Vanderbilt Law Review

Volume 16
Issue 3 *Issue 3 - June 1963*

Article 29

6-1963

Workmen's Compensation -- 1962 Tennessee Survey

J. Gilmer Bowman, Jr.

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Workers' Compensation Law Commons

Recommended Citation

J. Gilmer Bowman, Jr., Workmen's Compensation -- 1962 Tennessee Survey, 16 *Vanderbilt Law Review* 919 (1963)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol16/iss3/29

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Workmen's Compensation—1962 Tennessee Survey

*J. Gilmer Bowman, Jr.**

The Tennessee Supreme Court was again faced with a substantial number of workmen's compensation cases during the current survey year. Fewer of the cases than usual were concerned primarily with whether the decision below was supported by sufficient evidence. However, a number of them were illustrative of aspects of the statutory requirement that an employee suffer an injury by accident arising out of and in the course of his employment in order to be eligible for workmen's compensation benefits.

I. Scope of Coverage

Three cases decided during the survey year involved the question of whether the injured employee was covered by, and restricted to an action under, the workmen's compensation statute. In *Commercial Insurance Co. v. Young*,[1] the employer had only three employees and therefore was not presumed to have accepted the provisions of the statute. However, the employer had taken a workmen's compensation insurance policy from the insurance company and had paid the required premium. The policy made the insurance company liable to employees for workmen's compensation benefits as provided for by

*Office of the General Counsel, National Labor Relations Board, Washington, D.C. The views expressed are those of the author and do not necessarily represent those of any department or agency of the United States Government.

1. 209 Tenn. 608, 354 S.W.2d 779 (1962).

statute, and the premium had been determined on the basis of the estimated total annual remuneration of the employer's employees. The plaintiff sustained a work-connected accident 37 days after the effective date of the policy. Her employer told her that a workmen's compensation insurance policy was in effect, and she brought suit against both her employer and the insurance company. The lower court gave her an award against both, and the Tennessee Supreme Court affirmed the award. The insurance company contended, *inter alia*, that it was not liable because the employer had not properly manifested acceptance of the provisions of the statute. Section 50-906 of the Tennessee Code provides:

> Employments not covered—Election of coverage—Revocation of Election.—The Workmen's Compensation Law shall not apply to:
>
> . . .
>
> (d) In cases where less than five (5) persons are regularly employed, provided, however, that in such cases the employer may accept the provisions of this law hy filing written notice thereof with said Division of Workmen's Compensation at least thirty (30) days before the happening of any accident or death, and may at any time withdraw the acceptance by giving like notice of withdrawal.

The insurer argued that since the employer had not given notice of acceptance to the Division of Workmen's Compensation, no liability for the injury accrued. However, both the employer and the insurer had given the Division of Workmen's Compensation written notice of the injury, and the court found that the employer had intended and desired to accept coverage under the statute. The court stated:

> It will be noticed that the section provides that the employer *may* accept the provision of this law by filing written notice thereof with said division of the workmen's compensation at least thirty (30) days before the happening of any accident or death. This section does not prohibit the employer from accepting the provisions of this Act immediately without having to wait for the expiration of the thirty day period. It seems logical to us to hold that the thirty day period was allowed to an employer in order that it might procure the necessary insurance or furnish satisfactory proof of its financial ability to pay claims that might arise against it under said law as required under Section 50-1205 T.C.A.[2]

In its original opinion, subsequently withdrawn, the court had held that section 50-1205 was permissive rather than exclusive and that an employer was not prohibited from accepting the provisions of the statute "by other means or methods."[3] In its final opinion, the court stated: "The law will not permit the collection of a premium for

2. *Id.* at 621, 354 S.W.2d at 785.
3. 354 S.W.2d at 783 (advance sheet edition).

insurance without exposure to risk."[4] The decision[5] appears to be a reasonable interpretation of the statute and consonant with precedent.[6]

In *Pigg v. Stacey*,[7] the trial court had sustained a demurrer to a common law action for damages against an employer for the wrongful death of an employee who was killed on May 2, 1960. The employee was 18 years old at the time of his death and allegedly was illegally employed. The plaintiff also alleged that he had an election either to seek common law damages or workmen's compensation. Section 50-908(b) of the Tennessee Code defines "employee" to include a minor whether lawfully or unlawfully employed. However, that provision did not become effective until March 10, 1961 after the death of the employee. The supreme court held the amendment to be a substantive provision, rather than one involving a matter of remedy, and declared it prospective in operation. Therefore, the court reversed the decision below and remanded the case for further proceedings since prior to the 1961 amendment an illegally employed minor had an election as to whether to seek damages at common law or workmen's compensation for a work-connected injury.[8]

Cradic v. Eastman Kodak Co.[9] also involved a common law action for damages suffered by an employee as the result of a work-connected injury. However, the question presented in the federal district court action was whether the employee was a "loaned employee" so as to limit him to an action for workmen's compensation. Eastman Kodak had leased a piece of equipment from a company, and the company had supplied the plaintiff, one of its employees, to operate the equipment. According to the lease, and in fact, Eastman Kodak had the right to direct and control the details of the work, and at the time of the injury, the employee was operating the equipment on Eastman Kodak's premises. The federal court dismissed the case on the ground that the employee was a "loaned" or "borrowed" employee and therefore restricted to any remedy under the Tennessee workmen's compensation statute to which he might be entitled. The court held:[10]

> The prime test which is determinative of the issue is: "In whose work was the employee engaged at the time; i.e., whose work was being done"?

4. 209 Tenn. at 624, 354 S.W.2d at 786.
5. The court also held that the plaintiff-employee had the burden of proving that the employer had elected to accept coverage under the statute. *Id.* at 629, 354 S.W.2d at 788.
6. See Woods v. City of La Follette, 185 Tenn. 655, 207 S.W.2d 572 (1947).
7. 356 S.W.2d 593 (Tenn. 1962).
8. American Sur. Co. v. City of Clarksville, 204 Tenn. 67, 315 S.W.2d 509 (1958).
9. 202 F. Supp. 590 (E.D. Tenn. 1962), 30 TENN. L. REV. 287 (1963).
10. 202 F. Supp. at 591.

> Owen v. St. Louis Spring Co., 175 Tenn. 543, 136 S.W.2d 498, 499; Gaston v. Sharpe, 179 Tenn. 609, 613, 168 S.W.2d 784. Stated another way: "* * * At law, the well known test of the existence of the relationship of master and servant is whether the employer has the right or duty of directing the employee as to the details of his employment and when, as here, the question is in an action for negligent injury, the test of the employer's liability is whether it was his duty to instruct and direct the servant in the details of the particular 'means' or 'method' of employment, out of which the injury arose. Texas Co. v. Bryant, Com'r., 178 Tenn. 1, 152 S.W.2d 627"; The Tennessee Supreme Court "* * * has applied this principle, which is universally accepted, to the settlement of questions involving 'loaned servants' in a number of cases." McDonald v. Dunn Const. Co., Inc., supra, 182 Tenn. 213, pp. 220, 221, 185 S.W.2d 517, p. 520. Terry v. Memphis Stone and Gravel Co., 6 Cir., 222 F.2d 652, 653.

Since the court also found that Eastman Kodak had hired the employee as well as the equipment, the decision would appear to be in accord with the majority rule.[11] Although the court indicated that the employee could maintain a compensation action against either Eastman Kodak, the special employer, or against the lessor company, the general employer, the law in Tennessee appears to be that if an employee is found to be a "loaned" or "borrowed" employee, the general employer's compensation liability is suspended until the employee is returned.[12] However, the court's statements on that point were *dicta.*

II. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

An employee covered by the statute must sustain an "injury by accident" "arising out of" and "in the course of" employment in order to recover workmen's compensation. "Arising out of" is an expression relating to the causal connection which must exist between the employment (including its nature, conditions, obligations, and incidents) and the injury. Thus, the injury must be rationally connected with the work by something more than mere coincidence. "In the course of" is a phrase which requires consideration of whether or not an injury is reasonably incident to the employment in terms of the time, place, and conduct of the employee when the accident occurs. However, the two expressions are merely two parts of a single test. The principal question in approximately half of the cases decided during the current survey year concerned "injury by accident," "arising out of," or "in the course of."

11. 1 LARSON, WORKMEN'S COMPENSATION LAW § 48.00 (1952).

12. Kempkau v. Cathey, 198 Tenn. 17, 277 S.W.2d 392 (1955). See Sanders & Bowman, *Labor Law and Workmen's Compensation—1955 Tennessee Survey,* 8 VAND. L. REV. 1037, 1042-43 (1955).

A. *Injury by Accident*

In *Combustion Engineering Co. v. Blanks*,[13] the court affirmed an award of compensation to an employee whose tuberculosis of the back was aggravated by his lifting a heavy object at work. The employee felt a sharp pain at the time, and the tuberculosis was subsequently discovered. The court held that in view of its decision in *Boyd v. Young*,[14] in which an employee was awarded compensation because he aggravated a pre-existing cancer by picking up a heavy object, the injury in the instant case had to be held to be compensable.

One of the principal questions in *McKenzie v. Campbell & Dann Manufacturing Co.*[15] was whether a post-traumatic neurosis caused by a compensable injury to an employee's ankle was an injury by accident within the meaning of the statute.[16] The court held that a traumatic or post-traumatic neurosis is one which is occasioned by or results from an accident to the nervous system and that the employee had sustained such an injury as the result of the injury to his ankle. This would appear to be in accord with the uniform rule in such cases.[17]

B. *Injury by Accident Arising Out of Employment*

The case of *White v. Whiteway Pharmacy, Inc.*,[18] aptly illustrates the "arising out of" aspect of the work-connection test in the law of workmen's compensation. In the *White* case, the deceased employee was at her place of employment and engaged in her usual duties when her estranged husband, a former employee of the company, came in and began an argument with her about her seeing other men socially. The argument became heated, and he stabbed and killed her. The court held that there was no causal connection between the employee's employment and her death and that the fact that she was killed while she was at her place of employment was sheer coincidence. The case is in accord with the universal rule which is, according to Professor Larson, that: "When the animosity or dispute which culminates in an assault is imported into the employment from claimant's domestic or private life, the assault does not arise out of

13. 357 S.W.2d 625 (Tenn. 1962).
14. 193 Tenn. 272, 246 S.W.2d 10 (1951).
15. 209 Tenn. 475, 354 S.W.2d 440 (1962).
16. The other major question was when compensation for permanent partial disability should begin. The court held that the employee was entitled to benefits for temporary disability until such time as the extent of his permanent disability could be determined. In this connection, see the discussion of Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962) at text accompanying notes 50, 51 *infra*.
17. 1 LARSON, WORKMEN'S COMPENSATION LAW § 42.22 (1952).
18. 360 S.W.2d 12 (Tenn. 1962).

the employment under any test."[19]

The dismissal of a widow's suit for workmen's compensation was affirmed in *Knight v. Berkline Corp.*[20] The health of the plaintiff's husband had gradually deteriorated over the years to the point that he was transferred to the job of night watchman, the job at which he worked until he was discharged. Apparently (the opinion does not specifically indicate) he died after his employment ceased. Nor does the opinion indicate the cause of his death. The court did state, however, that the deceased's physician testified that he was suffering from arteriosclerosis and cardiac failure and that the deceased's activities at home would have contributed as much to the acceleration of his condition as would his night watchman's work. The court held that there was material evidence that the deceased's death was not the result of any disease or condition connected with his work, and, from those facts which can be gleaned from the opinion and surmise based on the case relied on by the court,[21] the case would appear to have been properly decided.[22]

The injured employee in *Maryland Casualty Co. v. Miller*[23] was assisting in installing acoustical tile in a ceiling when dust and other material fell on exposed portions of her body, causing them to become irritated and swollen and resulting in contact dermatitis. Thereafter, she became totally and permanently disabled by panniculitis and matomyositis.[24] These conditions developed only at the places where the dermatitis had occurred; prior to the injury, the employee had been in excellent health. The causes of panniculitis and matomyositis are unknown, but the employee's personal physician testified that, in his opinion, her disabling condition resulted from the contact dermatitis which had continued on into the other conditions. Other doctors were of the opinion that the dermatitis was unrelated to the other conditions but admitted that there was medical authority to support the position that the dust and other substances which had fallen on her could have caused her condition. The court affirmed an award of compensation on the ground that it was not mere

19. 1 LARSON, WORKMEN'S COMPENSATION LAW § 11.21 (1961).

20. 358 S.W.2d 323 (Tenn. 1962).

21. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961) (employee suffered injury by accident by virtue of work's causing repeated trauma to a nerve which resulted in disability).

22. The court also held that because the company had not complied with TENN. CODE ANN. § 50-1017(2) (1956), the suit was not barred by the statute of limitations even though it was not filed until four years after deceased's death.

23. 358 S.W.2d 316 (Tenn. 1962).

24. According to the court, "Panniculitis is a condition which involves the breaking out of the fatty tissues of the body, and possibly also the nerve tissues. Dermatomyositis involves inflammation and destruction of the muscle tissues of the body. Both are rare conditions, for which no cure is known." 358 S.W.2d at 317.

speculation or conjecture to conclude that the panniculitis and matomyositis were due to the contact dermatitis. In doing so, the court reiterated that where there is a conflict in medical testimony, the conflict must be resolved in favor of the employee. The sequence of events together with the testimony of the employee's personal physician were sufficient to convince the court of a relationship between the original accident and the employee's disabling condition.

In arriving at its conclusion, the court also referred to the fact that in compensation cases in other states, where the medical testimony was that it would be pure speculation to attribute an injury to a certain cause, compensation was awarded on the strength of facts pointing to that cause.[25] However, the court found it did not have to go that far in the instant case. And the case illustrates the approach that, given medical testimony that an injury could have resulted from the employee's work, the court will find a sufficient connection between the work and the injury to support an award of compensation.

The court affirmed a lower court ruling sustaining a demurrer to a widow's petition for compensation for the death of her husband in *Jones v. Huey*.[26] The deceased had injured his back in an allegedly work-connected accident. However, he had not sought workmen's compensation. Some months after he had left his employment, he was driving a tractor to bring firewood to his family, allegedly because he did not have sufficient funds to support them, when he stepped on the wrong mechanism on the tractor and was killed as a result. It was alleged that the injury made him unable to operate the tractor properly and thereby caused his death. The court, in accordance with precedent,[27] held that the employee's right to compensation ceased when he died and that there was no connection between his injury and his death sufficient to support an award for his death. The court stated: "In investigating and reading cases on this question it will be found that if the injured employee, knowing of his weakness, rashly undertakes to do things likely to result in harm to himself, the chain of causation is broken by his own negligence. See Yarbrough v. Polar Ice & Fuel Co., 118 Ind. App. 321, 79 N.E.2d 422."[28] The court's decision would appear to be in accord with local precedent[29] and the majority rule.[30]

25. Citing 2 LARSON, WORKMEN'S COMPENSATION LAW § 79.52 (1952).
26. 357 S.W.2d 47 (Tenn. 1962), 30 TENN. L. REV. 322 (1963).
27. Rose v. City of Bristol, 203 Tenn. 629, 315 S.W.2d 237 (1958).
28. 357 S.W.2d at 49.
29. See, *e.g.*, Mallette v. Mercury Outboard Supply Co., 204 Tenn. 438, 321 S.W.2d 816 (1959).
30. For an analysis of cases involving the chain of consequences from the original injury to the ultimate injury or death, see 1 LARSON, WORKMEN'S COMPENSATION

In *Huey Brothers Lumber Co. v. Kirk*,[31] the deceased employee had had a pre-existing condition, a congenital berry aneurysm, which is a weak spot in a blood vessel. While using a power saw to cut wood in the course of his employment he developed a severe headache. He went to a doctor, was operated on, and died. The medical testimony indicated that the strain of using the power saw would more likely cause the blood vessel to burst than not, and the court affirmed a compensation award. In doing so, the court noted its usual rule that even if ordinary exertion or usual strain at work produces an unusual result, the resulting injury is by accident and therefore compensable.

The preceding case should be compared with *Kellon v. American Bakeries Co.*[32] In the latter, the employee had a congenital back defect for which he had received medical treatment. While he was lifting some trays at work, he felt a sharp pain in his back which disabled him for several days. He then returned to work but was discharged approximately a month later. After his discharge, the pain returned while he was painting. The court found that his congenital defect would be aggravated by the movement or action which is ordinarily incident to the normal activities of a normal man and denied compensation on the ground that there was no evidence that the employee's work caused the damage to his back. On the basis of the facts related in the opinion, there can be no quarrel with the decision.

The employee in *Reedy v. Mid-State Baptist Hospital*[33] had sustained a non-work-connected injury to her back which had partially disabled her. At work, she again suffered a recurrence of her back injury and was paid compensation benefits until she was able to return to work. There was no evidence that she was more disabled as a result of the recurrence of her injury than she had been, and the court properly affirmed the lower court's denial of benefits for a permanent partial disability since her permanent disability was attributable not to her employment but to her original injury.

C. *Injury by Accident in the Course of Employment*

In *City of Gallatin v. Anderson*,[34] the injured employee was a policeman who was injured by a person he was attempting to arrest. The policeman had regular duty hours, and the injury occurred outside his normal duty hours at a place to which he had gone on a

LAW § 13.00 (1952).
31. 357 S.W.2d 50 (Tenn. 1962).
32. 357 S.W.2d 56 (Tenn. 1962).
33. 359 S.W.2d 822 (Tenn. 1962).
34. 209 Tenn. 392, 354 S.W.2d 84 (1962).

personal mission. He was not in uniform at the time. The person who caused the injury had committed an offense in the policeman's presence, and the evidence indicated that all policemen, including the plaintiff, had been instructed to act in the event an offense was committed in their presence whether during their normal duty hours or not. The court affirmed a compensation award since the policeman was found to have been acting in his official capacity at the time he was injured. While the facts of the case are somewhat unusual, the result would appear to be in accord with the usual interpretation of the requirement that an employee's injury occur in the course of his employment.

III. Extent of Injury

The employee in *Gluck Bros., Inc. v. Eddington*[35] had lost all the toes on one foot and had been awarded compensation for permanent partial disability to the body as a whole. He was a day laborer, and his doctor testified that the employee had also suffered pain and swelling in the foot and ankle as well as pain in the muscles of the leg and in his back. The court held that there was material evidence in the record to support the award based on a finding of an injury to the body as a whole rather than limiting recovery to the amount provided in the statute for the loss of the toes. There is ample local precedent for the court's decision, which is in accord with the majority rule.[36]

A federal district court awarded an employee an increase in compensation benefits in *Mitchell v. United States Fidelity & Guaranty Co.*[37] on the basis of a finding of increased disability since the original award. The employee had been found to have suffered a 50 per cent permanent partial disability as the result of a heart attack. According to the instant opinion, two doctors testified at the original trial that the employee's disability was 100 per cent. At the hearing in the instant case, the same two doctors testified again, and theirs was apparently the only evidence considered. One doctor stated that the employee's disability was the same as it was at the previous trial, i.e., 100 per cent. The other testified that the employee was totally disabled, "pointing out indicia of the plaintiff's increased incapacity . . . ."[38] The court stated:

> It matters not, therefore, that these same physicians testified in the 1958

35. 209 Tenn. 174, 352 S.W.2d 216 (1961).

36. See Sanders & Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 874-75 (1954).

37. 206 F. Supp. 489 (E.D. Tenn. 1962).

38. *Ibid.*

> hearing, as well as in the instant hearing, that the plaintiff's disability was, and is, 100%; Judge Taylor's conclusion that the disability in 1958 was only 50% pretermits the present consideration of that question. R. J. Reynolds Tobacco Co. v. Rollins (1958), 203 Tenn. 565, 315 S.W.2d 1.
>
> Accordingly, this Court finds that the more recent testimony of the physicians, when viewed in light of this Court's finding of a 50% disability in 1958, is tantamount to an increase in the plaintiff's incapacity due solely to his 1957 injury since the date of the original award.[39]

In the *Reynolds Tobacco* case cited by the court, the Tennessee Supreme Court reversed an award of increased compensation on the ground that the evidence showed that the employee was in no worse condition than before. On the basis of that case, the court in the instant case would appear to be in error in holding that the evidence showed an increase in disability since the evidence seems to have indicated that the employee was in the same condition as before. However, perhaps the holding can be explained on the basis of the testimony of one of the doctors "pointing out indicia" of increased disability.

IV. STATUTE OF LIMITATIONS

The Teunessee Supreme Court affirmed a compensation award in *American Mutual Liability Insurance Co. v. Baxter*[40] even though the employee did not file his suit for more than a year after he became disabled. According to the credited evidence, the insurance company's agent met with the employee to discuss his compensation claim, and when the employee mentioned that the year from the accident would soon be reached, the insurance agent told him not to worry about the statute of limitations. The employee relied on this and did not bring suit until after the insurance company refused to pay him benefits, which was more than a year from the date of the injury. The court held that the insurance company was thereby estopped to plead the statute of limitations, and the holding would appear to comport with the majority rule that strict compliance with notice and claim requirements may be waived by the employer or the insurer.[41]

In *Duplan Corp. v. Wilson*,[42] the court held that an employee's suit for compensation was not barred by the statute of limitations when it was brought within a year from the time he became disabled and prevented from working because of an occupational

39. 206 F. Supp. at 489-90.
40. 357 S.W.2d 825 (Tenn. 1962).
41. 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.70 (1952).
42. 358 S.W.2d 322 (Tenn. 1962).

disease, the disease was diagnosed, and the last compensation benefit payment from the insurance company had been received.

The court held in *General Accident Fire & Life Assurance Corp. v. Kirkland*[43] that an employer and his insurer are jointly and severably liable to an employee for work-connected injury[44] and that the employee may maintain a suit against the insurer even though a suit against the employer would be barred by the statute of limitations. In reaching that result, the court also held that section 28-106 of the Tennessee Code is applicable to suits under the workmen's compensation statute. That section provides:

> 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.

In the instant case, the employee had brought suit against the employer and his insurer. He took a voluntary nonsuit in the suit against his employer and had received an award against the insurer. The award against the insurer was subsequently reversed by the supreme court on technical grounds.[45] Within a year after that reversal, he instituted this suit. However, his rights against his employer were barred by the statute of limitations because he did not bring suit against the employer for more than a year after taking the voluntary nonsuit in the prior case.

In *Kimbrell v. United States*,[46] the United States Court of Appeals for the Sixth Circuit had occasion to construe a provision of Tennessee's workmen's compensation statute in a suit under the Federal Tort Claims Act.[47] The plaintiff-employee had been injured in an automobile accident for which the United States had been found to be responsible. The employee had received workmen's compensation from his employer, and more than a year after the accident, he instituted this action for damages. The United States contended that the employee could not maintain the action since section 50-914 of the Tennessee Code provides that the failure of an employee who is injured by a third party in a work-connected accident to bring suit against the third party within one year from the date of the accident shall con-

43. 356 S.W.2d 283 (Tenn. 1962).
44. Citing Collins v. Murray, 164 Tenn. 580, 51 S.W.2d 834 (1932).
45. General Acc. Fire & Life Assur. Corp. v. Kirkland, 207 Tenn. 72, 338 S.W.2d 549 (1960).
46. 306 F.2d 98 (6th Cir. 1962).
47. 28 U.S.C. § 2674 (1958).

stitute an "assignment" to the employer of any cause of action the employee may have against the third party. Thus, the United States contended that only the employer or his insurer could maintain the action. The court of appeals held that the Tennessee legislature, in using the term "assignment," did not necessarily mean that the employee lost all right or interest in the cause of action. Rather, it construed the provision to mean that the employer could institute the action if the employee had not done so within a year.[48]

There does not appear to be any controlling Tennessee precedent on the point, and while the decision is not free from doubt, it is a liberal construction of the statute for the benefit of the injured employee. The court stated that the suit was brought with the consent of the employer, and in such circumstances, it is at least arguable that the employer thereby impliedly waived his rights or reassigned the action to the employee. However, as the dissenting opinion pointed out, there was no evidence of an overt reassignment. In any event, the Tennessee courts are not bound by the decision. Nevertheless, if the question arises in Tennessee, the case of *Millican v. Home Stores, Inc.*,[49] must be considered if there is any tendency to construe the "assignment" provision in the statute as other than an assignment giving the employer complete and exclusive control over the cause of action. In the *Millican* case, the deceased employee's widow had settled her claims for his death with the third party for less than the amount allowable under the compensation statute, and the court held that the employer was subrogated for the amount of the settlement only, thereby leaving him liable for the remainder provided for under the compensation law. If the facts were similar in another case and a claim against a third party was prosecuted or settled by the employee or his representative more than a year from the date of injury, then it would seem that in fairness to the employer, it should be shown that the action was not being taken over the objection of the employer, at the very least.

V. COMPUTATION OF BENEFITS

In *Redmond v. McMinn County*,[50] the court modified the action of the lower court, which had credited the amount of compensation benefits paid an injured employee against the total amount due him for total permanent disability. The lower court had awarded him the difference between the two sums on the ground that the employee's total permanent disability arose at the time of injury. The employee's

48. Citing Keen v. Allison, 166 Tenn. 218, 60 S.W.2d 158 (1933).
49. 197 Tenn. 93, 270 S.W.2d 372 (1954).
50. 209 Tenn. 463, 354 S.W.2d 435 (1962), 30 TENN. L. REV. 326 (1963).

doctor stated that for a year after the injury, the employee's condition continued to improve and that the extent of an injury such as the employee had suffered could not be adequately determined for at least a year after the injury occurred.

The supreme court pointed out that the statute provides for four types of disabilities, *i.e.*, temporary total, temporary partial, permanent total, and permanent partial. Each type is separately compensated under the statute, and, according to the court, temporary total disability "refers to the injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits. . . ."[51] Thus, an employee is entitled to benefits for temporary disability plus whatever benefits he might be entitled to by virtue of the permanent character of his injury. By so holding, the court permits an employee to receive more than the statutory maximum for a permanent total disability.

The holding appears to be in accord with the statutory requirement that the compensation law be liberally construed and is an indirect method of increasing the amount of compensation an employee might receive. However, there is ground for speculation as to the extent of the practical effect the decision will have since it would seem probable that the extent of an employee's permanent disability would be determinable in most cases in a far shorter period than that involved in the instant case.

51. *Id.* at 468, 354 S.W.2d at 437.