Vanderbilt Law Review

Volume 9
Issue 5 *Issue 5 - August 1956*

Article 13

8-1956

Labor Law and Workmen's Compensation -- 1956 Tennessee Survey

Paul H. Sanders

James G. Bowman, Jr.

LABOR LAW AND WORKMEN'S COMPENSATION—1956 TENNESSEE SURVEY

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

LABOR LAW

Inducing Breach of Contract: Howard v. Haven[1] was the only case during the survey period which presented a legal problem relating to the activities of a labor organization. In this case an electrical contractor sought an injunction and damages because of the acts of a local labor union, its business agent, and other named defendants in preventing the plaintiff from carrying out a hospital construction contract. On the trial of the case the determinative issue became whether or not the defendants brought about a breach of the contract which the complainant claimed to have had with the general contractor on the project in question. In response to specific questions the jury found that the defendant local labor union did unlawfully procure a breach of contract which complainant had with the general contractor, but it answered the same question in the negative with respect to the local union's business agent and another named defendant. Damages were assessed by the jury at $7,330, which were trebled in the judgment entered by the chancellor pursuant to Williams code section 7811.[2]

The judgment was affirmed by the court of appeals and the Supreme Court granted certiorari limited to the question whether the judgment was void by reason of the fact that the verdict of the jury had exonerated the agent through which the local union acted. The Supreme Court in turn affirmed the judgment, in an opinion written by Chief Justice Neil. The lower courts were justified, the opinion states, in finding that the local was an active participant; "that others, who were identified with the Union, were taking part in the controversy, all of which resulted in a forcible breach of the contract. The petitioner, Local No. 175, being a voluntary association, couldn't act except through its membership. Its conduct could be, and was, shown by circumstances indicating that it was a joint conspirator along with other named defendants."[3] The opinion then adds the statement that there is material evidence to show that the complainants lost the contract because of the activity of Local No. 175, Burnette

* Professor of Law, Vanderbilt University; member, Tennessee Bar.
** Attorney, Office of Solicitor, United States Department of Labor; member, Tennessee Bar. The views expressed are those of the authors and do not necessarily represent those of the United States Department of Labor or any other Federal agency.

1. 198 Tenn. 572, 281 S.W.2d 480 (1955).
2. NOW TENN. CODE ANN. § 47-1706 (1956).
3. 198 Tenn. at 579, 281 S.W.2d at 483.

(the local's business agent exonerated by jury verdict), Williams (a member of the local not named as defendant) and Cofer (a named defendant exonerated by jury verdict):

> It is not material that Williams was not sued as a joint wrongdoer, as well as other members of the Union; nor is it important that the jury should find against one defendant and in favor of another, since all joint wrongdoers are liable jointly and severally for all damages. Nor can the one against whom the judgment is rendered escape liability on the ground that others were acquitted. The record discloses the most convincing evidence of the fact that Local No. 175 was vitally interested in securing the Warlick contract for Chattanooga contractors who employed only Union workers. We think the weight of the evidence shows that Local No. 175 was the principal conspirator. Its members were the ultimate beneficiaries, regardless of any office they might hold in the Union.[4]

The opinion of the court declares that the doctrine of respondeat superior has no application to the case so as to relieve the local union because of the exoneration of its business agent. This is found to be so because of the existence of a conspiracy or common purpose and design instead of a master-servant relationship. *Loveman Co. v. Bayless*,[5] which declares that a verdict against a master based on the acts of a servant under the doctrine of respondeat superior can not stand in the face of a verdict in favor of the servant, is distinguished on the basis that the local union did not occupy the relationship of master to its co-defendants as servants. The local union either authorized Burnette to engage in unlawful activity with respect to the contract or ratified his action by accepting the benefits resulting from his acts. "We think it was within the province of the jury to find against both Burnette and Local No. 175. The verdict in favor of Burnette did not affect the verdict and judgment against his co-defendant."

In denying the petition to rehear in this case the court also rejected a contention that the order in this case violated rights of free speech under the first and fourteenth amendments of the United States Constitution. The matter of federal pre-emption or occupancy of the field with regulation under the Taft-Hartley Act[6] was not discussed in any portion of the court's opinion.

WORKMEN'S COMPENSATION

Employees' claims for workmen's compensation were involved in twenty-three of the cases before the Supreme Court during the survey year, and three cases presented questions of first impression. Although

4. *Id.* at 580, 281 S.W.2d at 483.
5. 128 Tenn. 307, 160 S.W. 841 (1913).
6. Labor-Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C.A. § 158 (1956). See Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955).

the Tennessee Workmen's Compensation Law[7] was enacted over thirty-seven years ago, controversy still rages with apparently undiminished vigor over its proper interpretation and application.

The Employment Relationship: Two decisions in the reported cases turned on the existence of the employment relationship. In both cases, the court affirmed compensation awards on the ground that the injured workmen were employees rather than independent contractors inasmuch as the employers had not relinquished their right to control the performance of the work.

Bond Brothers, Inc. v. Spence[8] concerned a truck owner-driver who contracted to haul logs in his truck for a company engaged in cutting timber and sawing it into lumber. The agreement was indefinite as to duration and no specific amount of timber at a particular place was set aside for the trucker to haul. He was paid for each trip, and payment was based on the amount hauled and the length of the trip. The lower court, in holding him an employee, relied on the fact that the checks he received in payment bore the following provision immediately above the place for his endorsement:

> This draft is accepted in full payment for the material or services specified, and the endorser hereby warrants that the production of said material or the rendering of the services specified, was in compliance with the requirements of the Fair Labor Standards Act of 1938, as amended.

The Supreme Court, through a rather full treatment of the case by Justice Prewitt, said the employer had thereby acknowledged that the truck driver came within the provisions of the Federal Fair Labor Standards Act as an employee since that Act deals only with employers and employees, not with independent contractors. The opinion goes on to point out that some evidence of control over the truck driver was indicated because he had been instructed to make deliveries to several different towns and the employer's foreman had accompanied him on occasional trips. The employer also could have terminated the relationship at any time. Relying on a prior definition of "independent contractor,"[9] the court stated that the fact that the driver was paid by the trip indicated employment to work by the "piece" rather than to do "a piece of work" in this case since the contract's duration was

7. TENN. CODE ANN. §§ 50-901 to -1211 (1956).
8. 198 Tenn. 316, 279 S.W.2d 509 (1955).
9. "One who contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of the work, and who has the right to employ and direct the action of the workmen independent of his employer, and free from any superior authority in the employer to say how the specified work shall be done, or what the laborers shall do as the work progresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains that result." Odom v. Sanford & Treadway, 156 Tenn. 202, 207, 299 S.W. 1045, 1046 (1927).

indefinite and a specified amount of timber had not been designated for hauling. The court concluded by holding that a master-servant relationship is presumed once employment is shown and the employer has the burden of showing the independent contractor relationship if he would avoid compensation liability on that ground.[10] Here the employer had not evinced to the court's satisfaction the lack of a right to control the driver's conduct in the manner of doing the work.

The result in the case does not appear to be particularly questionable even though the employee here provided a major piece of equipment, i.e., the truck. Professor Larson reports "a growing tendency to classify owner-drivers as employees when they perform continuous service which is an integral part of the employer's business."[11] The check endorsement relative to compliance with the Fair Labor Standards Act had no necessary significance in the question here considered. Such an endorsement is for the purpose of affording protection under the "hot goods" provision of § 15(a)(1) of the statute.[12] This use of the language is consistent with the endorser being an independent contractor or separate business entirely.

In *Barker v. Curtis*[13] the petitioner had a contract with a coal company to mine coal on land leased to the company by a corporation which purchased all the coal mined on the land. The coal was sold to the coal company and it in turn sold to the corporation. The company furnished the major items of equipment to establish the mine, though the petitioner supplied part of the necessary equipment. He employed six miners, had a collective bargaining agreement covering them with a union, and withheld federal income and social security taxes from the wages he paid them. After his accident, he operated the mine through his brother until he sold his equipment and ceased his connection with the coal company. The company told him where to mine the coal, how to do it, how much to mine, and where to deliver it. The company also laid out plans and specifications for the structural development of the mine and its representatives or those of the corporation made weekly inspection trips through the mine. This was apparently sufficient evidence of a right to control to satisfy the trial court of the existence of an employer-employee relationship for compensation purposes. The Supreme Court, in an opinion by Justice Burnett, indicated its limited function in reviewing such a finding and its obligation to give the statute a liberal construction in favor of the fact of employment. The court held that there was material evidence to support the trial court's finding, a question of fact for the

10. Citing D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 514, 206 S.W.2d 897, 904 (1947).
11. 1 LARSON, WORKMEN'S COMPENSATION § 44.34 (1952).
12. 52 STAT. 1052 (1938), 29 U.S.C.A. § 215 (1956).
13. 287 S.W.2d 43 (Tenn. 1956).

chancellor in this particular case. However, the court also observed several additional factors supporting the status of employment rather than that of independent contractor. First, it found that the petitioner could have been discharged if he had failed to conduct the operations in a manner approved or directed by the company. Second, the company carried workmen's compensation insurance on him as an employee and had so informed him. Though the court stated that evidence of such insurance coverage had no probative value per se,[14] the fact that he had been informed that he was covered tended to indicate that the company considered him an employee. Third, there was some evidence that the coal company lacked substance as an independent enterprise between the petitioner and the corporation which owned the land and purchased the coal. The company's only responsibility was inferred as being that of writing compensation insurance on the petitioner and those working for him. The court concluded that on the evidence as a whole the company had reserved control over the main aspects of the work and the petitioner's work was "more or less a menial part."

The case stresses the need for a full consideration of all the facts in the case of an alleged independent contractor and that there is no "absolute formula" whereby the question may be determined.

Injury by Accident Arising out of Employment: In order to recover workmen's compensation, a covered employee must suffer an injury by accident "arising out of" and "in the course of" employment. The former phrase is simply an expression of the causal connection which must exist between the employment (including its nature, its conditions, its obligations and its incidents) and the injury. The injury must be rationally connected with the work by something more than mere coincidence. The determination of this connection was the principal problem in several of the reported cases during the year. The requirement of an "accident" will frequently be satisfied by the same evidence that shows causal connection.

Lee v. King Brothers Shoe Co.[15] involved the admissibility of hearsay evidence to prove the occurrence of a work-connected injury by accident. The opinion states that there is no question in the case about disability arising out of employment but only whether or not deceased died from accidental means. According to the testimony of a music store employee, the employee of a shoe store came into a music store

14. Citing Weeks v. McConnell, 196 Tenn. 110, 264 S.W.2d 573 (1954). *But cf.* Brademeyer v. Chickasaw Bldg. Co., 190 Tenn. 239, 229 S.W.2d 323 (1950) (workmen's compensation insurance coverage is some evidence of the employer-employee relationship). *Quaere* whether Weeks v. McConnell, *supra,* actually supports the court's statement. Though coverage may be evidence of the employment relationship, it does not appear to have been a decisive point in reported cases. See 1 LARSON, *op. cit. supra* note 11, § 46.40.

15. 198 Tenn. 458, 281 S.W.2d 49 (1955).

next door and said a case of shoes had fallen on him and that he was suffering great pain. The same witness testified that the deceased employee was walking slowly in a stooped position and holding his stomach as he entered the store and remained that way as he walked out of sight after leaving it. The music store was a short distance from the shoe store where he was employed, and there were in fact heavy cases of shoes stacked up in the shoe store. Though the shoe store employee had been in good health before suffering the injury, he died four days later, and the medical testimony indicated that the injury contributed to his death. The lower court admitted the deceased employee's statement in evidence and awarded compensation to his widow.

The Supreme Court, in an opinion by Justice Prewitt, affirmed on the ground that the statements were apparently made within a few minutes after his injury when he appeared to be in such pain and under such excitement as to preclude any reasonable possibility of fabrication.[16] This, of course, was nothing more than an application of the so-called res gestae exception to the hearsay rule[17] and was recognized by the court as such. The event causing the deceased employee's injury apparently was unwitnessed, and the testimony of the music store employee indicated that the deceased's statements were uttered under circumstances tending to make them credible. If they were inadmissible, his widow would likely have found it difficult, if not impossible, to establish any rational connection between his employment and his injury and subsequent death since the Tennessee court will not indulge a presumption of employment connection for unexplained injuries to employees in the course of their employment.[18]

The court affirmed another compensation award in *Great American Indemnity Co. v. Friddell*[19] because the record contained sufficient evidence to show that the injury arose out of employment. A carpenter fell from a scaffold at work and injured his hand and ankle. Shortly thereafter he developed stomach pains which were reported to a physician within three or four days of the fall and which later became so serious that an operation was performed. A ruptured appendix was discovered and removed, and a partial disability resulted. Some of the medical evidence indicated that the fall could have aggravated a pre-existing condition and caused the rupture. That is, a "fecalith, 'kind of a little hard marble'" was found during the

16. Citing National Life & Accident Ins. Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92 (1935).
17. See 6 WIGMORE, EVIDENCE §§ 1745-46 (3d ed. 1940).
18. Wilson v. St. Louis Terminal Distributing Co., 198 Tenn. 171, 278 S.W.2d 681 (1955).
19. 198 Tenn. 360, 280 S.W.2d 908 (1955).

operation and there was medical testimony to the effect that the fall could have caused this to block the base of the appendix, thereby causing the rupture. Other medical evidence was to the effect that it was exceedingly improbable that a ruptured appendix would have a traumatic origin. In an opinion by Special Justice Clement, the Supreme Court, in accordance with its usual rules, held that the credibility of witnesses and weight of the evidence were for the trial court's determination. Any reasonable doubt about the "arising out of" factor would be resolved in favor of the injured employee.[20] The employee's petition alleged he had "suffered an internal rupture in the lower quadrant of his abdomen," and the court held this sufficient fairly to raise the issue of an aggravation of a pre-existing condition, the fact proved.[21] This again illustrates the court's liberality in dealing with the sufficiency of pleadings.[22]

In *Wilson v. St. Louis Terminal Distributing Co.*,[23] the court, in an opinion by Justice Prewitt, affirmed the dismissal of a widow's compensation suit because she failed to show that her husband's unexplained death resulted from an injury by accident arising out of his employment. The deceased employee, a night watchman for a barge company, had walked down an incline approximately 250 feet long and at about a 35 degree grade to reach the place where he performed his duties. Before reaching the cabin where he was found he walked down and up steps four feet eight inches in height, told the employee he was relieving, in passing him, that he had a pain in his chest and was going to sit down. Over seven hours later he was found dead in a chair in the cabin. There was no evidence either of exertion aggravating a pre-existing diseased condition, of an internal or external accident, or of violence. The employee had previously been in apparent good health. On these facts, the court held that the fact that an employee is found dead at the place of employment during working hours does not of itself create a prima facie case of compensation liability.[24] Some connection between the death and the employment must be shown. In view of the paucity of the evidence tending to indicate such a work-connection, the result is in keeping with established precedent in Tennessee.[25]

20. Compare the instant case with Lynch v. LaRue, 198 Tenn. 101, 278 S.W.2d 85 (1955), discussed in Sanders & Bowman, *Labor Law and Workmen's Compensation—1955 Tennessee Survey*, 8 VAND. L. REV. 1037, 1050-51 (1955).

21. Ledford v. Miller Bros. Co., 194 Tenn. 467, 253 S.W.2d 552 (1952).

22. See Sanders and Bowman, *Labor Law and Workmen's Compensation—1954 Tennessee Survey*, 7 VAND. L. REV. 861, 879 (1954).

23. 198 Tenn. 171, 278 S.W.2d 681 (1955).

24. Citing Home Ice Co. v. Franzini, 161 Tenn. 395, 32 S.W.2d 1032 (1930); Farris v. Yellow Cab Co., 189 Tenn. 46, 222 S.W.2d 187 (1949).

25. Heron v. Girdley, 198 Tenn. 110, 277 S.W.2d 402 (1955); Farris v. Yellow Cab Co., 189 Tenn. 46, 222 S.W.2d 187 (1949). See also McCormick v. National City Bank, 303 N.Y. 5, 99 N.E.2d 887 (1951).

One commentator has said: "When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death most courts will indulge a presumption or inference that the death arose out of the employment."[26] However, he also says that even in states having a statutory presumption of coverage under such circumstances, the presumption has not always been applied in cases in which the death apparently resulted from a personal weakness or condition in the employee and there was no evidence of any work exertion precipitating it.[27]

In the instant case the court's discussion of the lack of a prima facie showing of liability begins with the statement:

> Where it is shown that the employee is subjected to physical exertion and that while so exerting himself is caused to be stricken with an ailment from which he dies, a prima facie case is made. Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610; Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223.[28]

If this should be interpreted as requiring that the exertion and the injury be synchronized then it must be observed that the court has not so held in the cases cited. The *Milstead* opinion would not support such an interpretation even though the facts in the case might. Neither the facts nor the opinion in the *Lay* case would support such a view. A requirement of this sort, taking literally the sentence quoted from the opinion, would overrule sub silentio both the *Lay* case and others.[29] Other portions of the court's opinion are somewhat ambiguous with respect to the requirements for a prima facie case in cases like the instant one. The proper interpretation of the quoted sentence however is undoubtedly found in the intention of the court to state that the ailment causing death must be a result of the exertion, and not that they must be synchronous. Otherwise, an unnecessarily restrictive doctrine would be propounded which would not be supported by the precedents cited.

In *Nashville Bridge Co. v. Todd*,[30] an employee had been engaged as a scraper inside compartments of steel river barges for about a week. Though he was apparently in good health, he became sick one day after lunch and died shortly after leaving work that afternoon. There was evidence that people unaccustomed to working in the compartments when there was excessive heat in them would be affected by

26. 1 LARSON, *op. cit. supra* note 11 § 10.32.
27. *Ibid.*
28. 198 Tenn. at 175, 278 S.W.2d at 683.
29. See, *e.g.*, Parrott v. Parrott, 198 Tenn. 96, 278 S.W.2d 83 (1955); Heron v. Girdley, 198 Tenn. 110, 277 S.W.2d 402 (1955); Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953).
30. 286 S.W.2d 861 (Tenn. 1956).

such heat. The temperature in the compartment on the fatal day was not shown, and, according to the court's opinion, there was no evidence that the heat was excessive or that the employee was too hot. The other employees in the compartment testified that they were not too hot and that the deceased employee had not complained of the heat. Therefore, the court reversed a compensation award because there was no evidence to connect the employee's illness and death with his employment. According to the court's opinion, written by Justice Swepston, the employee could have become sick from causes completely independent of the employment. Since no work-connection was demonstrated, compensation was not authorized.

The court did, however, find a disability arising from employment in *Fidelity & Casualty Co. v. Roberts*[31] when an employee was prevented from working because of the irritation caused by the stainless steel wire used to sew up an incision. He had been operated on for a compensable injury and had opened the incision in a subsequent accident at work. The court said that an employee may recover for either a new injury or an aggravation of a compensable injury resulting from medical or surgical treatment of it. The holding is in accord with what is regarded as the majority rule.[32]

It might be pointed out here that the Supreme Court continues to hold that on review it will examine the record only for the purpose of determining whether the trial court's findings are supported by material evidence and will not weigh or reweigh the evidence to determine where the preponderance lies. Thus, the court affirmed awards to employees found to suffer from the occupational disease silicosis[33] even though in one case two doctors testified that the doctor who diagnosed the silicosis (here silico-tuberculosis) could not have done so with any certainty from the data upon which he relied, *i.e.*, X-ray, clinical symptoms, and case history, since the employee was suffering from tuberculosis and pneumoconiosis, a dust condition in the lungs.[34] The court said that the weight of evidence and the impeachment and credibility of the witnesses were to be left to the trial court.

This latter point was decisive in *Block Coal and Coke Co. v. Gibson*.[35] There the employee insisted he was disabled because of back pains resulting from an unsuccessful operation. The doctor who performed the operation stated it had been successful though another doctor testified that he was unable to account for the petitioner's suf-

31. 198 Tenn. 386, 280 S.W.2d 918 (1955).
32. 1 LARSON, *op. cit. supra* note 11, § 13.21.
33. Lodge Manufacturing Co. v. Wilkerson, 286 S.W.2d 865 (Tenn. 1956); Eggert v. Tennessee Products & Chemical Corp., 286 S.W.2d 874 (Tenn. 1956).
34. Lodge Manufacturing Co. v. Wilkerson, *supra* note 33, at 866.
35. 285 S.W.2d 112 (Tenn. 1955).

fering pain except by what he had been told by the petitioner. It was his opinion that the condition preceding the operation might not have been corrected if the employee continued to suffer these pains. Both doctors added that they believed the employee to be telling the truth about the pain. This had satisfied the trial court, and the Supreme Court affirmed, in an opinion by Chief Justice Neil. The opinion states that, if both doctors found the employee credible, why should the trial judge deny compensation on the ground that he was a malingerer.

Injury by Accident in the Course of Employment: To determine whether an injury occurs "in the course of" employment, consideration is given to whether or not it is reasonably incident to the employment in terms of the time, place and conduct of the employee when the accident takes place.[36]

Greenfield v. Manufacturers Casualty Co.[37] was the only case during the survey year in which the court was primarily concerned with this aspect of the work-connection of an injury. The manager of a store had no fixed working hours and sometimes worked at night. Her district supervisor requested that she come back and work at the store one night after her evening meal. She was told that the store was to pay for her evening meal. She was injured on the way to one of the three public eating places said to have been suggested by the supervisor as good places for her to patronize to create good will for the store. The Supreme Court affirmed a denial of workmen's compensation under these circumstances holding that the injury did not arise out of or in the course of the employment. The employee was not regarded as being engaged in any business for the benefit of her employer. She was traveling along a route she had selected to one of the suggested restaurants, not the one nearest the store, for what was regarded as a purely personal purpose. The employer's intention to pay for the meal was said to be merely indicative that additional compensation would be paid for the work to be performed after she returned to the employer's premises from the meal.

The fact that there was testimony indicating that the employer was sufficiently interested in where the employee dined to make recommendations about it tends to make the course of employment question a close one. However, he apparently did not anticipate sufficient benefit to require dining in one of the restaurants. Hence, the court was perhaps justified in finding that the question was not close enough

36. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION 668 (1947); 1 LARSON, *op. cit. supra* note 11 § 14:00; 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1542 (3d ed. 1948).

37. 198 Tenn. 452, 281 S.W.2d 47 (1955).

to make the usual "going and coming" rule inapplicable.[38]

Measure of Compensation and Computation of Benefits: The employee in *Smith v. Morristown Poultry Co.*[39] had suffered an eye injury which was found not to have been satisfactorily cured by surgery. After the operation, she returned to the only type of work she had ever performed—picking, dressing, and processing chickens—at approximately the same rate of pay she enjoyed prior to the injury. There was conflict in the medical evidence, but it was considered sufficient to support the finding that she had suffered a 50% permanent partial disability because of the 50% impairment of vision in one eye due to the injury. The court, in an opinion by Special Justice Clement, affirmed an award of compensation for the disability. The 1953 amendments to what is now code section 50-1007[40] were not considered helpful to the defendants in the matter of measuring disability. The opinion states that these amendments appeared to have liberalized the law in favor of the employee rather than to have restricted compensation for injury to a bodily member to the statutory schedule. It does not appear that the court had so restricted recoveries even prior to the 1953 amendments if the injury to the member had spread to and interfered with other parts of the body.[41] The finding of a disability impairing earning capacity was sufficiently supported by medical and other evidence even though the employee had not in fact suffered an appreciable loss of earnings. This is in accord with the well-settled Tennessee test in these cases and with the general rule.[42]

The 1953 amendment in the statute which now appears as the last paragraph of code section 50-1007(c) received its important interpretation in *Hooper v. Young Sales Corp.*[43] and *Bituminous Casualty*

38. For a discussion of this problem in general, see 1 LARSON, *op. cit. supra* note 11, §§ 15-18.

39. 198 Tenn. 412, 280 S.W.2d 929 (1955).

40. "All other cases of permanent partial disability not above enumerated shall be apportioned to the body as a whole, which shall have a value of 300 weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury." TENN. CODE ANN. § 50-1007(c) (1956).

41. Russell v. Virginia Bridge and Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938); Central Surety and Insurance Corp., v. Court, 162 Tenn. 477, 36 S.W.2d 907 (1931); and Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).

42. "The question is whether, in the open labor market, in his disabled condition, the employee, after the injury, is able to earn in spite of his disability, as much as he was able to earn before the injury." Greenville Cabinet Co. v. Ramsey, 195 Tenn. 409, 414, 260 S.W.2d 157, 159 (1953). "Obviously, evidence that at the time of the hearing below, the employee is earning wages, is evidence that he has the capacity to earn them, but it is not conclusive evidence." *Id.* at 416, 260 S.W.2d at 160. See, *e.g.*, Crane Enamel Co. v. Jamison, 188 Tenn. 211, 217 S.W.2d 945 (1949); Agricola Furnace Co. v. Smity, 239 Ala. 488, 195 So. 743 (1940); Voight v. Industrial Comm'n, 297 Ill. 109, 130 N.E. 470 (1921).

43. 288 S.W.2d 703 (Tenn. 1956).

Corp. v. Smith.[44] In each case the injured employee had sustained a temporary total disability for a period of several weeks and a permanent partial disability of 50%. Justice Tomlinson wrote the opinion of the court in the two decisions, each of which modified in some degree the method of calculation utilized in the lower court.

In the *Hooper* case the court first rejected the argument that the claimant (with a 50% disability) is entitled for 300 weeks to 50% of 60% of his average weekly wage until such 50% of such 60% reaches the statutory weekly maximum. The court noted that section 50-1007(c) is expressly made subject to section 50-1007(a) and that the "natural construction" of the language of the latter subsection "is that the employee is entitled to 60% of his average weekly wage until such 60% thereof reaches the maximum of $28 per week."

The court then makes clear that the percentage of permanent disability has no relation to the weekly benefit figure but instead is used to determine the number of weeks for which the benefits will be paid. Section 50-1007(c) gives the body as a whole a value of 300 weeks for the purposes of determining the amount of an award for a permanent partial disability. "If the body as a whole has a value of 300 weeks then, in calculating the amount payable for a permanent loss of a part of that body, or its use, it would necessarily follow that when the loss is 50% of the body, the loss suffered by the employee and for which he is entitled to compensation, is 150 weeks."[45]

The third point of great significance in the *Hooper* case was the court's conclusion that, by reason of the 1953 amendment, payments for the weeks of total disability need not be credited against the award for permanent partial disability (in the *Hooper* case, $28 per week for 150 weeks). The court noted the schedule of benefits provided for the loss of specific members as set forth in the same section of the statute and the fact that employees had been held to be entitled to the value fixed in the schedule for a described loss in addition to compensation received because of total temporary disability:

> Notice has been taken of the fact that the Legislature provided that the value fixed in its schedule for the loss or partial loss of the use of a member of the body, such as the arm or eye, etc., shall be in addition to the compensation received for temporary total disability. The Legislature has now fixed in identically the same terms a value to that body as a whole as the basis for determining the amount of compensation to be received for permanent partial loss of its use.
>
> It follows logically that the Legislature had the same intention in fixing a value for the partial loss of the use of the body as it had in fixing a value for the partial loss of the use of a member of the body. To otherwise conclude would attribute to the Legislature an inconsistency not revealed by the 1953 amendment, or by the provisions of the Workmen's

44. 288 S.W.2d 913 (Tenn. 1956).
45. 288 S.W.2d at 705.

> Compensation Statute wherein is spelled out the formula for determining the amount of compensation in cases of permanent partial loss of the use of a member of the body or partial loss of the use of the body as a whole.[46]

In *Shaw v. Firestone Tire & Rubber Co.*,[47] the court held that the amount of compensation due for a compensable back injury, incurred in January, 1953, is to be determined according to the last paragraph of Williams code section 6878(c),[48] as it read at the time of the injury. The employee was injured prior to the enactment of the 1953 amendments raising the maximum compensation payable from $25 to $28 per week. Therefore, the compensation payable was the maximum amount allowed at the time of the injury instead of the increased amount.

Notice of Injury: The court held in *Bond Brothers, Inc. v. Spence*,[49] that physical disability will excuse giving the employer the statutory notice of injury.[50] The injured employee had been unconscious or semi-conscious and unable to write for over 30 days after the injury and had failed to give the written notice, but the employer did have actual notice of the injury. The court stated that the reasonableness of the employee's excuse for failure to give the notice was for the trial court's determination.[51] This treatment of the problem seems to be entirely in line with the notice provisions in Williams code section 6872.[52]

There was no reasonable excuse found for the failure to give the requisite notice within 30 days from the date of injury in *McCarty v. Musgrave Pencil Co.*,[53] and the court affirmed a denial of compensation. According to his own testimony the employee had suffered a hernia while pushing a wheelbarrow at work. He felt a sharp pain in his abdomen and noticed a protrusion there but failed to report the incident to his employer. He continued to work for some time after the 30-day notice period had passed. The employee suffered a disabling heart attack as the result of a hernia operation. The court said that in the absence of liability for the original injury, the hernia, there could be no liability for the second injury, the heart attack. The basis of liability for the second injury is that the causal connection makes it a part of the original injury. With respect to the hernia, the

---

46. *Ibid.*
47. 288 S.W.2d 433 (Tenn. 1956).
48. Now TENN. CODE ANN. § 50-1007(c) (1956). The court cited Sun Coal Co. v. Epperson, 178 Tenn. 114, 156 S.W.2d 400 (1941); Standard Surety & Casualty Co. v. Sloan, 180 Tenn. 220, 173 S.W.2d 436 (1943).
49. 198 Tenn. 316, 279 S.W.2d 509 (1955).
50. Citing Watson v. Proctor & Gamble Defense Corp., 188 Tenn. 494, 221 S.W.2d 528 (1949).
51. Citing Tipton v. North American Rayon Corp., 181 Tenn. 434, 181 S.W.2d 619 (1944).
52. Now TENN. CODE ANN. § 50-1001 (1956).
53. 288 S.W.2d 444 (Tenn. 1956).

employee knew he had been injured on the day the alleged accident occurred. The employer had no actual notice of the injury, and the employee had no excuse for failing to give notice of his injury.[54]

Statute of Limitations: The employer in *Adams v. Patterson*[55] had voluntarily made payments to his injured employee in excess of the amount required by the statute after telling him that he felt he should make such payments as long as the employee was disabled. Then he stopped the payments saying that he felt he had paid all he was required to pay. The employee sued for compensation within a year from the date the payments ceased but over a year from the date of the accident causing the injury. The lower court found that the statute was not tolled since the payments were a gratuity, not voluntary compensation payments. The Supreme Court reversed, in an opinion by Justice Tomlinson, because it found no evidence to support the finding. It considered the employer's remarks as a recognition of his liability to pay as long as the employee was disabled and apparently equated this with a recognition of his statutory liability.[56] Since the suit was brought within one year from the date the voluntary payments ceased, it was brought within the statutory period.[57]

The court held in *Bradford v. Dixie Mercerizing Co.*[58] that an employee's suit was barred by the one year limitation period inasmuch as it had been brought nearly three years after the accidental injuries were alleged to have been received and his family doctor had told the employee within four days of that date that he had suffered the back injury for which this suit sought compensation. The court, in an opinion by Justice Prewitt, found that this was not an injury which had gone undiscovered or had not developed until several years after the accident thereby precluding the running of the statute until that time.[59]

The court did not, however, find the employee's suit in *Link v. Southeastern Greyhound Lines*[60] barred by the statute of limitations. The defendant named in the suit was Southeastern Greyhound Lines,

54. The court said the instant case was more analogous to York v. Federal Chemical Co., 188 Tenn. 63, 216 S.W.2d 725 (1949) than to Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947) and McBrayer v. Dixie Mercerizing Co., 176 Tenn. 560, 144 S.W.2d 764 (1940), the cases on which the employee relied.

55. 288 S.W.2d 453 (Tenn. 1956).

56. The court distinguished the instant case from White v. Travelers Ins. Co., 188 Tenn. 651, 222 S.W.2d 1 (1949) (employer recognized no liability beyond that he assumed and paid, thus making the statute run from the date of injury.)

57. TENN. CODE ANN. § 50-1003 (1956).

58. 285 S.W.2d 136 (Tenn. 1955).

59. Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947).

60. 198 Tenn. 262, 279 S.W.2d 259 (1955).

an operating unit of the Greyhound Corporation and not a legal entity. After the statute of limitations had run, the trial court granted the employee's request to amend the complaint to name the corporation, but it refused to make the amendment retroactive, thereby causing the suit to be barred by the statute. The Supreme Court reversed, in an opinion by Justice Swepston. The court held that the amendment did not bring in a new party. The employee was regarded as intending to sue the corporation, his employer, and the amendment amounted only to a correction of a misnomer, not the substitution of a new party. Accordingly, it should have been retroactive, thereby causing the suit to be seasonably brought. There would seem to be little question about this result and its support in Tennessee precedent.[61]

The most important decision of the Supreme Court with respect to statute of limitations in workmen's compensation cases came in *Griffitts v. Humphrey*.[62] As stated in Justice Burnett's opinion:

> We are faced flatly with the proposition of when the statute of limitations starts to run in a Workmen's Compensation case. Whether from the date of accident or from the date of known disability resulting from a previous accident. Heretofore this Court has determined the matter in one instance from the date of the accident and in others from the date of known disability. The question now is should we say that the cases in which the time of the running of the statute is fixed at the time of the known disability should be segregated and held as applying only to the facts of those particular cases or should we now adopt a rule which is applicable in Workmen's Compensation cases to all of such cases? We are faced flatly with this proposition and will attempt to answer it.

The opinion recognizes frankly the different wordings in Williams code section 6874 ("accident") and 6884 ("injury")[63] and the divergent lines of authority stemming from its decisions in *Graham v. J. W. Wells Brick Co.*[64] and *Ogle v. Tennessee Eastman Corp.*[65]

> [U]nder the doctrine of stare decisis the Graham case was attempted to be sidestepped very gently. It now behooves us to make a clear distinction.[66]

The opinion proceeds to make clear that the approach of the *Ogle* case is to be the general rule, *i.e.*, the statute of limitations commences to run at the time the injury accrues, or is determined to be compensable, rather than at the time of the accident. This is the proper construction,

61. *Cf.* Love v. Southern Ry., 108 Tenn. 104, 65 S.W. 475 (1901). See Morgan, *Procedure and Evidence—1955 Tennessee Survey*, 8 VAND. L. REV. 1071, 1074 (1955).
62. 288 S.W.2d 1, 2 (Tenn. 1956).
63. Now TENN. CODE ANN. §§ 50-1003, 50-1017 (1956).
64. 150 Tenn. 660, 266 S.W. 770 (1924).
65. 185 Tenn. 527, 206 S.W.2d 909 (1947).
66. 288 S.W.2d at 3.

the opinion states, not only because of the relative position of the two words in the statute but, more basically, because the contrary holding would defeat the basic purposes of the law by making the statute of limitations begin to run before the cause of action accrues.

Subrogation and Third Party Liability: Reece v. York[67] was a case of first impression in Tennessee. The employee's injuries resulted from a third party's tort, and the employer was subrogated to the judgment the employee obtained against the third party. However, after deducting the employer's medical payments from the judgment, the employer's compensation liability exceeded the net amount of the judgment. The Supreme Court held that when an employee has recovered an award against a third party tort-feasor which, because of statutory subrogation, has been credited against the employer's liability to the employee, he may not be required to begin making weekly installment payments to the employee until the sum total of net credits of weekly installments that would have accrued from the date of injury are equal to the net credit of the award against the third party tort-feasor.[68] The credit the employer had received from the tort recovery amounted to substantially more than would have been due the employee in compensation payments when the compensation award was made. Therefore, the court remanded the case to the lower court for a determination of the date on which payments should begin. The court found that if the employer had to begin making payments from the time compensation was awarded, the employee would in effect be receiving double benefits for a time. That would shorten the duration of the period in which compensation would otherwise have been payable. Such a result would not be desirable since compensation payments are to be paid in weekly installments or as near as may be to the manner in which the employee is accustomed to receiving his wages.[69]

The court's conclusion appears to be the logical one to be drawn from considerations of the policies underlying the payment of compensation in periodic installments. The employee is in the same situation he would have been in if his injury had not been caused by the third party's tort. In any event, the problem is not likely to arise with any degree of frequency since tort recoveries may generally be expected to exceed any compensation liability

67. 288 S.W.2d 448 (Tenn. 1956).

68. In Millican v. Home Stores, Inc., 197 Tenn. 93, 270 S.W.2d 372 (1954) the facts were similar to those in the instant case, and the lower court had ordered installment payments to be made from the date of the compensation award. However, the Supreme Court rejected arguments in the instant case based on the stare decisis doctrine since the question of payment timing had not been before it in the *Millican* case.

69. The court pointed out that the only exception is in the case of a lump sum payment under TENN. CODE ANN. § 50-1023 (1956).

United States Fidelity & Guaranty Co. v. Elam,[70] also presented a question of first impression. The employer's standard workmen's compensation policy carried an endorsement or rider binding the insurer to provide medical and hospital benefits far in excess of the maximum required by statute and subrogating the carrier to the extent of any payments under the clause to all the rights against third parties vested by law in the employer, his employees, or their dependents. An employee was allegedly injured by a third party and instituted a suit to recover damages after he had received compensation payments and medical benefits from his employer. A settlement of the suit was reached, however, and it provided, among other things, for indemnification of the employee for all sums he might have to pay the carrier for compensation and medical benefits provided for him by his employer's insurance carrier. At the time the settlement was agreed to, the carrier had expended or incurred liabilities for approximately the maximum medical benefits provided for in the policy. It therefore intervened in the employee's suit for recovery under the settlement agreement of the compensation payments and all the medical and hospitalization expenses and liabilities it had incurred. The trial court allowed recovery only of the compensation payments and the maximum medical benefits required by the compensation statute. The Supreme Court, however, modified this to permit recovery of the total medical expenses as well.

The court held that the compensation statute subrogated the employer or his insurer for the compensation payments and the maximum statutory medical liability, but not for any additional medical or hospitalization benefits. The endorsement to the insurance policy was held to provide conventional subrogation between the employer and the insurer for the excess medical benefits. The employee's agreement to this subrogation arrangement was implied because he had accepted the benefits and services authorized by it. He was held to be required to take the obligations of the agreement along with its benefits. The court found that the employer, and hence the insurer, was not an intermeddler or mere volunteer in providing the benefits because:

> (1) He is satisfying a moral obligation.
>
> (2) He has a substantial interest in restoring his employees to service and in maintaining good will by the knowledge of the protection afforded them.
>
> (3) The provision of such excess medical and hospital protection is in accord with the intention of the Legislature in passing the Workmen's Compensation Act.

70. 198 Tenn. 194, 278 S.W.2d 693 (1955).

(4) The provision of adequate medical and hospital services for the rehabilitation of every injured employee is in keeping with sound public policy.[71]

On rehearing, the court held that the insurance carrier could recover both the amounts it had expended prior to the settlement agreement and the amount of its incurred but unpaid liabilities at that time. It was subrogated under the statute for the statutory sums paid or payable, and the insurance agreement provided subrogation for the additional amounts paid or payable under the policy. The carrier had incurred legal obligations for additional medical expenses before the settlement was entered into, and it did not become a volunteer or intermeddler by paying those obligations after the date of the settlement. Further, the insurer had been unable to learn the terms of the settlement until after it had actually paid all the obligations it had undertaken prior to the date of the settlement.

The court's decision in this case will at least not discourage the making of similar agreements between employers and insurance carriers and may even encourage them. Certainly such agreements should be regarded as beneficial for employees since the maximum medical benefits required by the compensation law may at times be grossly inadequate, as the instant case demonstrates.

Liability of Successive Insurance Carriers: Wilson v. Van Buren County[72] involved a question of first impression when the case was presented to the court for the second time.[73] The employee apparently was suffering from undiagnosed silicosis when his employer changed insurance carriers. When his condition was diagnosed as silicosis and he became disabled, the second carrier's policy was in effect. The court, in an opinion by Chief Justice Neil, affirmed the lower court's determination that the second carrier alone was liable. It held that by what is now code section 50-1101 the legislature had attempted to fix a definite point at which liability for a compensable occupational disease should be determined so as "to remove the issue from the field of speculation as far as possible."[74] Since the statute makes the employer in whose employment the employee was last injuriously exposed to the disease, and the insurance carrier at that time, liable for the disability without "right to contribution from any prior employer or insurance carrier," the Supreme Court felt that the insurance carrier at the time the employee's disease became disabling as

71. *Id.* at 218, 278 S.W.2d at 704.
72. 198 Tenn. 179, 278 S.W.2d 685 (1955).
73. For the prior opinion in the instant case, see Wilson v. Van Buren County, 196 Tenn. 487, 268 S.W.2d 363 (1954). See also Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181 (1955).
74. Wilson v. Van Buren County, 198 Tenn. 179, 184, 278 S.W.2d 685, 687 (1955).

determined in the prior decision in the case should be solely liable even though the disease had existed undiscovered during the term of a prior insurer's policy. This result does not seem to be inconsistent with decisions in other jurisdictions.[75] The court places primary emphasis on the date the disease was identified to the petitioner as a disabling occupational disease, not the date the disease was contracted or disabling without being identified, for the purpose of determining which insurer is liable. The court refused to attempt any equitable apportionment of liability between the insurance carriers here on the ground that to do so would not serve the interests of employees.

Priority of Claims: McKee v. Dever Bros.[76] presented a question as to the relative status of a workmen's compensation claimant and the holder of a note secured by a registered chattel mortgage for priority of payment out of personalty covered by the mortgage executed by the employer. Judge Hickerson, for the Middle Section of the Court of Appeals, reversed the chancellor and decreed priority for the mortgagee in accordance with what are found to be express provisions of the statute.[77]

75. See 2 LARSON, *op. cit. supra* note 11 § 95.20.
76. 284 S.W.2d 305 (Tenn. App. M.S. 1955).
77. TENN. CODE ANN. § 50-1015 (1956).