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LABOR LAW AND WORKMEN'S COMPENSATION—1954 TENNESSEE SURVEY

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Labor Law is best defined, perhaps, as that body of law which is directed toward, and peculiar to, the various incidents of the employer-employee relationship, whether viewed individually or collectively.[1] In this sense it includes all laws, such as those on workmen's compensation, wages and hours and unemployment insurance, setting forth the rights and limitations of the individual employee as against the employer (directly or indirectly), as well as those concerned with union organizational activity and collective bargaining.

PICKETING—STATE COURT JURISDICTION

Lodge Mfg. Co. v. Gilbert[2] was the only appellate court decision during the survey year dealing with the union organization phase of Labor Law. The case involved the authority of a state court, at the request of a manufacturer of goods shipped in interstate commerce, to enjoin picketing of its plant. The picketing, and the strike which it accompanied, was designed to secure recognition for a union which could not invoke the machinery of the National Labor Relations Board because of non-compliance with certain filing requirements of the Labor-Management Relations (Taft-Hartley) Act of 1947.[3]

In the chancery court, the manufacturing company asked for an injunction restraining all picketing or, in the alternative, that only one picket be permitted at a time. The chancellor sustained the plea of the defendants that exclusive jurisdiction over the practices complained of was in the National Labor Relations Board under the Taft-Hartley Act, but, nevertheless, continued the temporary injunction previously granted pending appeal. The scope of this temporary injunction was not stated in the opinion. The Supreme Court, in an opinion by Chief Justice Neil, agreed with the lower court that it lacked jurisdiction to determine questions such as the qualification of the union to act as a collective bargaining representative, the existence

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1. See SMITH, LABOR LAW — CASES AND MATERIALS iii (2d ed. 1953); *cf.* FORKOSCH, A TREATISE ON LABOR LAW 5-6 (1953).
2. 195 Tenn. 403, 260 S.W.2d 154 (1953).
3. 29 U.S.C.A. § 159 (f), (g), (h) (1947). This inability to have the benefit of Board procedures does not, under the terms of this statute, make it illegal for an employer to recognize the non-complying union as a collective bargaining agent for his employees.

of unfair labor practices, and the legality of the strike. However, the Taft-Hartley Act does not exclude all state court jurisdiction, the opinion points out, and unlawful acts causing irreparable damage to property, such as mass picketing, may be enjoined by such a court. The court concludes therefore that, although it is a proper case where peaceful picketing is permissible, the alternative prayer to limit the pickets to one should have been granted.[4]

The foregoing decision preceded that by the United States Supreme Court in the much-discussed case of *Garner v. Teamsters Union*[5] which held that state courts may not enjoin peaceful picketing which amounts to an unfair labor practice under the Taft-Hartley Act. The Tennessee Supreme Court's decision in the instant case, however, is concerned with "mass picketing" and therefore falls within an area of state power expressly recognized as lying outside the scope of the *Garner* decision.[6] Recent emphasis has been given, furthermore, to state power over mass picketing, threats of violence, obstructions of streets and highways and picketing of homes in *United Construction Workers, etc. v. Laburnum Construction Corp.*,[7] decided June 7, 1954.

While the Supreme Court of the United States has made it abundantly clear that, regardless of the effect on interstate commerce, the Taft-Hartley Act has not brought about any federal pre-emption of regulation of mass picketing, the scope of this latter term has not been clarified by that tribunal. It is doubtful in the extreme that it would find acceptable a mechanical definition which, under all circumstances, would make the use of more than one picket the equivalent of mass picketing. Nor should it be assumed that the Tennessee Supreme Court has adopted a rule which divorces the concept of "mass" from all the surrounding facts and circumstances. A balance must be struck between freedom of communication and what is necessary to maintain public order, including the prevention of violence, actual or threatened. The opinion in the instant case does not make too clear, however, which underlying facts led to the judgment that one picket, but no more than one, should have been permitted in this situation.

WORKMEN'S COMPENSATION

1. Introductory

Problems arising under the Tennessee Workmen's Compensation Law came before the Supreme Court in eighteen cases during the

4. Nashville Corp. v. United Steel Workers of America, CIO, 187 Tenn. 444, 215 S.W. 2d 818 (1948) had upheld an injunction which limited the number of pickets and designated the areas where they might picket.

5. 346 U.S. 485, 74 Sup. Ct. 161 (1953); 7 VAND. L. REV. 422 (1954).

6. 346 U.S. 485, 488, 74 Sup. Ct. 161; *cf.* Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942), and cases cited in Note, 7 VAND. L. REV. 422, 424 n.10 (1954).

7. 74 Sup. Ct. 833, 838 (1954).

survey year. This volume of litigation before our highest court thirty-five years after the enactment of the basic statute suggests that questions in this area of the law may well continue to be of importance, routinely, to virtually any practitioner. As is well known, the purpose of such statutes was to provide a method of compensating an employee or his dependents for a work-connected injury or death without the common law requirement of proving negligence attributable to the employer and without the availability to the employer of the "unholy trinity" of common law defenses, *viz.*, contributory negligence, fellow-servant rule, and assumption of risk.[8] On the other hand the employer could be assured that recovery under such a statute would be no more than a fixed amount and that normally it would reflect loss of earning ability only rather than all the elements of damage as at common law.[9]

Some of these distinctive features of Workmen's Compensation are highlighted by the decision of the Court of Appeals in *Thoni v. Hayborn.*[10] A $35,000 judgment had been entered on a jury verdict by the circuit court on behalf of an injured employee suffering thirty percent permanent disability. The employer whose negligence had caused the injury had elected not to operate under the Workmen's Compensation Act,[11] thus depriving himself of the three common law defenses[12] set forth above as against covered employees. In an opinion by Judge Hickerson, the judgment of the lower court was affirmed. The verdict was not considered to be excessive in light of the usual rules applicable in personal injury cases including compensation for physical pain and mental anguish. In contrast it may be noted that the workmen's compensation statute sets an absolute maximum of $8500[13] and the fractional disability in the *Thoni* case would have been compensated at a much lower figure.[14]

Two other Court of Appeals decisions, arising under the Federal Employers' Liability Act[15], provide further contrast with the Tennessee Workmen's Compensation Law.[16] In each instance the appellate court affirmed the lower court's direction of a verdict for the defendant railroad, because of the absence of proof of the neg-

8. RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 129 (1950); see Cate, *Workmen's Compensation—1953 Tennessee Survey*, 6 VAND. L. REV. 1012 (1953).
9. TENN. CODE ANN. § 6859 (Williams 1934); see New York Central R.R. v. White, 243 U.S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667 (1917).
10. 260 S.W.2d 376 (Tenn. App. M.S. 1953).
11. TENN. CODE ANN. § 6854 (Williams 1934).
12. *Id.* § 6862.
13. *Id.* § 6881.
14. *Id.* § 6878(c).
15. 45 U.S.C.A. § 51 (1954).
16. Chaffin v. Nashville, C. & St. L. R.R., 259 S.W.2d 877 (Tenn. App., M.S. 1953); Hawkins v. Clinchfield R.R., 266 S.W.2d 840 (Tenn. App., E.S. 1953).

ligence required under this statute. While one of these cases involved a hernia which is subject to special provisions under the Tennessee Workmen's Compensation Law,[17] in the other the injured railroad employee stepped on a nail hidden in the grass next to the track. In this latter instance certainly there would have been little doubt of the occurrence of an "injury by accident arising out of and in the course of the employment"[18] sufficient for the workmen's compensation statute.

2. Covered Employment

Two workmen's compensation cases during the survey year raised the question of the existence of the employment relationship. As is generally true under labor legislation, an affirmative finding on this point is normally a condition precedent for the application of the statute. The only exception under the Tennessee statute is provided by Code Section 6866, which imposes obligations upon the principal and intermediate contractors for employees of the subcontractor.[19] While the common law master-servant test of the right to control the physical performance of the work was applied in the two decisions, one of the cases in particular shows how this "test" might be better regarded as a short-hand expression for the conclusion drawn after weighing a great many factors tending to indicate the nature of the relationship.[20]

In *Weeks v. McConnell*[21] the Supreme Court affirmed the finding of the circuit judge that an injured paperhanger was the employee of a house builder rather than an independent contractor. Under an oral contract the paperhanger, using his own simple tools, was to be paid by the roll. Nothing was said about control over the performance of the work. The builder visited the job where the paper was being hung one or more times a day but gave no directions regarding the work. The builder thought the paperhanger was a subcontractor and paid insurance on him under the mistaken impression that the statute imposed a liability on him as principal contractor for an uninsured working subcontractor.[22] Both parties testified that the builder had the power to terminate the relationship at any time. Justice Tomlinson's opinion indicates that this latter fact was of the greatest importance in the affirmance of the finding that the paperhanger was an employee.[23] The court makes clear that it does not

17. TENN. CODE ANN. § 6892a (Williams Supp. 1952).
18. *Id.* § 6852 (d).
19. *Cf.* Weeks v. McConnell, 264 S.W.2d 573 (Tenn. 1954).
20. *Cf.* RESTATEMENT, AGENCY § 220, and see 1 LARSON, WORKMEN'S COMPENSATION § 43:53 (1952).
21. 264 S.W.2d 573 (Tenn. 1954).
22. *Cf.* TENN. CODE ANN. § 6866 (Williams 1934).
23. Citing Odom v. Sanford & Treadway, 156 Tenn. 202, 210, 299 S.W. 1045 (1927).

consider the presumption of employment indulged in in certain unskilled occupations to be applicable to a skilled trade such as paperhanging.[24] The holding is consistent with the general line of authority throughout the country in making an unqualified right to terminate the equivalent of the right of control.[25]

Still v. Penn. Thresherman & Farmers' Mut. Cas. Ins. Co.[26] presents another phase of the employment relationship question. In this instance no right to control was found because of the absence of a contract of hire between the deceased and the person upon whose premises he was working when killed. The evidence showed a contract between the operator of the Kingsport Machinists School and the B. & S. Welding & Supply Company, a corporation, for "crane service" at a stated rate per hour. The deceased, the general foreman of the corporation, was electrocuted on the school premises, while giving directions to a fellow-employee of the corporation engaged in operating a crane. The lower court held that the deceased was excluded from coverage under the statute as a "casual employee" of the school operator.[27] The Supreme Court, in an opinion by Justice Gailor, declared that there was error in holding deceased to be a casual employee, but affirmed the judgment because he was the employee of an independent contractor, the corporation. The fact that the deceased's contract of hire was with the corporation, that he received his compensation from it, is taken to be controlling as to his status.

The court does not use the term but the case might well have treated as raising the problem of special versus general employment, the "borrowed employee."[28] The result is consistent with the general line of authority in dealing with this problem. The special employer becomes liable for workmen's compensation for the loaned employee of the general employer only if there is an express or implied contract of hire, the work being done is essentially that of the special employer, and the special employer has the right to control the details of the work.[29]

The provisions of the Tennessee Workmen's Compensation Act are made inapplicable to "any person whose employment at the time of the injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer."[30]

24. *Compare* Brademeyer v. Chickasaw Bldg. Co., 190 Tenn. 239, 229 S.W.2d 323 (1950), *with* Mayberry v. Bon Air Chemical Co., 160 Tenn. 459, 465, 26 S.W.2d 148 (1930).
25. 1 LARSON, *op. cit. supra* note 20 at § 44:35.
26. 195 Tenn. 323, 259 S.W.2d 538 (1953).
27. See TENN. CODE ANN. § 6856(b) (Williams 1934).
28. 1 LARSON, *op. cit. supra* note 20 at § 48:00.
29. *Ibid.*
30. TENN. CODE ANN. § 6856(b) (Williams 1934).

Normally the two clauses in this exclusion are not treated as equivalent.[31] This exclusion has been treated in Tennessee, however, as being determined by the regularity of the type of activity in the particular business rather than the regularity of the employment itself.[32] In both *Rhyne v. Lunsford*[33] and *Thoni v. Hayborn*[34] it was found that employees were not "casual" who were engaged in the construction of facilities to be used in the principal purpose of the business. These holdings are in line with previous authority in Tennessee.[35] In the *Rhyne* case the employee of a lumber company was injured three hours after starting to work. He had worked previously as a common laborer for the company for a period of several months. After a several weeks' lay-off he had been called back and assigned to digging a ditch in connection with the construction of a platform under the supervision of the company's maintenance foreman. Justice Tomlinson's opinion points out that other employees of the company whose service had been continuous were working in the same ditch. These facts were held to support a finding of regular employment. In the *Thoni* case the employee operated a bulldozer used in the construction of filling stations. Judge Hickerson's opinion states "the business of the defendants was building service stations and selling gasoline and oil through them," hence the injured employee's work was in the regular course of business of the employer.[36] In this case a finding that the employment was casual would have taken the suit completely outside of the workmen's compensation statute, instead of depriving the employer, who had elected not to operate under it, of his common law defenses.

3. Injury by Accident Arising Out of Employment

The theory of Workmen's Compensation has been summarized generally by the sanguinary slogan attributed to Lloyd George that: "The cost of the product should bear the blood of the workingman."[37] Seemingly all have agreed that ". . . the blood of the workingman was a cost of production, [and] that industry should bear the charge."[38] Implicit in such statements is the idea that there are boundaries to the obligation. There must be an injury which is work-

31. See RIESENFELD AND MAXWELL, *op. cit. supra* note 8 at pp. 192-93.
32. U.S. Rubber Products v. Cannon, 172 Tenn. 665, 113 S.W.2d 1184 (1938); Dancy v. Abraham Bros. Packing Co., 171 Tenn. 311, 102 S.W.2d 526 (1937); *cf.* 1 LARSON, *op cit. supra* note 20 at § 51:12.
33. 263 S.W.2d 511 (Tenn. 1953).
34. 260 S.W.2d 376 (Tenn. App. M.S. 1953).
35. Mashburn v. Ne-Hi Bottling Co., 191 Tenn. 135, 229 S.W.2d 520, 232 S.W.2d 11 (1950).
36. 260 S.W.2d 376, 378.
37. PROSSER, TORTS 519 (1941).
38. Bausman, J. in Stertz v. Industrial Ins. Comm'n of Wash., 91 Wash. 588, 590, 158 Pac. 256, 258, Ann. Cas. 1918B 354 (1916).

connected and by something more than mere coincidence. According to the statute, compensation may be had in Tennessee if there is (1) an injury by accident (2) arising out of and (3) in the course of the employment.[39] Once an injury by accident has been established, the question of its work-connection remains. "Arising out of" and "in the course of" are but two facets of the unitary, not dual, test of work-connection.[40]

Patterson Transfer Co. v. Lewis[41] was the only case during the survey year in which the question of injury by accident was the primary issue. A truck driver died from a heart attack (coronary thrombosis) while unloading his truck. The trial court found that there was no unusual effort involved. Therefore, the problem was to decide whether a heart attack could be an injury by accident when there was no unusual exertion. The court affirmed an award of compensation by stating that: "It is now well established that ordinary and usual exertion at work resulting in injuries, is compensable."[42] This result was not unexpected in view of earlier cases in the jurisdiction,[43] and follows the liberal view of a majority of the courts that the "by accident" requisite is satisfied either if the cause of the injury was of an accidental nature or if the effect came as the unexpected result of routine performance.[44] Since "unexpectedness" is the basic ingredient to be considered, the majority is satisfied that the injury itself may be the required accident. A substantial minority of courts rules that there must be some unusual exertion in the "heart attack" and "breakage" cases.[45] This probably stems from a fear that awards might be based on harms having no true relation to employment, and the minority has used "accident" as an arbitrary terminus. However, in view of the

39. TENN. CODE ANN. § 6852(d) (Williams 1934).

40. For more detailed treatment of the test, see 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 6.00-36.00 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT §§ 1542-1543 (3d ed. 1948); 7 *id.* at §§ 1617-1693 (3d ed. 1950); HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 72-182 (1944).

41. 195 Tenn. 474, 260 S.W.2d 182 (1953).

42. 195 Tenn. 474, 478-79, 260 S.W.2d 182, 184 (1953).

43. Cunningham v. Hembree, 195 Tenn. 107, 257 S.W.2d 12 (1953); T. J. Moss Tie Co. v. Rollins, 191 Tenn. 577, 235 S.W.2d 585 (1951); Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948); Roehl v. Graw, 161 Tenn. 461, 32 S.W.2d 1049 (1930); King v. Buckeye Cotton Oil Co., 155 Tenn. 481, 296 S.W. 3, 53 A.L.R. 1096 (1927). *But cf.* Morrison v. Tennessee Consolidated Coal Co., 162 Tenn. 523, 39 S.W.2d 272 (1931) (contracting tuberculosis from coal dust in mine is not unexpected).

44. See, *e.g.*, Central Surety Co. v. Industrial Commission, 84 Colo. 481, 271 Pac. 617 (1928); Bussey v. Globe Indemnity 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, *op. cit. supra* note 20 at § 38.00. See Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 337 *et seq.* (1912); 7 VAND. L. REV. 428 (1954).

45. See, *e.g.*, Muff v. Brainard, 150 Neb. 650, 35 N.W.2d 597 (1949); Cordray v. Industrial Commission, 139 Ohio 173, 38 N.E.2d 1017 (1942); 4 SCHNEIDER, *op. cit. supra* note 40 at 1240 (3d ed. 1945).

basic idea behind the compensation concept, it would seem that an award should be allowed if *this* effort (unusual or not) by *this* employee resulted in an unexpected injury impairing his earning capacity. In the instant case, once the court determined that an injury by accident is possible without external accident or unusual exertion, the result was a foregone conclusion, as there was medical testimony that the usual effort of unloading the truck was a factor causally contributing to the death.

"Injury by accident" and "arising out of" were not so neatly distinguished in *Wilhart v. L. A. Warlick Construction Co.*[46] where a laborer succumbed to an attack of apoplexy. At the time of the attack, he was carrying a small piece of rope immediately after having been engaged in lifting lumber up to co-employees on a scaffold. The medical evidence was that when apoplexy results from exertion, it occurs during the exertion, not after. The doctors concluded that here there was no exertion sufficient to cause apoplexy, and the court affirmed a judgment denying compensation.

Apparently the court was not satisfied simply to hold that there was no injury by accident since it further concluded that there was no manifest connection between the employment and the apoplexy, essentially an "arising out of" problem. In fact, it is impossible to discover from the opinion whether the court bottoms the result on "injury by accident" or "arising out of." It indicated that had there been unusual exertion or strain at the time of the attack, compensation might have been due. Though at first blush the opinion smacks of the unusual exertion test,[47] the court did not lose sight of the essential problem involved. Certainly some effort connected with the employment, bearing a causal relation to the attack, would be necessary. Here the risk was personal to the employee, and the mere fact that death occurred at work was not enough, alone, to make it compensable.[48]

The opinion illustrates how closely "accident" and "arising out of" are intertwined in some types of cases. However, where there is an injury by accident, it must be further shown that the injury arose out of the employment. Ultimately, the issue resolves into a medico-legal inquiry into causation, a nice demonstration of the tremendous influence of medical evidence. Therefore, perhaps the injury by accident test is not so important as the "arising out of" determination.

The court affirmed an overruling of defendant's demurrer in *Work-*

46. 195 Tenn. 344, 259 S.W.2d 655 (1953).
47. 1 LARSON, *op. cit. supra* note 20 at § 38:60.
48. Finch v. Evins Amusement Co., 80 Ga. App. 457, 56 S.E.2d 489 (1949); Hahne & Co. v. Guenther, 114 N.J.L. 571, 178 Atl. 58 (1935); Ackerman v. H. B. Wiggins Sons Co., 19 N.J. Misc. 519, 21 A.2d 628 (1941); Sandlie v. North Dakota Workmen's Compensation Bureau, 70 N.D. 449, 295 N.W. 497 (1941).

man v. General Shoe Corp.[49] An employee had suffered a previous injury in the plant for which no compensation had been sought. That injury resulted in phlebitis, and, in the instant case, the phlebitis caused a fall to a level floor. Because of the statute of limitations, the later injury could not be related back to the earlier.[50] However, the court felt that if the employee could show some connection between this fall and a hazard of the employment, compensation could be had.[51]

Courts are generally agreed that an idiopathic fall is compensable if conditions of the employment increase the danger of the fall, such as a fall from a height,[52] near machinery,[53] a sharp object[54] and the like.[55] The controversial question is whether an idiopathic fall like that in the instant case arises out of the employment. Some courts have not sought to distinguish between falling from a low height and falling while standing on a level floor and have allowed compensation,[56] while others have not been able to find any employment hazard in a simple fall.[57] The rule of the instant case, that an idiopathic fall to the floor is compensable if some hazard connected with the employment is proved, seems reasonable enough. It insists upon the requirement of causal connection with the work while indicating liberality in its application. The difficulty will come in determining what sort of hazard is sufficient to satisfy the requirement. It has been suggested that factual distinctions based on the degree of hardness of the floor are the only rational approach,[58] tenuous though the distinctions may be, if any standard of work-connection is to be retained.

Lay v. Blue Diamond Coal Co.[59] involved a coal miner who died as a result of thrombosis brought about by the spontaneous rupture of

49. 265 S.W.2d 883 (Tenn. 1954).
50. But for the statute of limitations, recovery might well have been had. See 1 LARSON, *op. cit. supra* note 20 at § 13:12.
51. No special fact connecting the employment with the injury was pleaded, but this was not fatal. See section on Pleading and Evidence, *infra*, for a discussion of this aspect.
52. See, *e.g.*, Baltimore Dry Docks & Ship Building Co. v. Webster, 139 Md. 606, 116 Atl. 842 (1922). *Contra:* Van Gorder v. Packard Motor Car Co., 195 Mich. 588, 162 N.W. 107 (1917).
53. See, *e.g.*, Industrial Commission v. Nelson, 127 Ohio 41, 186 N.E. 735 (1933).
54. See, *e.g.* Garcia v. Texas Indemnity Co., 146 Tex. 413, 209 S.W.2d 333 (1948).
55. See 1 LARSON, *op. cit. supra* note 20 at § 12:12.
56. General Insurance Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App. 1951); *cf.* Savage v. St. Aeden's Church, 122 Conn. 343, 189 Atl. 599 (1937).
57. See, *e.g.*, Cinmino's Case, 251 Mass. 158, 146 N.E. 245 (1925); Riley v. Oxford Paper Co., 103 A.2d 111 (Me. 1954); Andrews v. L. & S. Amusement Corp., 253 N.Y. 97, 170 N.E. 506 (1930); Remington v. Louttit Laundry Co., 74 A.2d 442 (1950).
58. See the discussion of Pollock v. Studebaker Corp., 97 N.E.2d 631 (Ind. App. 1951), *aff'd*, 105 N.E.2d 513 (1952), in 1 LARSON, *op. cit. supra* note 20 at § 12:14.
59. 264 S.W.2d 223 (Tenn. 1953).

an intercranial artery. His employer knew he had high blood pressure, and the injury occurred during his first day on the job. He had to walk in a stooped position, or crawl, from 500 to 800 feet to reach the room where the coal was to be mined. Shortly after reaching the room, he was found unconscious. Medical evidence showed that this travel, combined with his high blood pressure, caused the injury resulting in his death. The court, holding that the rule of the *Patterson* case, treated above, controlled, reversed a judgment denying compensation. The employer was held to have taken the man along with his infirmity. The fact that, according to the medical evidence, the unusual exertion aggravated an internal weakness was enough to cause the injury to arise out of the employment.

The facts as found in the case would have justified recovery even under the restrictive "peculiar risk doctrine" in that this walk was a hazard peculiar to the employment and not one common to people in general.[60] The language in the *Patterson Transfer* case discussed above, along with other precedents,[61] indicates that the Tennessee court has not looked with favor on the "peculiar risk doctrine." The court has adopted the approach of reason by determining whether in fact there is a connection between the employment and the injury, regardless of whether the general public faces a similar hazard.

4. Injury in the Course of Employment

An injury is usually thought of as occurring "in the course of" employment when it takes place within the period of employment at a place where the employee may be expected to be.[62] The time and place of the injury along with the activity engaged in are components of the "course of employment" aspect of the work-connected injury test of an employer's liability. Though the phrase "in the course of" is taken from the law of master and servant, in workmen's compensation cases an employer's liability is more often caused by something acting upon the employee rather than an act or an omission of an act by the employee, which usually underlies the invoking of the doctrine of *respondeat superior*. In this aspect of compensation cases, attention is primarily directed toward deciding whether the employer's interests are being carried out directly or indirectly, in view of the nature of the employment environment, the characteristics of human nature, and customs and practices obtaining in the particular em-

60. 1 LARSON, *op. cit. supra* note 20 at § 9:20; 6 SCHNEIDER, *op. cit. supra* note 40 at § 1543; HOROVITZ, *op. cit. supra* note 40 at 104 (1944).

61. T. J. Moss Tie Co. v. Rollins, 191 Tenn. 577, 235 S.W.2d 585 (1951); Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).

62. 1 LARSON, *op. cit. supra* note 20 at § 14:00; 6 SCHNEIDER, *op. cit. supra* note 40 at § 1542; HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION 668 (1947).

ployment situation. This aspect of the test is controlling primarily in the "deviation cases" in which the employee is not actually at his place of work or is on his way to or from an activity not an integral part of the employment.[63] Generally, compensation is allowed in cases where the deviation is said to be for the personal comfort of the employee in connection with the employment and where the deviation is not such as to indicate an intent to abandon the employment relationship.[64] Typical of cases within the personal comfort doctrine are those involving injuries while eating,[65] drinking,[66] smoking,[67] and visiting rest rooms.[68]

Less agreement is found in the cases involving deviations to carry out personal errands during travel required by the employment.[69] Where there is a deviation from the route for a personal errand, Tennessee and the majority of the courts deny compensation for an injury taking place before a return to the business route.[70] The minority allows compensation when the injury happens while the employee is returning from the errand to his route.[71] The difference, of course, is based on what is regarded as a work-connected injury. The majority feels that there is no connection with the work unless the injury takes place on the route indicated by the business of the employer. The fact that the employee is returning to a route in connection with his employer's business, and is therefore "in the course of" his employment, is the rationale upon which the minority supports recovery for injuries during the return to the route from a deviation.

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63. For more comprehensive treatment of deviation cases, see 1 LARSON, *op. cit. supra* note 20 at § 19:00; 7 SCHNEIDER, *op. cit. supra* note 40 at §§ 1690-1693 (3d ed. 1950); HOROVITZ, WORKMEN'S COMPENSATION LAWS 170 (1944).

64. 1 LARSON, *op. cit. supra* note 20 at § 20:00; 7 SCHNEIDER, *op. cit. supra* note 40 at § 1617 (3d ed. 1950); HOROVITZ, WORKMEN'S COMPENSATION LAWS 167 (1944).

65. Racine Rubber Co. v. Industrial Commission, 165 Wis. 600, 162 N.W. 664 (1917).

66. Menendes v. Dravo Const. Co., 109 Pa. Super. 224, 167 Atl. 423 (1933). *But cf.* Callaghan v. Brown, 218 Minn. 440, 16 N.W.2d 317 (1944).

67. Bradford's Case, 319 Mass. 621, 67 N.E.2d 149 (1946).

68. Steel Sales Corp. v. Industrial Commission, 293 Ill. 435, 127 N.E. 698 (1920); *cf.* Tennessee Chemical Co. v. Smith, 145 Tenn. 532, 238 S.W. 97 (1922).

69. See note 63 *supra;* Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929), opinion by Cardozo, C. J., is the leading case on the "dual purpose doctrine," which provides compensation for an employee injured in traveling on a combination of business and a personal errand if the necessity for travel would still have been present had the personal aspect of the trip been eliminated.

70. Even though the trip is a business trip under the dual purpose doctrine, *supra* note 69, a deviation from the route to transact personal business may not be compensable. Inland Gas Corp. v. Frazier, 246 Ky. 432, 55 S.W.2d 26 (1932); Erickson v. Erickson & Co., 212 Minn. 119, 2 N.W.2d 824 (1942); Hill v. Dept. of Labor & Industry, 173 Wash. 575, 24 P.2d 95 (1933) (compensation denied when motorman was returning to street car after mailing letter); 1 LARSON, *op. cit. supra* note 20 at § 19:00.

71. See, *e.g.,* Macon Dairies v. Duhart, 69 Ga. App. 91, 24 S.E.2d 732 (1943); 1 LARSON, *op. cit. supra* note 20 at § 19:35.

The case of *Lumberman's Mutual Casualty Co. v. Dedmon*[72] illustrates the strictness of the rule as applied by the Tennessee court in deviation cases. A lumber inspector, required to visit lumber yards in various towns, for a trade association, was on his way from one such lumber yard to a hotel on the same street, where he was expected to complete reports concerning the business, when he stopped his car and crossed the street to visit a store to discuss fishing equipment (clearly a personal errand). While walking across the street to his car after completing his errand, he was struck and killed by a passing automobile. A recovery of compensation was reversed by the court in an opinion by Justice Tomlinson. The deceased was held to have been outside the course of his employment until he returned to the point of his deviation because there was no relation between his employment and his being in the street in an exposed condition at this particular time and place. The entire trip from the point of deviation from the business route because of a personal errand to the point of return to the route is outside the scope of the employment.[73] It should be noted that the deviation rule has been applied with a vengeance in this case in that the employee was in a street where his employment required him to be at the time of his injury and was headed in the general direction of his hotel, an objective within the scope of his employment. However, it is neither so severe nor so tenuous as the decision in an earlier Tennessee case where compensation was denied by dividing a straight-line route into segments because of a personal errand to be accomplished along the route.[74] The Tennessee court feels that when the employee is injured in the process of tending to strictly personal matters, he should bear the risk of injury rather than his employer since there is no real connection between the injury and the employment.

With the *Dedmon* precedent before it, the court recognized that the reversal of an award of compensation in *Underwood Typewriter Co. v. Sullivan*[75] was clearly indicated. A typewriter repairman was sent to a school in Oklahoma City to learn new techniques of repair. During his free time on Saturday evening, he was riding with a fellow employee in the latter's car in search of a particular type of bird seed for a female companion's bird and was killed while returning to the hotel after purchase of the seed. The court, by holding that the injury resulted from a voluntary act not accepted by or known to the em-

72. 264 S.W.2d 567 (Tenn. 1954).
73. *Cf.* ". . . the courts now generally recognize that human beings do not run on tracks like trolley cars . . . ." 1 LARSON, *op. cit. supra* note 20 at p. 292.
74. Free v. Indemnity Co. of North America, 177 Tenn. 287, 145 S.W.2d 1026 (1941). Criticized in 1 LARSON, *op. cit. supra* note 20 at § 19:23, as inconsistent with the dual purpose doctrine.
75. 265 S.W.2d 549 (Tenn. 1954).

ployer and outside the duties for which the employee was hired, obviously felt that the discriminating tastes of the lady and not the employer's business contributed to this employee's death. Again, as in the *Dedmon* case, the employee was returning to the course of his employment from a deviation but had not completed this objective.

5. *Measure of Compensation*

Greenville Cabinet Co. v. Ramsey,[76] turned on the type of evidence sufficient to determine loss of earning capacity. An employee had sustained a compensable injury (hernia) and was re-employed by the same employer at a higher wage than at the time of the injury. He was discharged after the lower court trial. The medical testimony was that there was a 50% permanent disability, and the court affirmed a judgment awarding compensation for 50% permanent partial disability. The trial court chose to accept the medical evidence rather than post-injury earnings as indicative of capacity, and the Supreme Court held that there was substantial evidence to support the award. The court followed its usual rule in such cases,[77] and the more usual rule elsewhere,[78] that post-injury earnings, while persuasive, are not necessarily conclusive of earning capacity. The interesting feature of the case is that, though there was a seeming conflict between actual earnings and medical prognostications, the latter were followed. This particular evidentiary situation distinguishes the case from previous ones in the jurisdiction,[79] though the same rule is followed in all.

It should be noted, in this connection, that the last paragraph of Code Section 6878(c),[80] which controlled the instant case, was changed by the 1953 legislature.[81] However, it does not seem that the new wording would affect the result of the case or the rule that it announces.

The sole question for determination in *McCracken v. Rhyne*[82] was

76. 195 Tenn. 409, 260 S.W.2d 157 (1953).

77. "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." 195 Tenn. 414. "Obviously, evidence that at the time of the hearing below, the employee is earning wages, is evidence that he has capacity to earn them, but it is not conclusive evidence." *Id.* at 160. Crane Enamel Co. v. Jamison, 188 Tenn. 211, 217 S.W.2d 945 (1949); Standard Surety & Casualty Co. v. Sloan, 180 Tenn. 220, 173 S.W.2d 436, 149 A.L.R. 407 (1943); Sanders v. Blue Ridge Glass Corp., 161 Tenn. 535, 33 S.W.2d 84 (1930); Russell v. Big Mountain Collieries, 156 Tenn. 193, 299 S.W. 798 (1927).

78. Agricola Furnace Co. v. Smity, 239 Ala. 488, 195 So. 743 (1940); Voight v. Industrial Com., 297 Ill. 109, 130 N.E. 470 (1921); McGhee v. Sinclair Refining Co., 146 Kan. 653, 73 P.2d 39, 118 A.L.R. 725 (1937); Industrial Commission v. Royer, 122 Ohio St. 271, 171 N.E. 337 (1930); Haynes v. Ware Shoals Mfg. Co., 198 S.C. 75, 15 S.E.2d 846 (1941).

79. See cases cited note 77 *supra*.

80. TENN. CODE ANN. § 6878(c) (Williams 1934).

81. Tenn. Pub. Acts 1953, c. 111.

82. 264 S.W.2d 226 (Tenn. 1953).

the amount of compensation due for permanent partial disability ensuing from a back injury. This required an interpretation of "wage of the workman at the time of the injury" as formerly used in Section 6878(c).[83] The chancellor had construed it to mean "average weekly wage," $32.22 in this case, but the court determined that the legislature meant what it had said, *i.e.*, wage at the time of the injury, or $42.80 in the instant case. Instead of applying a single measure, regardless of the varying language used in the statute, it is reasonable to follow the literal language in each instance, the opinion declares, because policy may vary as between a schedule injury and permanent disability.

The 1953 legislature amended the section to read "average weekly wages" after the rights in the case had accrued.[84] Though because of the statute of limitations the problem will probably not arise again, the case suggests the general and generous approach of the court to the problem of statutory construction in compensation cases. Generally, in a period of rising wages, the wage at the time of the injury might tend to be higher than the average weekly wage, though this would not follow in a period of recession. However, the court's application of the statute further indicates its tendency to interpret the compensation act so as to succor the employee,[85] where possible, since the act is avowedly designed for that purpose[86] with incidental advantages for an employer.[87]

Plumlee Revisited. An employee was awarded partial permanent disability for the right hand by a lower court when he lost the use of his little finger through a break at the proximal joint.[88] The Supreme Court found that the injury was uncomplicated in that it did not extend to or affect the use of the hand to the extent found by the chancellor and applied the statutory schedule for the loss of a fourth finger.[89]

The case follows the usual rule[90] in this and other[91] jurisdictions

83. TENN. CODE ANN. § 6878(c) (Williams 1934).
84. See note 81 *supra.*
85. Giles County v. Rainey, 195 Tenn. 239, 258 S.W.2d 775 (1953); Plumlee v. Maryland Casualty Co., 184 Tenn. 497, 201 S.W.2d 664 (1947). See 9. Pleading and Evidence, *infra.*
86. See *supra* p. 863.
87. Though shorn of his common law defenses, recoveries usually cost the employer less than at common law. See, *e.g.*, Thoni v. Hayborn, 260 S.W.2d 376 (Tenn. App. M.S. 1953).
88. Adams Construction Co. v. Cantrell, 263 S.W.2d 516 (Tenn. 1953).
89. "In all cases the permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member . . . ." TENN. CODE ANN. § 6878(c) (Williams 1934).
90. Catlett v. Chattanooga Handle Co., 165 Tenn. 343, 55 S.W.2d 257 (1952); Tennessee Products Co. v. Atterton, 182 Tenn. 110, 184 S.W.2d 371 (1945); Crane Enamelware Co. v. Crawley, 180 Tenn. 272, 174 S.W.2d 458 (1943).
91. New Amsterdam Casualty Co. v. Brown, 81 Ga. App. 790, 60 S.E.2d 245

that when a member is lost and the injury does not spread so as to affect other members, the scheduled compensation is exclusive, regardless of the question of loss of earning capacity. However, if the effects of loss of the member do spread to and interfere with other parts of the body, compensation may be based on the extent of disability and not confined solely to the schedule for the loss of the member alone.[92] The Tennessee court's *Plumlee* doctrine[93] seems to go further than most courts do when the injury, though confined to loss of the member without spreading damage, results in fact in total disability. In such a case, the court allows compensation for total permanent disability. This humanitarian doctrine has been severely criticized[94] as a destruction of schedule rates for loss of members, something which should be left to the legislature, not the courts. The doctrine is not universally disapproved, however.[95] The court indicated that the facts in the instant case were not sufficient to take it out of the more general rule and distinguished it from the *Plumlee*-type cases.

Schedule awards for permanent partial disability represent a conclusive presumption by the legislature of the extent of impairment of earning capacity in certain types of injuries. They are not, for that reason, entirely consistent with the overall theory of workmen's compensation, since the schedule provides compensation when in fact there may be no loss of earning capacity or when the loss would justify more compensation than the schedule provides. There is some evidence that the court is out of sympathy with the theory underlying the statutory schedule[96] because it does not allow for the interplay of reality. This judicial attitude may partially explain the development of the *Plumlee* doctrine, though it might not justify it.

6. Second-Injury Fund

A recovery of compensation for total permanent disability was affirmed in the case of *Giles County v. Rainey*[97] when an employee who

(1950). *Accord:* Smith v. Industrial Commission, 69 Ariz. 399, 214 P.2d 797 (1950); Hlady v. Wolverine Bolt Co., 325 Mich. 23, 37 N.W.2d 576 (1949); Lappimen v. Union Ore Co., 244 Minn. 395, 29 N.W.2d 8 (1947). See LARSON, WORKMEN'S COMPENSATION LAW § 58.20 (1952).

92. 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); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).

93. Plumlee v. Maryland Casualty Co., 184 Tenn. 497, 201 S.W.2d 664 (1947) (total permanent disability for loss of use of leg as opposed to schedule loss for permanent partial disability).

94. Kelly, *The Demarcation of Disabilities under Tennessee Workmen's Compensation Laws*, 20 TENN. L. REV. 333, 345 *et seq.* (1948).

95. LARSON, *op. cit. supra* note 20 at § 58:20.

96. Johnson v. Anderson, 188 Tenn. 194, 217 S.W.2d 939 (1949), 21 TENN. L. REV. 208 (1950); Standard Glass Co. v. Wallace, 189 Tenn. 213, 225 S.W.2d 35 (1949); Hix v. Cassetty, 186 Tenn. 343, 210 S.W.2d 481 (1948); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).

97. 195 Tenn. 239, 258 S.W.2d 775 (1953).

had become industrially blind in his left eye as a small child had subsequently become industrially blind in his right eye as the result of a compensable accident. The employer's liability was limited to the loss of the right eye, and the Second-Injury Fund was held accountable for the difference between loss of use of an eye and total permanent disability. This was a case of first impression under a recent change in the wording of the section establishing the Fund. As originally enacted,[98] the statute made an employer liable for a previously sustained "injury," whereas the amendment changed the wording so as to compensate for a previous "disability" and created the Second-Injury Fund.[99] Under the earlier wording, and in a case with substantially similar facts, the court had held that recovery was to be limited to compensation for the injury only, not for the effect of the injury when combined with a previous handicap.[100] "Disability," as currently used in the section, was held to cover the facts involved in the instant case so as to allow recovery against the Second-Injury Fund even though the previous impairment was not incurred in an employment situation.

Under the same wording in the Longshoremen's and Harbor Workers' Compensation Act,[101] the Supreme Court of the United States reached an identical result.[102] The liberal interpretation of "disability" by these courts would appear to be in complete harmony with the Fund's *raison d'être*.[103] Its purpose is to prevent disabled individuals who are seeking employment in the labor market from being penalized because of the provisions of the compensation statute. This is accomplished by making the Fund, not the employer, liable for the difference in compensation between the latest injury and the total effect on the employee's earning capacity. Once this result has been accepted, there would seem no valid reason for a limitation based on the source of the prior handicap since in any event the employee's earning capacity is reduced to the same extent. The court recognized this in the instant case. The rule of the case allows the Fund to further the ends of the compensation act by providing more adequate protection to an employee with impaired earning capacity without unduly burdening the immediate employer.

7. Dependency

The question of whether a posthumous child born of a marriage

98. Tenn. Pub. Acts 1919, c. 123, § 20; TENN. CODE ANN. § 6871 (Williams 1934).
99. Tenn. Pub. Acts 1945, c. 149, § 1; TENN. CODE ANN. § 6871 (Williams Supp. 1952).
100. Catlett v. Chattanooga Handle Co., 165 Tenn. 343, 55 S.W.2d 257 (1932).
101. 33 U.S.C.A. §§ 901 *et. seq.* (1927).
102. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198, 69 Sup. Ct. 503, 93 L. Ed. 611 (1949).
103. 2 LARSON, *op. cit. supra* note 20 at §59:31.

void *ab initio* is a legitimate heir and thereby a dependent under the workmen's compensation act was involved in *Winfield v. Cargill, Inc.*[104] A workman abandoned his wife and child. Without obtaining a divorce, he then underwent a marriage ceremony (which, of course, did not create a valid marriage) with a second woman who already had an illegitimate child by another man. He continued to live with the second woman, to whom his posthumous child was born.

The Supreme Court, through an opinion written by Justice Tomlinson, modified the chancellor's decree excluding the posthumous child from participation in the compensation award. He was permitted to share the award with the abandoned wife and child and the other child of the pseudo-wife. The court held that by adding "annulment or" to Code Section 8453[105] in 1932, the legislature had effectively prevented the legitimacy of a child of a marriage void *ab initio* from being questioned. Since a legitimate posthumous child may be a dependent[106] and share the compensation, it follows that one whose legitimacy cannot be questioned should be able to recover also.[107]

The policy announced in the instant case, to say the least, does not tend to discourage illegitimacy and illicit relationship—the wonted custom of the common law in other fields—but it does take cognizance of reality by recognizing that an illegitimate child can be as dependent in fact as a legitimate one. It must be remembered, in this connection, that the Workmen's Compensation Act is itself a departure from the common law traditions. However, the tendency of the courts has been to exclude an illegitimate when "child" or "children" has been used in the acts because their common law term of art meaning would not include such a person.[108] When phrases such as "member of the family" or "member of the household" have been used, courts have found little difficulty in including illegitimates within the scope of either phrase.[109] Some states have included them expressly by statute.[110] In the case of *Green v. Burch*,[111] the Kansas court interpreted "child" to include illegitimates and allowed benefits to a posthumous illegitimate. Thus, though there is hesitation, the tendency

104. 264 S.W.2d 584 (Tenn. 1954).
105. "The annulment or dissolution of the marriage shall not in any wise affect the legitimacy of the children of the same." TENN. CODE ANN. § 8453 (Williams 1934).
106. Travelers Ins. Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d (1943).
107. An illegitimate child in fact dependent on the employee for support may participate in the compensation. Portin v. Portin, 149 Tenn. 530, 261 S.W. 362 (1924).
108. Murrell v. Ind. Comm., 291 Ill. 334, 126 N.E. 189 (1920); Scott v. Independent Ice Co., 135 Md. 343, 109 Atl. 117 (1919); Lopo v. Union Pacific Coal Co., 53 Wyo. 143, 79 P.2d 465 (1938).
109. Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So. 842 (1945); 2 LARSON, *op. cit. supra* note 20 at § 62:23.
110. KY. REV. STAT. § 342.085 (1946); N. C. GEN. STAT. ANN. § 97-2 (1943).
111. 164 Kan. 348, 189 P.2d 892 (1948).

may be said to be to include illegitimates as dependents; and the Tennessee court has again demonstrated its liberal approach in applying the compensation act.

8. Statute of Limitations

The case of *Taylor v. J. W. Carter Co.*[112] is notable solely for the language used in applying the Act's one year limitation provisions. An employee was injured on October 3, 1951, and did not bring suit until October 15, 1952, twelve days after the end of the one year period. He claimed to have been bedridden for three weeks after the injury and that, under Code Section 6884(4)[113] the one year period of limitations was thereby tolled during his alleged incapacity. Justice Tomlinson, in affirming a dismissal of the action on the merits, said that:

> "The mere fact that Taylor was away from his work for three weeks immediately following, and because of, the injury is *no evidence whatever that he was physically unable to cause this suit to be instituted within the remaining eleven months and one week of the year.* He does not, therefore, bring this case within the protection of 6884(4).[114] (Emphasis added).

There can be little quarrel with the result reached under the facts of the case.[115] However, the reasoning used to support the result seems inconsistent with the statutory provision extending the period of limitations "for one year from the date when . . . incapacity ceases."[116] Whether there is a period of incapacity after injury is the question. If there is, then by the plain meaning of the section, the period runs for one year from the date the incapacity ceases.[117] Since there was no incapacity in the instant case the exception was inapplicable; and the suit was not brought within the period allowed. The supporting reasoning is to be regarded, at best, as unnecessary. If applied literally in a case where there had been a period of incapacity, the

112. 264 S.W.2d 586 (Tenn. 1954).

113. "In case of physical or mental incapacity, other than minority, of the injured person or his dependents to perform or cause to be performed any act required within the time in this section specified, the period of limitation in any such case shall be extended for one year from the date when such incapacity ceases." TENN. CODE ANN. § 6884 (4) (Williams 1934).

114. 264 S.W.2d 586, 587.

115. The court has previously announced that the period of limitations is to be calculated from the time the injury occurs, or is discovered to be compensable, as distinguished from the time of the accident. Burcham v. Carbide & Chemical Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949). This is in line with the majority rule. 2 LARSON, *op. cit. supra* note 20 at § 78:41. However, when the rule was propounded in Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947), it was severely criticized as being a too liberal construction. 20 TENN. L. REV. 398 (1948).

116. See note 113 *supra.*

117. McBrayer v. Dixie Mercerizing Co., 176 Tenn. 560, 144 S.W.2d 764 (1940).

obvious result would make a common statutory provision of little meaning. The passage in question may well have been not so much an interpretation of the statute[118] as an expression of a reaction to the facts of this case. One may question whether the court would wish to stand by it in an appropriate case turning on this aspect of the statute.

9. Pleading and Evidence

When it has been dealing with the sufficiency of pleadings, the court has virtually traced the words of the statute ". . . to the end that the objects and purposes of this chapter may be realized and attained."[119] In compensation cases, a variance between pleading and proof is not necessarily fatal. Thus, when an employee pleaded a ruptured disc in his spinal column and proved a sacroiliac strain, the court affirmed an award of compensation.[120] All that is required is that the employer or insurer be apprised of the nature of the claim in order to enable him to meet it, particularly where the claim is of a type not included in the statutory schedule.[121] Even though a fact essential to recovery is not formally pleaded, the complaint will be liberally construed so as to uphold it, if possible, against a demurrer.[122] The attention of the court is directed to the substance of the case rather than to the form of presenting it, so long as the defendant is warned of the general fact situation with which he will be confronted.[123] This judicial policy closely approaches that of administrative agencies, where informal pleadings are usually customary.[124]

The importance of medical testimony was illustrated in many cases during the survey year.[125] Of necessity, courts in these cases must rely heavily on the opinions of medical men in determining whether there was an injury by accident and the extent of an employee's disability. Lay testimony is acceptable as proof of the extent of dis-

118. The incapacity need not be continuous from the time of the accident. The limitation period may be tolled during incapacity originating at the date of the injury, as distinguished from the date of the accident. McBrayer v. Dixie Mercerizing Co., 176 Tenn. 560, 144 S.W.2d 764 (1940).

119. TENN. CODE ANN. § 6910 (Williams 1934).

120. Rhyne v. Lunsford, 263 S.W.2d 511 (Tenn. 1953).

121. Workman v. General Shoe Corp., 265 S.W.2d 883 (Tenn. 1954); Rhyne v. Lunsford, 263 S.W.2d 511 (Tenn. 1953).

122. Workman v. General Shoe Corp., 265 S.W.2d 883 (Tenn. 1954) [demurrer overruled though employee injured by fall induced by disease (risk personal to the employee) and no special hazard of the employment was pleaded in connection with the injury].

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

124. For more detailed treatment of the disposition of compensation claims as administered before administrative bodies and courts, see 2 LARSON, *op. cit. supra* note 20 at §§ 78:10 *et seq.*; HOROVITZ, WORKMEN'S COMPENSATION LAWS, 382-94 (1944).

125. See, *e.g.*, Lay v. Blue Diamond Coal Co., 264 S.W.2d 223 (Tenn. 1953); Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182; Wilhart v. L. A. Warlick Construction Co., 195 Tenn. 344, 259 S.W.2d 655 (1953).

ability, but contradictory medical testimony will support a holding which goes contra to the lay evidence.[126] Often, the medical testimony is determinative of whether compensation is due an injured employee, and, if so, how much.

The rule in Tennessee compensation cases is that the findings of fact of the trial court will be sustained if supported by any material evidence.[127] A refusal to reopen a case will not be treated on review as an abuse of the trial court's discretion if the original determination was supported by material evidence.[128] In operation, the rule seems comparable to the usual treatment of findings of administrative agencies. There, the agency is required to draw its conclusions from a preponderance of the evidence, and its findings of fact are not reviewable if supported by substantial evidence.[129] The Tennessee rule is in line with the general rule in compensation cases that the finder of fact will not be disputed on review if the facts as found are supported by a residuum of competent evidence.[130]

126. Davis v. General Electric Supply Corp., 264 S.W.2d 563 (Tenn. 1954).

127. See, *e.g.*, Adams v. Looney, 265 S.W.2d 889 (Tenn. 1954) (temporary partial disability resulting from concussion and damage to sight and hearing caused by falling limb); Davis v. General Electric Supply Corp., 264 S.W.2d 563 (Tenn. 1954) (material evidence to support finding that employee had recovered from back injury by date compensation payments ceased); Wright v. Gerst Brewing Co., 195 Tenn. 150, 258 S.W.2d 739 (1953) (material evidence to support refusal to reopen an award for injury to leg).

128. Wright v. Gerst Brewing Co., 195 Tenn. 150, 258 S.W.2d 739 (1953).

129. See, *e.g.*, 48 STAT. 926 (1934), as amended, 62 STAT. 991 (1948), 29 U.S.C.A. § 160(c) (Supp. 1953); *cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 Sup. Ct. 456, 95 L. Ed. 456 (1951).

130. 2 LARSON, *op. cit. supra* note 20 at § 79:00 (1952).