Vanderbilt Law Review

Volume 12
Issue 4 *Issue 4 - October 1959*

Article 17

10-1959

Labor Law and Workmen's Compensation--1959 Tennessee Survey

Paul H. Sanders
Vanderbilt School of Law

J. Gilmer Bowman, Jr.
National Labor Relations Board

LABOR LAW AND WORKMEN'S COMPENSATION—1959 TENNESSEE SURVEY

PAUL H. SANDERS*
J. GILMER BOWMAN, JR.**

* * *

I. LABOR LAW

A. Labor Injunctions

As it has been in the two preceding survey years, the question of state jurisdiction to deal with a labor dispute was of major importance during the current period. Congress has provided in the Labor-Management Reporting and Disclosure Act of 1959 for the elimination of the so-called "no man's land" between federal and state authority over labor disputes affecting interstate commerce.[1]

* Professor of Law, Vanderbilt University.
**Office of the General Counsel, National Labor Relations Board, Washington, D.C. The views expressed are those of the authors and do not necessarily represent those of any Department or agency of the United States Government.

1. National Labor Relations Act § 14, added by 61 Stat. 136 (1947), as amended, 29 U.S.C. § 164 (1952), is amended by adding the following new subsection:
"(c) (1) The [National Labor Relations] Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

In so doing, it has been made clear that the National Labor Relations Board is to maintain its exclusive jurisdiction over such problems at the level of the standards prevailing on August 1, 1959. The new statute thus may be viewed as accepting and giving even firmer legal foundation to the doctrine of federal pre-emption in this area. Stated very generally, this means that state courts do not have jurisdiction in the first instance to regulate by injunction or otherwise conduct "arguably" subject to the National Labor Relations Act because protected or prohibited by the statute.[2]

This federal occupation of the field of regulation of labor relations affecting interstate commerce, accompanied by the vesting of primary jurisdiction in a specialized agency, does not extend to the state's traditional concern with the maintenance of order and protection of persons and property against violence, even though such incidents are intermingled with a labor dispute. Nevertheless, the latest articulation by the Supreme Court of the United States of the guiding principles for demarcation between federal and state authority indicates in sweeping terms the broad scope given to this primary jurisdiction of the NLRB.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the Taft-Hartley Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. [Footnote omitted] Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.
>
> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations

---

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." Pub. L. No. 86-257, 86th Cong., 1st Sess. § 701 (Sept. 14, 1959). Previously the pre-emption doctrine barred state court action even when the NLRB declined jurisdiction. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

2. The latest pronouncement, which includes a full-scale review of prior decisions and an enunciation of controlling principles in applying the doctrine of federal pre-emption in San Diego Building Trades Council v. Garmon, 79 S.Ct. 773 (1959). Citations to prior leading cases and law review treatments of this topic can be found in 12 VAND. L. REV. 287-91 (1958). See also 7 VAND. L. REV. 422 (1954).

> Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.[3]

The one Tennessee appellate court decision during the survey period dealing with the foregoing subject raises important questions as to the scope of the pre-emption doctrine. While the determination of these questions will undoubtedly be influenced in some degree by the subsequently decided *Garmon* case, it does not appear that they have been affected directly by the new federal labor legislation. In *Aladdin Indus. v. Associated Transp.*[4] the court of appeals (middle section) considered the case on remand from the Supreme Court of the United States which had vacated the 1956 judgment of the Tennessee court.[5] The Tennessee Court of Appeals previously had affirmed lower court decrees punishing truck driver employees of carriers and their labor union for contempt in violating a mandatory injunction requiring the trucking companies to continue customary service to a manufacturing plant despite the picket line of another union. In the current survey period decision, the Tennessee Court of Appeals again affirms the decrees of the chancellor punishing for contempt on the ground that the subject matter was not pre-empted by federal law, and on the additional ground that, in any event, the chancellor had jurisdiction to determine his own jurisdiction and to issue a temporary injunction preserving the *status quo* pending such determination. As this is written, the case is again pending before the Supreme Court of the United States on petition for certiorari.

The mandate of the United States Supreme Court in the above case, after vacating the previous judgment, called for its reconsideration in light of the same court's outright reversal of another Tennessee Court of Appeals decree in the *Kerrigan Iron Works* case.[6] Although the previous *Aladdin* decision had treated the *Kerrigan* decision by the same court as embodying essentially the same principle, the present opinion by Judge Felts points to two "obvious and important" differences. The first is with respect to "differences in parties, pleadings and issues in the main suits" in that in *Aladdin* the suit was against the carriers alone while in *Kerrigan* the suit was against both the carriers to require continuation of service and the labor union

3. San Diego Building Trades Council v. Garmon, 79 Sup. Ct. 773, 779 (1959).

4. 323 S.W.2d 222 (Tenn. App. M.S. 1958).

5. Aladdin Indus. v. Associated Transp., 298 S.W.2d 770 (Tenn. App. M.S. 1956), *vacated* and *remanded sub nom.*, McCrary v. Aladdin Indus., 355 U.S. 8 (1957).

6. Teamsters' Union v. Kerrigan Iron Works, Inc., 353 U.S. 968 (1957), *reversing* Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc., 296 S.W.2d 379 (Tenn. App. M.S. 1956). See, Sanders and Bowman, *Labor Law and Workmen's Compensation—1957 Survey*, 10 VAND. L. REV. 1110, 1111-12 (1957).

representing truck drivers to enjoin alleged "conspiracy" and "illegal boycott" in refusing to cross the picket line of another union at the company's plant. The second difference, as the *Aladdin* opinion states it, is: "Kerrigan was the main suit and these were ancillary . . . ." "Appellants [in *Aladdin*] did not seek any orderly review, but flouted the temporary injunction as void and defied the court as a usurper." "Defendants [in *Kerrigan*] respected the authority of the court to try the case, and brought up its final decree for direct review by appeal."[7]

The two differences quoted are treated as crucial in the two separate grounds used by the court to support its conclusion. The court finds the controlling principle of federal pre-emption in the following language from the decision of the Supreme Court of the United States in *Weber v. Anheuser Busch, Inc.*[8]: "[W]here the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the Federal act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction . . . ." In concluding that the subject matter of these cases was not withdrawn from state power, the opinion of the Tennessee Court of Appeals stresses that the question must be determined upon the state of the case at the time the lower court assumed jurisdiction and issued a temporary injunction. The state of the pleadings, that is the parties named and the averments of the original bill in *Aladdin* as contrasted with *Kerrigan,* is treated as controlling the propriety of state court jurisdiction. "Thus, when they became guilty of contempt, the only pleading was the bill which contained no averment to take the case out of state power or to make a case pre-empted by federal authority."[9] Furthermore, the court advises that even under supplemental pleadings allegations related to "acts of contempt, not of acts of 'concerted activities' under § 7 of the federal Act, or of a union 'unfair labor practice'. . . ."[10] Since the truck drivers had testified that each was acting individually in refusing to cross the other union's picket line they are estopped, the court declares, from contending that such conduct was "concerted activity" under section 7 of the federal act.

While concluding that the subject matter was not withdrawn from state power, the opinion gives equal stress to the point that the injunction, even if erroneous, must be obeyed until set aside by the court granting it or by an appellate court. The court discusses the

7. All three quotations can be found at 323 S.W.2d 222, 226 (1958).
8. 348 U.S. 468, 481 (1955).
9. 323 S.W.2d 222, 227 (1958).
10. *Ibid.*

distinction between a court order that is absolutely void and binding on no one and an order that is only voidable or erroneous. The opinion quotes with approval from the decision in *United States v. United Mine Workers of America,*[11] and states its principle in the following language:

> Where a court has general equity jurisdiction and its action is invoked by proper pleadings upon a matter fairly debatable, at least not obviously outside such jurisdiction, the court has authority to determine the issues, including that of its own jurisdiction, and to grant a temporary injunction or stay order to preserve the *status quo* pending such determination, and to punish for contempt disobedience of such order or injunction.[12]

On the petition to rehear, Judge Felts discusses and distinguishes the several previous Tennessee decisions whose language had indicated that the orders of a court acting without jurisdiction are void.[13]

If the first ground in this opinion is examined against the principles set forth in the subsequent *Garmon* decision by the Supreme Court of the United States, it is difficult to reconcile the approaches taken, particularly since it now seems to be clear that the initial determination as to whether conduct is subject to the federal act is reserved exclusively for the National Labor Relations Board. Furthermore, it seems doubtful that the problem will be determined by the state of the pleadings or the particular point of time in a case at which it becomes clear that a labor relations problem is involved. It is more likely that the nature of the substantial question presented will ultimately be held to be the determining factor, that is, it will be held that the primary jurisdiction of the National Labor Relations Board attaches at that point where it becomes clear to the state or federal court that its processes are being invoked or utilized to regulate what is essentially a labor dispute. This point might be when original relief is sought or it might not become apparent until some subsequent development in the case. Primary jurisdiction in a federal administrative agency is not precluded by an original proper acquisition of jurisdiction by some state or federal court.[14]

The other ground in the Tennessee Court of Appeals opinion, namely, that an injunction, however erroneous, should be obeyed until set aside by appropriate court action, is supported by much authority, the most impressive of which would seem to be the decision of the Supreme Court of the United States in the above mentioned *United Mine Workers* case. The principle may be simply stated that

11. 330 U.S. 258 (1947).
12. 323 S.W.2d 222, 229 (1958).
13. 323 S.W.2d 231, 235 (1958).
14. Thompson v. Texas-Mexican Ry., 328 U.S. 134 (1946). See 4 DAVIS, ADMINISTRATIVE LAW § 19.01 (1958).

normally it is better that even erroneous court orders be obeyed, than that they be openly flouted and that the regular procedures for appeal be utilized to correct the allegedly erroneous action. If the Supreme Court of the United States should decide to review this question under the circumstances of the present case it would be faced with something of a dilemma. The approach of the Tennessee court is consistent with the *United Mine Workers* precedent but the high court would have to consider the extent to which state courts might utilize such an approach to avoid the principle announced in the cases establishing federal pre-emption. On the assumption that the vast majority of state courts would feel obliged to follow conscientiously the guidelines set forth in the *Garmon* case, it would appear the better policy to permit a state court to issue enforceable orders pending a determination of its authority to act in some of the doubtful areas that will of necessity exist along the boundary line between federal and state jurisdiction. Extensive use of this particular power to avoid the impact of the federal pre-emption doctrine where clearly applicable, with accompanying rationalization for the exercise of state power over labor relations problems, might lead to the curtailment of even this useful and desirable ground for upholding exercise of state court authority.

B. Check-off

Section 302(a) of the Labor-Management Relations (Taft-Hartley) Act of 1947[15] makes it unlawful for an employer to pay money to a labor organization representing his employees. Section 302(c) of the same statute states that the provisions of the section are not applicable "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or upon the termination date of the applicable collective agreement, whichever occurs sooner . . . ."[16] Two cases during the survey period involved suits by unions against employers to enforce check-off provisions contained in collective bargaining agreements.

In *Murtha v. Pet Dairy Prod. Co.*,[17] the court ruled against the claim of the union with respect to some 234 employees who revoked their check-off authorizations between the expiration date of one collective agreement and the execution of a new contract several months later. In the case of eighteen employees whose notices of revocation of

15. § 302 (a), 61 Stat. 136 (1947), *as amended,* 29 U.S.C. § 186 (a) (1952).
16. § 302 (c), 61 Stat. 136 (1947), *as amended,* 29 U.S.C. § 186 (c) (1952).
17. 314 S.W.2d 185 (Tenn. App. E.S. 1957).

check-off authorization were received and honored by the company after the date of the new contract, the court held that the company was under a contractual duty to comply with the provisions of the new agreement for the effective period of the authorizations. Prior to the expiration date of the previous contract (May 31, 1955) approximately all of the companys' employees were members of a local of the Teamsters' Union and each employee had prior to such date signed and filed a form of check-off authorization furnished by the local union which contained this paragraph:

> This authorization and assignment shall be irrevocable for the term of applicable contract between the union and the company, or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, unless I give written notice to the company and the union at lease 60 days and not more than 75 days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.[18]

The company and the local labor union had entered into a written contract for period of one year from June 1, 1954 to May 31, 1955. Under article 1, section 4 of this written contract it was provided:

> The Employer agrees to deduct from the pay of all employees covered by this agreement dues, initiation fees and/or uniform assessments of the Union having jurisdiction over such employees and agree to remit to said Union all such deductions. Where laws require written authorization by the employees, the same is to be furnished by the Union in the form required. No deduction shall be made which is prohibited by applicable law. Dues to be deducted shall be four dollars ($4.00) and shall remain at this amount until the majority shall vote otherwise.[19]

A new written contract was not executed until October 27, 1955, but the parties had agreed orally in July, 1955, to continue the provisions of the old contract in effect until a new contract could be negotiated. The company continued to comply with the check-off provisions of the contract until the latter part of July, 1955, when it started receiving written notices from certain employees revoking their check-off authorizations and of their resignations from the union. The company continued to receive these revocations durmg Augnst, September, October and November, 1955, and as these were received the company discontinued deducting union dues in accordance with the revocations. Article 1, section 4 of the new contract between the parties provided:

> The Company agrees to deduct from the first pay check each month of each employee who is a member of the Union, dues, initiation fees, and/or uniform assessments of the Union and agrees to remit to the Union all of such deductions on or before the 20th day of each month,

18. *Id.* at 187.
19. *Ibid.*

> provided the employees have filed proper written authorization for such a check-off. No deduction shall be made which is prohibited by applicable law. Dues to be deducted shall be four dollars ($4.00) and shall remain at this amount until the majority of the Union members shall vote otherwise at a duly called meeting.[20]

The bill brought by the union alleged that the company violated article 1, section 4 of the agreements by honoring revocations which had been executed contrary to the terms of the check-off authorizations; and that these attempted revocations were not terminated in conformity with the terms of the authorization because required notice was not given "at least 60 days and not more than 75 days before any periodic renewal date." The chancellor sustained the bill in all respects and awarded treble damages pursuant to *Tennessee Code Annotated* section 47-1706. The court of appeals for the eastern section reviewed the record de novo. It affirmed the decree below except as to treble damages and the dues of the 234 employees whose revocations were received in the period before the execution of the new contract. As to these, the court said that any attempt to make the provisions of the new contract applicable would be ineffective. Furthermore, during this period it would have been impossible for these employees to have given the advance notice of revocation as required by the terms of the authorization because they were unable to determine either the "termination date" of the verbal agreement or the "periodic renewal date" of the new contract. Since neither of the fixed dates for revocation were ascertainable, the court was of the opinion that the authorizations during the period of oral extension were revocable at will. On the other hand, the eighteen employees who did not send in their revocation until after the new contract was signed had not taken effective action to revoke. The court reasons that as to these, the employees in question were members of the union on and before the execution date of the new contract. Furthermore, they had previously signed and filed with the company authorizations providing automatic renewals. These authorizations were irrevocable for the term of the applicable contract, or for one year, whichever occurred sooner, and were by specific reference made an integral part of the agreement. The court concluded that as to these employees the conditions of article 1, section 4 of the new agreement had been met and the company was under a contractual duty to deduct dues accordingly. The court found the provision for treble damages under *Tennessee Code Annotated* section 47-1706 inapplicable. On the petition to rehear, the court modified that portion of the decree which had awarded specific performance

20. *Ibid.*

which question was considered to have been rendered moot by the expiration of the second agreement.

In *United Steelworkers of America v. Knoxville Iron Company*,[21] the union's suit to enforce the check-off provisions of a labor agreement was met by the contention that the agreement in question violated provisions of the Tennessee "right to work" law and was therefore unenforceable. The United States District Judge sustained this contention of the company and held that the union was not entitled to any of the relief it sought because of the illegality of the check-off provision. The contract in question as summarized in the opinion had a provision for the deduction and remission of union dues and initiation fees for employees from whom an authorization had been received. The same section of the contract provided that all employees who were members of the union in good standing when the contract was executed and those becoming members after that date "shall as a condition of employment, maintain their membership in the union in good standing as to payment of dues and initiation fees for the duration of this agreement. Each new employee hired thereafter shall sign and furnish to the company at the time of his employment an application card for membership in the union . . . ."[22] This section of the agreement further provided that the application for union membership was not to become effective until thirty days after employment and employee was given not less than fifteen days and not more than thirty days after the date of his employment to mail to the company a written notice of his decision not to become a member of the union.

The facts in the case as stated in the court's opinion indicated that during the term of a contract entered into on April 3, 1956, the company received and recognized notices received from many of its employees indicating withdrawal from the union and revocation of authorization to check off union dues. The facts do not indicate that any employee was denied employment or terminated from his employment and the issue before the court was solely whether or not the check-off provisions of the agreement should be enforced by requiring the company to continue to deduct union dues from employees' wages in accordance with written authorizations received from such employees.

The court's opinion quotes fully the sections of the *Tennessee Code*[23] which make it unlawful to deny or attempt to deny employment because of affiliation or nonaffiliation with a labor union. The court also refers to the several decisions of the Tennessee Supreme

21. 162 F.Supp. 366 (E.D. Tenn. 1958).
22. *Id.* at 368.
23. TENN. CODE ANN. §§ 52-208 to -210 (1956).

Court interpreting the state's "right to work" statutes and giving them effect in "spirit" as well as "letter." The court also states that construction of the state statutes by the Tennessee Supreme Court is binding on the federal courts. Turning to the provisions of the contract in question, the court's opinion finds that the section which the union is attempting to enforce by this suit, viewed as a whole, makes union membership a "prime factor" in securing work. The court concludes: "When viewed from a realistic standpoint and read in relation to that part of the contract that requires payment of Union dues to maintain employment, the result is inescapable that a person must join the Union and pay Union dues in order to procure and maintain employment. This violates the letter and spirit of the above quoted Tennessee statutes."[24] The court then concludes that it is not possible to sever the portions of the union contract found to be invalid because it is of the opinion that the entire relief sought by the union is based on the illegal provision of the contract.

C. Arbitration

Two decisions of the United States Court of Appeals for the Sixth Circuit during the survey period relate to arbitration of labor disputes in Tennessee. In *A. L. Kornman Co. v. Amalgamated Clothing Workers of America*[25] the appellate court with one judge dissenting upheld the action of the federal district court in enforcing an arbitration award against the named company relating to vacation pay. The federal district court had concluded that jurisdiction had been conferred upon it by section 301 of the Labor Management Relations Act of 1947.[26] The district judge had concluded further that the award had been rendered pursuant to the authority conferred upon the arbitrator by the collective bargaining agreement; that the company's refusal to abide by the award was a violation of the terms of the agreement; and there being no dispute as to any material fact, that the union was entitled to a judgment enforcing the award.

The opinion by Circuit Judge Martin rejects the position of the company that jurisdiction of the United States District Court cannot be invoked for the purpose of enforcing the award for the reason that it rests upon individual claims of employees and not upon the collective agreement with the union. The opinion discusses and distinguishes the decision of the Supreme Court of the United States in *Association of Westinghouse Salaried Employees v. Westinghouse*

24. 162 F.Supp. 366, 371 (1958).
25. 264 F.2d 733 (6th Cir. 1959).
26. 61 Stat. 136 (1947), *as amended*, 29 U.S.C. § 185 (1952).

Electric Corp.[27] The opinion quotes extensively from the prior decision of the Sixth Circuit in *Local 19 v. Buckeye Cotton Oil Company*[28] which held that *Westinghouse* was not controlling in an action brought to enforce arbitration provisions of a collective bargaining agreement. The opinion goes on to indicate that the subsequent decision by the Supreme Court of the United States in *Textile Union Workers v. Lincoln Mills*[29] suggests agreement by the high court with the principles enunciated in the *Buckeye Cotton Oil Co.* decision. The majority opinion recognizes that the *Kornman* case goes further than *Lincoln Mills* in that the arbitration has been completed and the union seeks enforcement of the award that has been granted in its favor by means of a suit for money judgment in an amount identical with that of the award.

The dissenting judge finds the case indistingnishable from *Westinghouse* and therefore concludes that the district court did not have jurisdiction. The dissent considers the *Lincoln Mills* decision inapplicable because it sought merely to enforce an agreement to arbitrate and did not deal with the collection of unpaid compensation to various individual employees. As this is written the case is pending on application for certiorari before the Supreme Court of the United States.

This case illustrates the continuing difficulties that will be experienced if full weight as precedent must be given both to the *Westinghouse* decision and the subsequent decision in *Lincoln Mills.* In the first case Mr. Justice Frankfurter, because of a desire to avoid what he would have regarded as an unconstitutional conferring of jurisdiction on the federal court, construed section 301 of the Taft-Hartley Act as not being applicable to suits by unions to enforce claims of individual employees for wage payments due under collective agreement. The subsequent *Lincoln Mills* decision which held that federal courts were given jurisdiction by section 301 of Taft-Hartley to enforce agreements to arbitrate reflects a rejection of the basic approach utilized in *Westinghouse.* This is best illustrated, perhaps, by noting Mr. Justice Frankfurter's dissent in *Lincoln Mills.* While there are a number of federal court decisions which have attempted to give continued effect to the *Westinghouse* limitation on the power of federal courts to enforce collective agreements,[30] the present decision of the Sixth Circuit may be taken as indicating the lack of vitality in the *Westinghouse* precedent subsequent to the *Lincoln Mills* pro-

27. 348 U.S. 437 (1955).
28. 236 F.2d 776 (6th Cir. 1956), *cert. denied,* 354 U.S. 910 (1957).
29. Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).
30. Textile Workers Union v. Cone Mills Corp., 166 F.Supp. 654 (M.D.N.C. 1958), *rev'd,* 6 CCH LAB. L. REP. ¶ 65,587 (1959); United Steel Workers v. Pullman Standard Car Mfg. Co., 241 F.2d (3rd Cir. 1957).

nouncement insofar as the enforcement of arbitration agreements are concerned.

In *United Steelworkers of America v. American Manufacturing Co.*,[31] the Sixth Circuit Court of Appeals upheld the action of the United States District Court for the Eastern District of Tennessee denying relief to a labor union which sought to compel a manufacturer to arbitrate a grievance, in accordance with the provisions of a collective bargaining agreement between the parties. The grievance in question resulted when an employee, who had suffered work-connected injury and who had obtained a court approved compromise settlement of his workmen's compensation claim, applied to be returned to his job with the company. At the time of his application he submitted a physician's statement which declared that the employee in question "is now able to return to his former duties without danger to himself or to others." In connection with the negotiation for a settlement of the employee's claim under the Workmen's Compensation Act of Tennessee, a statement from the same physician (dated approximately a month earlier) had been utilized. It had been to the effect that the employee had a permanent partial disability to his spine of about twenty-five per cent. The order of the Hamilton County circuit court which had approved the compromise lump-sum settlement made reference to a dispute between the parties as to the duration and extent of the employee's disability but the order had made no finding with respect to these items.

The company had first taken the position that the employee's grievance protesting the refusal of the company to return him to work was not arbitrable because the Hamilton County circuit court had "adjudicated the matter." According to the opinion of the Sixth Circuit Court of Appeals, the federal district judge had refused relief in the suit brought by the union under section 301(a) of the Taft-Hartley Act,[32] on the principle of estoppel in that it was thought to be inequitable for the employee "by repudiating the very conduct by which he induced the [company] to act, to take a position inconsistent with such conduct and compel the [company] to incur a loss."[33]

The contract between the parties contained a provision for a grievance procedure including the statement that if a satisfactory agreement with respect to a complaint cannot be reached through the procedure "the same shall be submitted to arbitration for a decision as hereinafter provided and such decision shall be final and

31. 264 F.2d 624 (6th Cir. 1959).
32. 61 Stat. 136 (1947), *as amended*, 29 U.S.C. § 185(a) (1952).
33. 264 F.2d 626.

binding upon both parties."[34] Other quoted portions of the contract relating to grievance procedure and arbitration indicate a very broadly worded contract in this respect.

The appellate court states that the question of whether an issue is arbitrable under a collective bargaining agreement is a question of law for the determination of the court and if the grievance is arbitrable under the provisions of the agreement, the union has the right to a court order requiring the employer to arbitrate, citing *American Lava Corp. v. Local Union 222*.[35] The court next declares that arbitration could not be denied as a matter of law in this case on the ground that the issue had been adjudicated by the Hamilton County circuit court. The approval of the compromise settlement, the court points out, included no adjudication as to the extent of the disability, "the question of estoppel may be involved, but the nature and extent of Sparks' injuries were not judicially determined."[36] The court then declares that it is obliged to affirm the judgment of the trial court if it is correct even though it acts for reasons different from those relied upon by the trial judge. The court finds this good reason for refusing the union relief in its conclusion that the claim or grievance of the employee was so frivolous and patently baseless as to prevent the existence of an arbitrable issue. The court's principle reliance for this conclusion is the alleged lack of probative value in the statement of his physician as to his ability to return to his former duties without danger to himself or others when viewed against other statements made in connection with the workmen's compensation claim. The court's thinking on this point is illustrated by the following:

> The statement that Sparks could return to work 'without danger to himself or to others' falls far short of saying that he could return to his former position with 'ability and efficiency' equal to that of other employees, which is necessary in order for him to claim his seniority rights under Article XIV. In fact, considered in the light of the allegations of the complaint as amended in the Workmen's Compensation case, the kind of work Sparks would be required to do, and the findings in the three physical examinations made of Sparks during the preceding thirty-three days, it is so lacking in probative value with respect to the issue in this case as to compel the conclusion that the so-called claim or grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties.[37]

It will be noted that the action of the company in refusing to return the grievant to work in this case was claimed to be a discharge

34. *Id.* at 627.
35. 250 F.2d 137 (6th Cir. 1958).
36. 264 F.2d 626.
37. *Id.* at 628.

without adequate cause, prohibited by the bargaining agreement. What the appellate court does amounts to imposing its own judgment as to the merits of the claim that is made rather than allowing it to be processed through the machinery the parties have established. The opinion assumes that what has been said and done in the course of negotiations with respect to a workmen's compensation claim is to be fully controlling in determining the altogether different question of termination of employment for cause. Furthermore, the court seems to be of the opinion that the actual existence of some percentage of permanent disability is necessarily determinative of the issue of adequate cause for discharge. The opinion seems to confuse the question of ability and efficiency which may be involved in some seniority claims under the collective agreement with the question of the right of an employee to continue in the employment relation. There is certainly no general obligation on an employer to continue a person in his employ when he is not physically able to perform the job duties required. This situation would not be changed by a contract requiring "good cause" for discharge. What was said or done during the course of negotiating the settlement of a workmen's compensation claim might throw light on such a question. It would appear, however, to be a matter that would require a full hearing in the specific case directed toward ascertaining the reasonableness of the company's action in refusing continued employment to a previously disabled employee. The approach of the court in the instant case precludes the possibility of such a hearing. It thus has the effect of deciding rights under the collective bargaining agreement without a hearing exploring the existence or non-existence of such rights.

D. Vacations

In *Miller v. Blue Ridge Glass Corporation*[38] the United States Court of Appeals for the Sixth Circuit in a per curiam opinion affirmed the judgment of the United States District Court which had dismissed an action by members of a local labor union seeking to recover vacation pay for the year 1955. The employees in question had received certain vacation pay in 1955 under the terms of a collective bargaining agreement, the vacation provisions of which had been executed in 1949. The vacation provision in question required an employee to work from February 1 to November 30 of the current year and a certain number of hours in the preceding calendar year. The vacation pay for those qualifying was a percentage of the earnings of the preceding calendar year. The matter in dispute was whether the vacation pay received in 1955 under the terms of the

38. 264 F.2d 634 (6th Cir. 1959).

above agreement was for 1954 or 1955. The company claimed that the payment in 1955 was for that calendar year, whereas the employees' claim was that the vacation pay received in a particular period was for the previous year because based on the earnings of that previous year. The appellate court examines in detail the company's method of payment and upholds its argument that the vacation pay received in 1955 by the employees was for that calendar year.

There would seem to be little question but that the result reached here would be in accordance with normal approach. The reference to the earnings of the preceding year obviously is only for the purpose of measuring the amount of vacation pay, since most of the other conditions relate to circumstances which must occur within the calendar year in which the vacation is paid.

II. Workmen's Compensation

The Tennessee Workmen's Compensation Law[39] received both legislative and judicial consideration during the survey year. In one enactment[40] the General Assembly increased the maximum weekly benefits from 32 dollars to 34 dollars and the maximum benefits under the statute from 11,000, to 12,500 dollars. The maximum medical benefits were increased to 1,800 from 1,500 dollars, and compensation paid for temporary partial disability may no longer be deducted in determining the amount due under the schedule for permanent partial disability. Finally, a new occupational disease provision was added to the list of compensable diseases.[41]

A second act[42] requires an employer to furnish any medical report provided him as the result of a medical examination of an injured employee to the employee upon request or, in the employer's discretion, to the employee's attorney or a member of his family.

A third act[43] authorizes counties having a population between 220,000 and 224,000 according to the 1950 Federal Census, or any subsequent Federal Census, to provide workmen's compensation insurance for, or to pay from ordinary funds, any claims of county employees which have accrued or may accrue and are submitted within two years of the date of accrual for personal injury or death

39. Tenn. Code Ann. § 50-1001 (1956).
40. Tenn. Code Ann. §§ 50-1004 (Supp. 1959).
41. Tenn. Code Ann. §§ 50-1007, 50-1008, 50-1010, 50-1011, 50-1013, and 50-1101 (Supp. 1959). The new occupational disease, numbered 10, is: "Beryllium and heavy metal poisoning and diseases or conditions caused by exposure to ionizing radiation from sources inside or outside the body. Heavy metals as used in this paragraph shall include all elements (or compounds thereof) with an atomic number of 80 or above." Tenn. Code Ann. § 50-1101 (Supp. 1959).
42. Tenn. Code Ann. § 50-1004 (Supp. 1959).
43. Tenn. Priv. Acts 1959, ch. 9.

arising out of and in the course of their employment. The governing body of such a county is authorized to make awards based on these claims following an investigation and public hearing, and the decisions of the governing body are final. But no award may be approved or paid in excess of that provided by the Workmen's Compensation Law.

1. Covered Employment.—American Sur. Co. v. City of Clarksville[44] made it clear that in Tennessee a minor employed in violation of the Child Labor Laws[45] may, through his representative, maintain an action against the employer for work-connected injuries or death either under the Workmen's Compensation Act or at common law.[46] A fourteen-year-old schoolboy employed during his summer vacation by the board of education on behalf of the city was killed by lightning while performing his duties on landscape projects on school grounds. Neither the city nor the school board had obtained an employment certificate for him, and his representative instituted actions both for workmen's compensation and for common law damages. The insurer brought this suit for a declaratory judgment. It had issued two insurance policies. One, a standard workmen's compensation and employer's liability policy, provided coverage for actions for workmen's compensation generally but only where brought by legally employed persons. The other, a standard comprehensive general liability policy, excluded from its coverage any liability for any employee's work-connected injury or death. The result of the court's opinion was that the insurer might be liable for workmen's compensation under the policy providing that coverage but not for common law damages under either policy since the workmen's compensation policy excluded liability to those illegally employed and the comprehensive policy excluded liability for a work-connected claim of any "employee." The court regarded the term "employee" in the insurance contract as unambiguous and generic, thereby including persons legally or illegally employed.

The court did not intimate an opinion as to whether the infant's death by lightning was an injury by accident arising out of his em-

44. 315 S.W.2d 509 (Tenn. 1958).

45. TENN. CODE ANN. § 50-701 (1956).

46. The Tennessee Supreme Court noted its previous holdings that an infant legally or illegally employed under the Child Labor Laws was not bound to accept the benefits of the Workmen's Compensation Act but could repudiate the employment contract and maintain an action for damages at common law. Western Union Tel. Co. v. Ausbrooks, 148 Tenn. 615, 257 S.W. 858 (1924); and Manning v. American Clothing Co., 147 Tenn. 274, 247 S.W. 103 (1922). Both cases involved actions for common law damages for work-connected injuries, and the court noted that in the *Ausbrooks* case it had intimated by way of dicta that the minor might seek either workmen's compensation or common law damages.

ployment or excluded from workmen's compensation coverage under the doctrine of *Jackson v. Clark & Fay, Inc.*[47] But the court did suggest that the infant probably was not a casual employee since the statutes and rules applying to the school board might well require it to maintain the physical plants and grounds of the schools as part of its regular business or duties. This is essentially the test for determining whether or not employment is casual or in the regular course of the trade, business, or professional occupation of the employer. The court pointed out that it is the nature of the employment, not its frequency or duration, which determines whether employment is casual.[48] Nor is the amount of wages paid the employee or the length of his employment determinative of the question.[49] That an employee of a public school system engaged in maintaining the plant or grounds of a school should not be considered casual would not be surprising.[50]

2. Injury by Accident Arising Out of Employment.—Basically, to be eligible for workmen's compensation benefits, a covered employee must suffer an injury by accident arising out of and in the course of his employment. According to the majority rule and the rule in Tennessee, the "by accident" requirement is met if the cause of the injury was of an accidental nature or if the effect was the unexpected result of routine performance of the job.[51] But an injury must not only be accidental to be compensable, it must also be connected with the employment. The phrase "arising out of" embodies the concept of a causal relationship between the injury and the employment,[52] and the phrase "in the course of" relates to the question of whether the injury occurred within the period of employment at a place where the employee might be expected to be.[53]

The employee in *Martha White Bakeries, Inc. v. Vance*[54] was a

47. 197 Tenn. 135, 270 S.W.2d 389 (1954); Sanders and Bowman, *Labor Law and Workmen's Compensation—1955 Tennessee Survey*, 8 VAND. L. REV. 1037, 1044-46 (1955).

48. Citing Parks v. E. M. Carmell Co., 168 Tenn. 385, 79 S.W.2d 285 (1935).

49. Citing Brady v. Reed, 186 Tenn. 556, 212 S.W.2d 378 (1948).

50. See Smith v. Lincoln Memorial Univ., 304 S.W.2d 70 (Tenn. 1957); Sanders and Bowman, *Labor Law and Workmen's Compensation—1958 Tennessee Survey*, 11 VAND. L. REV. 1287, 1295-96 (1958).

51. See, *e.g.*, Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182 (1953); Central Sur. & Ins. Corp. v. Industrial Comm'n, 84 Colo. 481, 271 Pac. 617 (1928); Bussey v. Globe Indem. Co., 81 Ga. App. 401, 59 S.E.2d 34 (1950); Brown's Case, 123 Me. 424, 123 Atl. 421, 60 A.L.R. 1293 (1924); 1 LARSON, WORKMEN'S COMPENSATION § 38.00 (1952).

52. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 72-182 (1944); 1 LARSON, WORKMEN'S COMPENSATION §§ 6.00-36.00 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION §§ 1542-43 (3d ed. 1948); 7 *id.* §§ 1617-1693 (3d ed. 1950).

53. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION 668 (1947); 1 LARSON, WORKMEN'S COMPENSATION § 14.00 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION § 1542 (3d ed. 1948).

54. 322 S.W.2d 206 (Tenn. 1959).

truck driver who fell to the ground from his truck and immediately afterward began having back pains with a swelling of his extremeties beginning later the same day. This led to the discovery that he had been suffering from cirrhosis of the liver. He subsequently underwent operations for hernia and removal of the spleen, but the pains attributed to the cirrhosis of the liver continued. One doctor testified that a fall such as he had suffered would put a strain on the liver; that a strain on the liver could result in the emergence of the symptoms of cirrhosis of the liver; and that the brief period of time between the fall and the emergence of the symptoms was some indication of a connection between the fall and the active appearance of the disease. The court affirmed an award of compensation for permanent partial disability of seventy-five per cent to the body as a whole on the ground that a causal connection with the employment had been sufficiently established.[55]

Two cases, one in the Tennessee Supreme Court[56] and one in a federal district court,[57] followed the usual rule in the state,[58] and the majority rule,[59] that an injury resulting from ordinary and usual exertion at work is compensable. In each case the employee had a heart condition, had engaged in somewhat strenuous activity in the performance of his work (though the rule does not require that the exertion be strenuous or unusual), had died of heart failure while working or almost immediately afterward, and there was medical testimony that the strain of the work had caused the death or had contributed to it. In these circumstances, the courts had no difficulty in finding that the deaths resulted from accidental injury arising out of employment.

3. Injury by Accident in the Course of Employment.—Timmerman v. Kerr Glass Mfg. Co.[60] involved a compensation suit for the death of a travelling salesman which occurred while he was driving over a weekend from the city where he was temporarily located to the city which was the base of his operations. According to his employer's policies, he would normally have remained in the temporary location but special permission had been given to make the trip. The court

55. Citing McCann Steel Co. v. Carney, 192 Tenn. 94, 237 S.W.2d 942 (1951) as similar on the question of causation.
56. Nashville Pure Milk Co. v. Rychen, 322 S.W.2d 432 (Tenn. 1958).
57. Sweat v. U. S. Fid. & Guar. Co., 169 F. Supp. 155 (E.D. Tenn. 1959).
58. Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182 (1953); Cunningham v. Hembree, 195 Tenn. 107, 257 S.W.2d 12 (1953); Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).
59. See, *e.g.*, Central Sur. & Ins. Corp. v. Industrial Comm'n, 84 Colo. 481, 271 Pac. 617 (1928); Bussey v. Globe Indem. Co., 81 Ga. App. 401, 59 S.E.2d 34 (1950); Brown's Case, 123 Me. 424, 123 Atl. 421, 60 A.L.R. 1293 (1924); 1 LARSON, WORKMEN'S COMPENSATION § 38.00 (1952).
60. 314 S.W.2d 31 (Tenn. 1958).

affirmed a denial of compensation on the ground that: "What this employee was doing at the time of the accident was not reasonably necessary for his health and comfort."[61] The court likened the case to cases in which employees deviate for personal reasons from the route they are travelling on their employer's business. They are regarded as having temporarily left their employment until they return to the route.[62] On this basis, the case would appear to be in accord with the majority rule.[63]

On the other hand, the court upheld a compensation award in *Gregory v. Porter*[64] against the employer's defense that the employee was killed while engaged in a purely personal mission. The employee was returning in his employer's automobile to the city where he lived and worked after delivering an automobile to another city for his employer, an automobile dealer. Such trips were a regular part of his duties, and he was on the route he usually travelled between the points involved though there were two routes available. He had told his wife that he expected to return home that evening and would call if he could not do so. He never called.

The court held that employees whose duties require them to travel are entitled to compensation for injuries received from hazards incident to the travel.[65] And in response to the employer's defense that the employee was on a personal mission, the court said: "Certainly there is a presumption that the deceased was on his way home to be with this family and there is nothing to rebut the position that he was on a business errand and was not on a mission purely personal in nature. See in this connection T.C.A. § 59-1038."[66] This case is readily distinguishable from the *Timmerman* case, of course, on the ground that in the instant case the employee was travelling as part of the performance of his job whereas in *Timmerman* there was no indication that the travel was undertaken at the employer's instigation or for his benefit.

A federal district court refused to award workmen's compensation in *Anderson v. Royal Indem. Co.*[67] At the time of the accident, the plaintiff was the manager of a beauty salon which rented space on the second floor of a large department store. She entered the store

61. 314 S.W.2d at 33.
62. Underwood Typewriter Co. v. Sullivan, 196 Tenn. 238, 265 S.W.2d 549 1954); Lumberman's Mut. Cas. Co. v. Dedmon, 196 Tenn. 94, 264 S.W.2d 567 (1951).
63. Sanders and Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 871 (1954).
64. 322 S.W.2d 591 (Tenn. 1959).
65. Citing Lumberman's Mut. Cas. Co. v. Dedmon, 196 Tenn. 94, 264 S.W.2d 567 (1951); Central Sur. & Ins. Corp. v. Court, 162 Tenn. 477, 36 S.W.2d 907 (1931).
66. Gregory v. Porter, 322 S.W.2d 591, 592 (Tenn. 1959).
67. 169 F. Supp. 122 (E.D. Tenn. 1958).

by an entrance of her own choice, though she would have been required to use a particular entrance had she come to work earlier, and she was injured by a fall on her way to pick up items on the first floor of the store which she used in her business. The court properly relied on Tennessee precedent[68] in disposing of the case on the ground that the employee was not within the very narrow confines of the Tennessee rule permitting recovery for injuries an employee receives from hazards incident to a particular route which is necessary or required by the employer for entrance to the premises.

The court apparently did not view any part of the store except the area rented by the employer as part of the premises, even though items used in the employer's business were stored elsewhere in the building and the employee was on her way to pick them up when she was injured. However, in view of the Tennessee Supreme Court's repeatedly avowed distaste for the "so close" rule[69] as well as its tendency to limit the concept of an employer's premises,[70] there seems little doubt but that the federal court correctly followed the precepts of the state court.

But the court's dislike of the "so close" rule and its tendency toward a narrow view of what constitutes an employer's premises can be overcome, as demonstrated by *Mallette v. Mercury Outboard Supply Co.*,[71] the case of "the bathtub incident." A night watchman of a marina operated on a barge was found to have injured his back at work several nights before he fell on steps connecting the barge with the bank of the lake in which it was anchored. The employee was hospitalized as a result of the fall and was severely injured in the hospital by an attendant's efforts to overcome his resistance during a bath he did not want to take.

The court, ultimately relying on local precedent,[72] held that the original injury to the back as a result of the fall occurred in the course of employment inasmuch as the steps were regarded as part of the premises of the employer as a matter of law. Though the steps were not built by the employer, they were used only for the purposes of his business, were the only reasonable means of getting to and from the barge anchored in the lake at the foot of a bluff, and were expected to be used by both employees and patrons of the marina. There are intimations in the opinion that the steps were

68. Smith v. Camel Mfg. Co., 192 Tenn. 670, 241 S.W.2d 771 (1951).

69. James v. Sanders Mfg. Co., 310 S.W.2d 466 (Tenn. 1958); Bennett v. Vanderbilt Univ., 198 Tenn. 1, 277 S.W.2d 386 (1955); Smith v. Camel Mfg. Co., 192 Tenn. 670, 241 S.W.2d 771 (1951).

70. Bennett v. Vanderbilt Univ., 198 Tenn. 1, 277 S.W.2d 386 (1955).

71. 321 S.W.2d 816 (Tenn. 1959).

72. Citing Little v. Johnson City Foundry & Mach. Co., 158 Tenn. 102, 11 S.W.2d 690 (1928).

unusually dangerous, but this should not be regarded as a controlling element in determining liability, and it is questionable that the court would ordinarily consider it a requisite to recovery.[73]

The court also held that the injuries resulting from "the bathtub incident" arose out of and in the course of the employment even though they were an aggravation of a pre-existing injury and caused by a third party. The problem was regarded as analogous to an aggravation of compensable injuries through the malpractice of a physician, which had previously been held to be compensable,[74] since the bath was an incident connected with the treatment for which the employee had been placed in the hospital. Apparently the court did not view the employee's resistance to the bath as sufficient to break the chain of causation from the original injury, and the holding in the case would appear to be in accord with the majority rule.[75]

4. Aggravation of a Pre-existing Condition.—The employee in *Eslinger v. Miller Bro. Co.,* [76] became overheated at work and then became completely disabled from hardening of the arteries (arteriosclerosis). The doctor who examined him initially said he had suffered a heat stroke, but another doctor who had examined him indicated that he had probably suffered heat exhaustion rather than a heat stroke, which he said was usually fatal. He also testified that the overheating could have temporarily aggravated the arteriosclerosis, but that it was not a permanent aggravation.

The court, noting it had held a work-connected injury resulting from heat prostration or exhaustion compensable,[77] reversed a denial of compensation on the ground that if the overheating had aggravated the pre-existing arteriosclerosis in any degree, it could not be regarded as temporary since the employee had remained disabled. The court apparently felt that the employee had established a prima facie case by showing an injury which could have excited or aggravated a pre-existing condition which could be disabling and that he had been disabled since the injury, thus shifting the burden of going forward with the evidence to the employee, who failed to carry it.[78]

Coleman v. Coker[79] involved an employee who died of a heart attack at work only a few days after being hired. He had had a

73. See in this connection, James v. Sanders Mfg. Co., 310 S.W.2d 466 (Tenn. 1958), where the Court rejected the application of the "so close" rule but seemed to hint that a different result would be reached if the sidewalk next to the employer's premises were hazardous.

74. Revell v. McCaughan, 162 Tenn. 532, 39 S.W.2d 269 (1931).

75. 1 LARSON, WORKMEN'S COMPENSATION § 13.21 (1952).

76. 315 S.W.2d 261 (Tenn. 1958).

77. Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).

78. In this connection, the court relied on Boyd v. Young, 193 Tenn. 272, 246 S.W.2d 10 (1951); and Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).

79. 321 S.W.2d 540 (Tenn. 1959).

heart condition and had been advised by a doctor not to work or drink alcoholic beverages. However, though for eighteen months he had done everything else he had been told, he had not stopped working. The court held that an employer takes an employee as he is and is liable for a work-connected injury or death resulting from an aggravation of a pre-existing condition.[80]

Though the employer contended that the employee's death was due to his wilful misconduct, the court found that such misconduct was not involved. The doctor had not specifically forbidden him to work or, knowing he was continuing to work, had not warned him against it. In discussing the concept of wilful misconduct, the court made this rather colloquial, but effective statement:

> A study of the cases in which the defense has been asserted over the Country, unsuccessfully, shows that although what the employee did was prohibitive that his acts were instinctive or thoughtless rather than intentional and deliberate and thus it does not comply or come within the willful rule. The term needs no further discussion because the word within itself signifies what is meant, that is, regardless of what an employee is told he goes on "hell-bent for election" anyhow.[81]

5. Second Injury Fund.—The employee in *Stovall v. General Shoe Corp.*[82] had injured her back and spine in a work-connected injury and had agreed to a settlement which the trial court approved. Before the court entered its judgment, the employee amended her petition to charge a prior loss of use of a leg which, coupled with the back and spine injury, rendered her totally and permanently disabled. A subsequent amendment sought an award from the second injury fund in addition to that obtained from the employer. The custodian of the fund demurred, and the lower court granted a discretionary appeal from its overruling of the demurrer.

The pertinent statutory provision reads:

> *Subsequent permanent injury after sustaining previous permanent injury—Estimation of compensation—'Second injury fund' created—Payments to—Disbursements from.*—If an employee has previously sustained a permanent disability by reason of the loss of, or loss of use of, a hand, an arm, a foot, a leg, or an eye and becomes permanently and totally incapacitated *through the loss, or loss of use of another member,* . . . such employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the 'second injury fund' herein created. (Emphasis added.)[83]

The custodian of the fund contended that the italicized textual

80. Citing Swift & Co. v. Howard, 186 Tenn. 584, 212 S.W.2d 388 (1948).
81. Coleman v. Coker, 321 S.W.2d 540, 542 (Tenn. 1959).
82. 321 S.W.2d 559 (Tenn. 1959).
83. TENN. CODE ANN. § 50-1027 (1956).

language did not include the back as "another member," thereby precluding liability in this case. The Supreme Court of Tennessee agreed with the trial court that this was too narrow a reading of this remedial statute. This approach appears to be in accord with the purpose of a second injury fund, *i.e.*, to remove the disadvantages handicapped workers might otherwise encounter in obtaining and retaining employment.[84] Though the court thus affirmed the trial court's action in overruling the demurrer, it reprimanded the lower court in no uncertain terms for granting a discretionary appeal because of its overruling the demurrer:

> Demurrers are generally not favored as a pleading either at law or in equity. Moreover there is a special reason for discouraging demurrers in all Workmen's Compensation cases and for granting a discretionary appeal in such cases. The policy of the law is for a speedy trial of the issues of liability and to this end they are advanced on the docket for trial. In all such cases where the trial judge grants a discretionary appeal to his action in overruling a demurrer the result is a long delay in the final decision of the case with injurious consequences to the injured employee.[85]

6. Scope of Review.—The Tennessee court, in *Skelf v. Mitchell Industrial Tire Co.*,[86] reaffirmed its rule that in compensation cases it will not disturb the findings of the trial court if they are supported by any material evidence. And this approach to appellate review was followed by the federal court of appeals in *Sterchi Bros. Stores v. Walker*,[87] a per curiam affirmance of the judgment of the federal district court.

Dixie Sand & Gravel Corp. v. Holland[88] related to the application of the Longshoremen's and Harbor Workers' Compensation Act[89] to the death of a clean-up man who fell into a navigable river and drowned while inspecting barges moored at his employer's dock. It was not his custom to inspect the barges, but he had volunteered to do so because of the potential danger to the barges posed by the prevailing weather conditions.

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

---

84. 2 LARSON, WORKMEN'S COMPENSATION § 59.31 (1952).
85. 321 S.W.2d at 562.
86. 314 S.W.2d 761 (Tenn. 1958).
87. 264 F.2d 269 (6th Cir. 1959).
88. 255 F.2d 304 (6th Cir. 1958).
89. 44 Stat. 1424-46 (1927), *as amended*, 33 U.S.C. §§ 901-50 (1952), *as amended*, 33 U.S.C. §§ 906-44 (Supp. IV, 1957), *as amended*, 33 U.S.C. §§ 906-44 (Supp. V, 1958).

It had been administratively held[90] that this employee's duties were entirely on land and that the claim for compensation did not come within the provisions of the act. This decision was appealed to a federal district court, which held that the act applied and compensation was due. The federal court of appeals vacated this judgment and ordered the district court to remand the case for an administrative determination of whether the employee's death arose out of and in the course of his employment. The court held that this question initially could only be determined administratively, the courts being authorized merely to review the determination. Since there was no express administrative finding on the point and the administrative denial of compensation could have been based on an erroneous view of the coverage of the act, the case had to be remanded for a clarification of the administrative holding. The court intimated, however, that the death was compensable under the act as having arisen out of and in the course of the employment under circumstances bringing it within the coverage of the act. It had occurred on navigable waters of the United States and the employer had employees in maritime employment.

7. *Notice of Injury.*—The employee in *Farmer v. Blue Diamond Coal Co.*[91] met with an accident at work which caused abdominal pains. More than thirty days later he noticed a knot or protrusion in the abdominal region and then gave notice of injury to his employer. Though the statute requires the employee to give notice within thirty days from the date of injury, the court upheld a finding that the employee had a reasonable excuse for not giving the notice sooner since he did not realize he had been injured when the accident occurred. The fact that he had previously suffered a hernia was not regarded as sufficient to put him on notice that the pains he felt at the time of the accident were due to a hernia.

The statute requires that there must be proof that the hernia appeared "suddenly" and "immediately" after the accident,[92] and the court said,[93] "the construction of the words 'suddenly' and 'immediately' is given to mean not to be the instant following the accident but it means that it appears so soon after the injury that it would not be possible to attribute it to any other cause."[94] It added that the

90. The Longshoremen's and Harbor Workers' Compensation Act is administered by the Bureau of Employees Compensation, U. S. Department of Labor. Deputy commissioners of the bureau determine liability under the act, and their decisions are subject to judicial review.

91. 319 S.W.2d 479 (Tenn. 1958).

92. TENN. CODE ANN. § 50-1009 (1956).

93. 319 S.W.2d at 480.

94. Citing Etter v. Blue Diamond Coal Co., 187 Tenn. 407, 215 S.W.2d 803 (1948).

reasonableness of the excuse for failing to give the required notice is primarily for the trial judge to determine.

8. Increase in Disability.—*R. J. Reynolds Tobacco Co. v. Rollins*[95] was an action to increase a prior compensation award because of an increase in disability.[96] The court reversed the trial court's award of increased compensation on the ground that the evidence showed that the employee was in no worse condition than he had been originally. Though there may have been a mistake in the initial determination of the extent of the injury based on erroneous conclusions of fact, the error could not be corrected by a subsequent suit based on an allegation of increased disability "because such evidence of failure of the condition to improve is by no means proof of an increase in disability."[97]

9. Survival of Right to Benefits.—The court, in *Rose v. City of Bristol*,[98] viewed as well-settled by precedent[99] the question of the survival of an injured employee's right to compensation when he dies from another cause. In this case, compensation had voluntarily been paid until the time of the employee's death, but no award of or agreement to pay compensation had been made. Even if an award or agreement had been made, only the compensation due and payable at the time of death could have been collected by the personal representative of the deceased.[100]

The holding is based on the view that workmen's compensation payments are essentially a substitution of wages actually or theoretically lost by an injured employee and is in accord with the majority rule.[101]

10. Insurance.—In *Norton v. Hall*,[102] the court held that under an agreement entitled "Voluntary Plan For Granting Coverage to Uninsured Underground Coal Mine Risks In Kentucky and Tennessee"[103] an insurance company had made the coal mine rating bureau its absolute agent and could not refuse a risk assigned it by the bureau. The insurance company denied compensation liability on the ground that it had refused to accept the mine involved as an insurance risk because the mine was in a very poor condition. The court, however, found that the company could not refuse the assignment of the risk by the bureau when the latter had, pursuant to its authority under

95. 315 S.W.2d 1 (Tenn. 1958).
96. Such actions are provided for in TENN. CODE ANN. § 50-1025 (1956).
97. 315 S.W.2d at 4.
98. 315 S.W.2d 237 (Tenn. 1958).
99. Bry-Block Merc. Co. v. Carson, 154 Tenn. 273, 288 S.W. 726 (1926).
100. Marshall v. South Pittsburgh Lumber & Coal Co., 164 Tenn. 267, 47 S.W.2d 553 (1932).
101. 2 LARSON, WORKMEN'S COMPENSATION § 58.40 (1952).
102. 321 S.W.2d 553 (Tenn. 1958).
103. 321 S.W.2d at 554.

the agreement, determined that the mine was in good faith entitled to insurance and the requirements of the agreement had been met by the mine's representatives.

11. Statute of Limitations.—Norton v. Standard Coosa-Thatcher Co.,[104] concerned an employee who brought an action for workmen's compensation in August 1956 based on an occupational disease which had become disabling in April 1956. He alleged that breathing fumes at work had brought on cancer of the throat, which is not an occupational disease under the compensation statute. The action was terminated by a voluntary nonsuit in March 1957, and the following June he instituted another action alleging that the cancer was the result of an accident in February 1956. Thus both the alleged accident and injury occurred more than one year before the second action was brought.

The court, in reversing the judgment of the lower court, held that the new action was not barred by the one year statute of limitations.[105] It followed its usual rule[106] that the statute begins to run from the date the injury becomes manifest or reasonably should have been known (April 1956 in the instant case) rather than from the date of the accident (February 1956). The new action was treated as a permissible reinstitution or amendment of the prior action within one year from the date of the voluntary nonsuit.[107] The allegation of injury resulting from the accident would have been permitted as an amendment to the pleadings in the earlier action and would have related back to the date that action was originally filed, thus bringing it within the period allowed by the statute of limitations.

104. 315 S.W.2d 245 (Tenn. 1958).
105. TENN. CODE ANN. § 50-1003 (1956).
106. Citing Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955).
107. TENN. CODE ANN. § 28-106 (1956) provides:
"*New action after adverse decision not foreclosing merits.*—If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest."