymaker*[78] the plaintiff and defendant in a negligence action were fellow employees, who were injured while driving in defendant's car in the course of their employment. Each received workmen's compensation payments on behalf of the employer for injuries suffered in the accident. Plaintiff and her husband brought separate actions to recover damages from the defendant for the same accident. A plea in abatement was filed in each case in which it was averred that the plaintiff and defendant were bound by the workmen's compensation law, that the defendant was not "such other or third party or person" within the meaning of the statute as would permit her to be sued for negligence at common law, and that enforcement of the right of the plaintiff against her employer was the exclusive remedy against either the defendant or the employer. Plaintiff demurred to this plea alleging legal insufficiency for the reason that the defendant was not the plaintiff's employer "or such other person legally liable to pay Workmen's Compensation to her." The lower court sustained the plea in abatement and dismissed the suits. The Supreme Court affirmed in an opinion by Chief Justice Neil. The decision is based on Code Section 6859, which in general makes the rights and remedies under the statute exclusive, and an interpretation of Code Section 6865, which retains a common-law remedy against the negligent third party causing the death or injury of the employee. The statute states that this last shall be true when the injury "was caused under circumstances creating a legal liability against some person other than the employer. . . ." The court reasons that the negligence of the defendant in the course of her employment created a legal liability against her employer which renders Section 6865 inapplicable since it is limited to circumstances creating liability against some person other than the employer. The right of subrogation

77. *Supra* note 75, at 370.
78. 270 S.W.2d 328 (Tenn. 1954).

given by the section to the employer, or his insurance carrier, would, if plaintiff's construction were allowed, the court says, result in the anomalous situation of the employer recovering from the negligent fellow employee (the defendant) all sums paid as compensation to the plaintiff plus unlimited damages at common law. The opinion discusses and rejects as inapplicable the general treatment of the problem in Professor Larson's treatise on workmen's compensation.[79]

One aspect of the subrogation rights of the employer was dealt with in *Millican v. Home Stores, Inc.*[80] In this case the employee had been killed in an automobile collision with third parties. His widow gave a covenant not to sue and dismissed a suit with prejudice in making settlements of her claims against these parties without the consent of the employer for sums less than the amount available to her under the workmen's compensation statute. A compensation award to the widow for the statutory amount less that received from the third parties was affirmed by the Supreme Court in an opinion by Justice Tomlinson. The employer's claim that the widow's receipt of money from the third parties in settlement of alleged claims against them relieved it of liability is rejected. The old wording of Section 6865 had been interpreted in effect as requiring the injured employee or his dependents strictly to elect whether he would proceed against the employer or third persons.[81] The 1949 amendment to this section permitted the employee to receive compensation from the employer and proceed against a third party at the same time, with the employer to the extent of his interest having a lien on the employee's recovery or settlement and being entitled to assignment of the claim against the third party under described circumstances. The employer's obligation to the widow in *Millican* decision is unaffected by her settlements, the court says, because the language of Section 6865, as amended, by necessary implication authorizes the employee to settle without suit—"by judgment, settlement or otherwise, the employer shall be subrogated." Hence the employer remains fully liable for compensation subject to a deduction for the amount received under the settlements. It is observed that it is unlikely that the question will be presented frequently since settlements with third parties for less than the amount recoverable under the workmen's compensation statute will rarely be made.

Statute of Limitations: Section 6884 (1) of the Tennessee Code sets a one year statute of limitations "after the occurrence of the injury" for proceedings to be instituted by the employee. Section 6874 bars a claim "unless within one year after the accident resulting in injury"

79. 2 LARSON, WORKMEN'S COMPENSATION §§ 71.00-77.30 (1952).
80. 270 S.W.2d 372 (Tenn. 1954).
81. Walters v. Eagle Indemnity Co., 166 Tenn. 383, 389, 61 S.W.2d 666, 668 (1933).

notice is given the employer and a claim filed with the proper tribunal. To harmonize the differences in the statutory wording the rule has been propounded in Tennessee that the statute of limitations runs from the date of injury rather than the date of accident.[82]

In *Johnson v. United States Fidelity and Guaranty Co.*,[83] the application of Tennessee law in a federal case resulted in the suit being barred. The accident occurred on December 8, 1952, and the employee was treated in employer's clinic, by a specialist and hospitalized. He was away from work for four months. The employee signed an insurance paper in which he stated that his injury was a possible ruptured disc in his back. Suit was filed fifteen months and twenty-two days after the accident. He had continued to work in the meantime although the injury was apparently severe. He brought suit after being discharged. The court, in an opinion by Judge Taylor, found that he had actual or constructive notice of his condition from the date of signing the insurance paper and that the doctors and the employer had not fraudulently concealed the nature of his injury from him. *Netherland v. Mead Corp.*[84] was treated as controlling.

Wilson v. Van Buren County[85] involved the running of the statute in an occupational disease case. The employee, who worked in a quarry, developed pneumoconiosis in 1949 and then became permanently disabled in September, 1952. He instituted suit within sixteen days after receiving an X-ray report from the State Department of Public Health stating that his condition had been diagnosed as silicosis. The latter disease is compensable under the Tennessee statute while pneumoconiosis is not. Section 6852 of the Tennessee Code provides that an employee has an occupational disease when the disease or condition has developed to such extent that it can be diagnosed as an occupational disease. The one year statute begins to run "after the beginning of incapacity for work" resulting from the disease. The lower court's denial of compensation on the ground that the notice and suit had not been timely was reversed by the Supreme Court in an opinion by Special Justice White. Plaintiff had no cause of action prior to his discovery in September, 1952, that he had an occupational disease listed in the statute, namely silicosis. The employee was not required to commence suit prior to actual or constructive knowledge on his part that he had a compensable disease. He brought suit sixteen days after such knowledge in this case. His knowledge of or concerning the results of a non-compensable occupational disease are not regarded as having any bearing on the question.

Hutto v. Benson[86] was discussed in the 1954 Survey. It held that the

82. Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947).
83. 126 F. Supp. 84 (E.D. Tenn. 1954).
84. 170 Tenn. 520, 98 S.W.2d 76 (1936).
85. 268 S.W.2d 363 (Tenn. 1954), 8 VAND. L. REV. 161.
86. 212 F.2d 349 (6th Cir. 1954); see Wade, *Conflict of Laws—1954 Tennessee*

Tennessee statute of limitations applied to the injury of an employee in a foreign jurisdiction (Texas), but that Tennessee would look to the law of the place of injury in order to determine when a cause of action would accrue.

Occupational Disease: In addition to *Wilson v. Van Buren County,* discussed above in the *Statute of Limitations* section, the occupational disease aspects of the Tennessee statute were involved in *Housley v. American Mutual Liability Co.*[87] This case raised a question as to when an employee could be said to have an occupational disease for purposes of the statutory barring of coverage of such diseases which an employee has on the effective date of this amendatory act.[88] The employee in question was working for the employer on March 12, 1947, the effective date of the amendatory act. He died in 1951 of silicosis, a listed disease, which was not suspected until a month before his death. The statute says that the employee has the occupational disease when the condition has developed to the extent that it can be diagnosed as such and that the burden is on the employee as to the coverage after the 1947 amendment. In the *Housley* case the Supreme Court affirmed a judgment of the trial court awarding compensation to the widow with an opinion by Chief Justice Neil. The evidence is taken to support a finding that the presence of the occupational disease could not have been diagnosed prior to the effective date of the amended act and that deceased was exposed at his employment to conditions conducive to the contraction of silicosis. He was exposed to such conditions for years before 1947 but exposure to silicia does not necessarily result in silicosis. There was no evidence that he had actually contracted the disease prior to that time, or that he was aware of silicosis or that it could have been diagnosed as such during that period. In fact, the employee's condition was not such as to suggest any serious disability until 1950 and then he was diagnosed and treated for tuberculosis by eminent medical authorities up until thirty days before his death.

Degree of Disability and Computation of Benefits: Tibbals Flooring Co. v. Brewster[89] raises once more the question of the degree of disability when injury is limited to a specific member covered in the schedule set forth in Code Section 6878.[90] In this case the employee's arm was severely cut while operating a power saw and because of pain he lost the use of it. He was qualified to perform manual labor only. The lower court awarded compensation for total and permanent disability and the Supreme Court affirmed in an opinion by Chief Justice Neil. "It cannot be doubted but that where there is an injury to a specific member there can be no award for total and permanent

Survey, 7 VAND. L. REV. 755, 758-61 (1954).
87. 270 S.W.2d 349 (Tenn. 1954).
88. TENN. CODE ANN. § 6852 (d) (Williams Supp. 1952).
89. 270 S.W.2d 323 (Tenn. 1954).
90. See particularly TENN. CODE ANN. § 6878(c) (Williams 1934).

disability unless the injury affects the body to such an extent that he is not able to earn a living."[91] There was medical testimony to the effect that the employee was suffering a 100 per cent disability and, for the defendant, to the effect that he was not a one-armed man and that the injured arm was better than if he had no arm at all. The court's opinion states that the issue is one of fact and that there is material evidence to support the findings of the trial judge. In this case the court is applying what has been termed the *Plumlee* doctrine.[92] The crucial point in such a case apparently is the factual determination as to the effect of the injury being limited to the particular member.

In *Hartley v. Liberty Mutual Ins. Co.*,[93] the only question related to the method of computing the injured employee's average weekly wage for purposes of the compensation statute. Code Section 6852(c) carries a definition of "average weekly wages" which in general provides for dividing earnings by weeks worked making allowance for days "lost" by the employee in excess of seven. In the *Hartley* case the employee had been laid off eight weeks due to the making of repairs to the work premises, and he had been out on strike for sixteen weeks. The lower court deducted the eight weeks but refused to deduct the sixteen weeks before dividing the earnings of the year to arrive at an average weekly figure. This method is affirmed by the Supreme Court in an opinion by Chief Justice Neil. "The average weekly wage of an employee should not, and is not, decreased for reasons over which he has no control, such as closing a plant for repairs, . . . occasional 'suspension of operations due to bad weather, unforeseen shortage of material, lack of orders, lack of cars, slack season' . . . . It is observed that all of the foregoing are occasions and conditions resulting in the cessation of operations by the employer. . . . But a strike, in which the injured employee voluntarily participates, does not fall within the same category."[94] *New Jellico Coal Co. v. Kenner*,[95] is cited as the leading case for this position. Its principle has not been overruled and it is not violative of Article 1, Section 8 of the Tennessee Constitution or the Due Process and Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States. This holding seems to penalize an employee for engaging in an activity which, so far as the case indicates, was perfectly lawful and in accordance with a basic right of employees.[96] Further it would seem to be inconsistent with the underlying purpose of the section, which, apparently, is not to punish or reward the employee for his past conduct but to arrive at a fair

91. *Supra* note 89, at 324.
92. Plumlee v. Maryland Cas. Co., 184 Tenn. 497, 201 S.W.2d 664 (1947); *cf.* Adams Constr. Co. v. Cantrell, 195 Tenn. 675, 263 S.W.2d 516 (1953).
93. 276 S.W.2d 1 (Tenn. 1955).
94. *Id.* at 3.
95. 172 Tenn. 185, 110 S.W.2d 476 (1937).
96. See Sections 7 and 13 of the National Labor Relations Act, 49 STAT. 452, 457 (1935), as amended, 29 U.S.C.A. §§ 157, 163 (Supp. 1954).

approximation of his probable future earning capacity within the period covered by the award.[97]

Other cases during the survey period involving calculation of benefits are *Allen v. Atlas Boot Co.*[98] and *Oakley v. Nashville, C. & St. L. R.R.*[99] The latter case was filed under the Federal Employers Liability Act by the widow and guardian of two minor children of a deceased employee of the railroad. A proposed settlement was made subject to the approval of the trial court in which the case was pending. The court did approve the settlement and the funds were paid into court by the railroad, the question of distribution of the net funds between the widow and the children being reserved. The court later ordered distribution "in accordance with the Tennessee Statutes of Descent and Distribution." This was found in error by the Supreme Court in an opinion by Justice Tomlinson. Under the federal statute, the widow and children are entitled to such sums as they might reasonably have expected to receive for support from respectively the husband and the father during minority. The widow insisted here on a proportion based on her life expectancy and children's proportions in terms of remaining years of minority; the Supreme Court found that the fact stipulation filed showed an intent of the parties to distribute in proportion to losses sustained under the federal statute. Hence the lower court erred in using the Tennessee Statute of Descent and Distribution. Since the claim in question is one lodged in the widow and children by the statute and is not an asset of the deceased employee's estate, the decision would seem to be eminently sound.

Scope of Review: In *Atlas Powder Co. v. Leister*,[100] the employer appealed from an award of compensation to an injured employee by the circuit court. It was argued that there was no material evidence to support the finding below and that the evidence preponderated against the finding. In this last connection the employer urged that, by the general provision in Section 10639.1 of the 1950 Code Supplement, the reviewing court must determine whether the evidence preponderates against the lower court judgment since no jury was had. The Supreme Court rejected this argument in an opinion by Justice Burnett. Code Section 6885, a part of the Workmen's Compensation Statute since 1919, permits the Supreme Court to review the evidence only to the extent of determining whether the fact findings of the trial court are supported by any material evidence. Section 27.1 of the 1950 Code Supplement makes Section 13 of the 1932 Code applicable to the supplement and that section states that if provisions of different chapters of the code appear to contravene each other, the provisions

97. See 2 LARSON, WORKMEN'S COMPENSATION § 60.12 (1952).
98. 268 S.W.2d 108 (Tenn. 1954).
99. 268 S.W.2d 110 (Tenn. 1954).
100. 274 S.W.2d 364 (Tenn. 1954).

of each chapter shall prevail on questions growing out of the subject matter of that chapter. Code Section 10639.1 is in a chapter entitled "Practice of the Supreme Court" and Section 6885 is in a chapter entitled "Workmen's Compensation Law." The question here being that of practice in the Supreme Court not generally but that of a workmen's compensation case, Section 6885 would necessarily prevail over any conflicting provision in Section 10639.1. Special provisions prevail over general ones. The trial court's findings were found to be supported by material evidence. The credibility of the witnesses is for the trial judge's determination.