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Recent Developments: Crawley v. General Motors: Dispensing with Disability in Occupational Deafness Claims

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393 (Fla. 1st DCA 1984) that an employee going and coming from work is outside the scope of his employment. However, the District Court of Appeal of Florida looked to *Sweat v. Allen*, 200 So. 348, 350 (Fla. 1941) in stating that the "applicability of the rule depends upon the circumstance of the particular employment." The court agreed with the commissioner's decision and found that Polite was not "off-duty away from the employer's premises." *Id.* Further, the court stated that "compensability is almost always awarded when the injury occurs while the employee is traveling along a public road between two portions of the employer's premises", citing Larson on Worker's Compensation Law § 15-14(a) (1985). The court's essential reasoning for finding an exception to the going and coming rule was grounded in the fact that Ms. Polite's duties required her to be in two different locations within the Dade County school system, and the travel between the two different workplaces "was an essential part of her employment." *Id.*

The District Court of Appeal of Florida examined this case in two steps. First, an examination of the compensability of the injury found that the encouragement of participating in after school activities, coupled with the official permission and knowledge of such participation by the Dade County School System was substantial and competent evidence that the injury arose out of and in the course of Polite's employment. Second, the findings that Polite was not "off-duty" at the time of the accident, and that she was traveling the only road available allowed the court to accept the Larson premises exception to the "going and coming rule." The importance of this Florida court's opinion is its recognition of the premises exception which is present and accepted in a similar form in Maryland.

–Robert L. Kline, III

Crawley v. General Motors: DISPENSING WITH DISABILITY IN OCCUPATIONAL DEAFNESS CLAIMS

In *Crawley v. General Motors*, 70 Md. App. 100, 519 A.2d 1348 (1987) the Court of Special Appeals of Maryland interpreted Md. Ann. Code art. 101, § 25A (1985) to mean that a claimant's eligibility to receive benefits under workers' compensation for occupational deafness is to be determined without regard to the employee's loss of wages or his ability to perform his regular type of work. Prior to this interpretation of § 25A, an employee who suffered from a hearing impairment as a result of industrial noise had to demonstrate a loss of wages or an incapacity to perform his regular work before being eligible for workers' compensation. By dispensing with this disability requirement, the court of special appeals has increased the number of claimants who are entitled to benefits for occupational deafness. Now, a claimant has to suffer only a compensable amount of hearing loss before being eligible for workers' compensation.

For over twenty years, Douglas Crawley, Sr. had been exposed to industrial noise in the assembly division of General Motors where he worked. Alleging that he sustained a hearing loss as a result of his continued exposure to the industrial noise at General Motors, Crawley filed a claim with the Workers' Compensation Commission. The Commission determined that Crawley had sustained a compensable degree of hearing loss resulting from his employment and awarded him benefits.

General Motors appealed to the Circuit Court for Baltimore City, arguing that a "disablement" was necessary before an employee could be compensated for occupational deafness. Crawley stipulated that he had not suffered any "disablement." Relying on *Belschner v. Anchor Post Prods., Inc.*, 227 Md. 89, 175 A.2d 419 (1961), the circuit court judge reversed the commission's order of award.

The claimant in *Belschner* had been employed as a saw operator for twelve years and as a result of this employment, suffered a compensable amount of hearing loss. The claimant, however, was still performing his duties as a saw operator and did not lose any wages. The Court of Appeals of Maryland affirmed the Workers' Compensation Commission's rejection of the claim and held that worker's compensation for an employee's loss of hearing was limited by the language of § 22(a):

> Where an employee of an employer subject to this article suffers from an *occupational disease*, and is thereby *disabled* from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, and the disease was due to the nature of the occupation . . . the employee . . . shall be entitled to compensation. . . .

Md. Ann. Code art. 101, § 22(a) (1985) (emphasis added).

The court of appeals in *Belschner* also analyzed the definitions of "occupational disease" and "disablement" in reaching its conclusion. Section 67(13) defines "occupational disease" as "the event of an employee's becoming actually incapacitated, either temporarily, partially or totally, because of a disease contracted as the result of and in the course of employment." Section 67(15) defines "disablement" as "the event of an employee's becoming actually incapacitated, either partly or totally." Citing *Lumbermen's Reciprocal Ass'n v. Coody*, 278 S.W. 856 (Tex. Civ. App. 1926), the court therein held that an employee is not actually incapacitated within the intent of the law if the employee has the capacity to continue his regular employment and receives his usual rate of pay. Although *Belschner* held that disablement was a prerequisite for worker's compensation for occupational deafness, the court therein stated, "If there is a need to liberalize the law or to change what we think it plainly means, that is a legislative, not a judicial function." *Belschner*, 227 Md. at 95, 175 A.2d at 422.

In 1967, six years after the *Belschner* decision, the Maryland General Assembly enacted art. 101, § 25A entitled "Occupational deafness." The court of special appeals in *Crawley* was confronted with interpreting this section to resolve the dispute. Crawley contended that the legislature in enacting § 25A was responding to the *Belschner* court's invitation to change the law. General Motors, on the other hand, contended that the legislature intended the disability requirement of § 22(a) to apply, viewing § 25A as merely establishing highly technical criteria for measuring occupational deafness.

The court of special appeals began its inquiry of the legislative intent by examining § 25A itself. "Although the language of section 25A does not specifically state whether the General Assembly intended to eliminate disablement as a precondition of recovery for occupational deafness. Nevertheless, section 25A(a) reads 'Occupational deafness shall be compensated according to the terms and conditions of *this* section.'" *Crawley*, 70 Md. App. at 106, 519 A.2d at 1351 (emphasis in original). Concluding that the language of the section is ambiguous and not clearly revealing the legislative intent, the court examined the legislative history of the section.

After examining the legislative history of § 25A, the court concluded that the legislature not only intended to provide technical criteria for measuring loss of hearing but also intended to make occupational deafness compensable regardless of an employee's inability to work or loss of wages. In reaching such a conclusion, the court found the language of § 25A(c) significant. "By providing that a hearing loss of 15 decibels or less shall *not* constitute a compensable disability, the language employed by the Legislature implies that a hearing

loss in excess of 15 decibels was intended to be a compensable disability." *Id.* at 107, 519 A.2d at 1352 (emphasis in original).

Now, a "disability" for occupational deafness claims is merely a loss of hearing in excess of 15 decibels as calculated in accordance with § 25A. An employee no longer has to suffer loss of wages or be unable to perform his regular type of work.

In dissenting, Judge Garrity stated that the majority's interpretation of § 25A is unreasonable and contrary to public policy. "The very *raison d'etre* for providing workmen's compensation in the wake of contracting an occupational disease or disorder is to restore to a worker that portion of lost wages due to the physical disability caused by that occupation." *Id.* at 109, 519 A.2d at 1353. Judge Garity felt that the intent of § 25A is to provide the much needed technical criteria for measuring occupational deafness and to provide a qualifying standard of 15 decibels as calculated in the section for determining compensability.

While it is difficult to determine the ramifications of the majority's interpretation of § 25A, the decision permits employees who suffer a compensable amount of hearing loss to be eligible for worker's compensation while continuing to draw full wages. This decision suggests that it is the deafness and not the disability that is to be compensated.

—Randolph C. Baker

Hughes v. Workmen's Compensation Appeals Board: PAYMENT OF WORKERS' COMPENSATION BENEFITS UNDER CONCURRENT EMPLOYMENT.

In 1979 a Pennsylvania Workers' Compensation referee awarded death benefits based upon his conclusion that, for the purposes of wage computation, a private corporation and the federal government were concurrent employers of the decedent under the Pennsylvania Worker's Compensation Act (hereinafter "Act"). The referee's decision was subsequently reversed by the Worker's Compensation Board (hereinafter "Board") which ruled that the federal government was not an "employer" within the meaning of the Act. In *Hughes v. Workmen's Compensation Appeals Board,* ____ Pa. Commw. ____, 513 A.2d 576 (1986), the claimant, Rebecca Lane Hughes, sought a judicial interpretation of the word "employer" as it is used in the Act.

David George Hughes died on July 3, 1977, from injuries sustained in an automobile accident that occurred while he was operating a vehicle for his employer, Salem Transportation Co. He was survived by his wife (hereinafter "claimant") and a minor daughter.

Claimant was granted death benefits on July 18, 1979 based on the referee's findings that, at the time of his death, Hughes was not only employed by Salem, but was also a member of the United States Navy and on active duty. Thus, Hughes was an employee of both the federal government and a private corporation. The referee considered the earnings from both employers in computing wages for the purpose of determining the proper compensation due Hughes' survivors. *Id.* at ____, 513 A.2d at 577.

The referee's decision was based upon Section 309(e) of the Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, P.L. 736 as amended, 77 P.S. § 582(e) which establishes a requirement "[t]hat when an injured employee is concurrently working under contracts with two or more employers, his wages from all of such employers shall be considered as if earned from the employer liable for compensation under the Act."

The Board reversed, determining that the federal government was not an employer of Hughes and determined compensation solely on Hughes' earnings with Salem. In reaching such a decision, the Board relied on *Pennsylvania Nat'l Guard v. Workmen's Compensation Appeal Bd. and David H. Greenwood,* 63 Pa. Commw. Ct. 1, 437 A.2d 494 (1981). However, this case was of little significance to Hughes since it dealt with a member of the Pennsylvania National Guard who was injured while participating in an annual training program. The claimant, Greenwood filed a worker's compensation claim which was denied by the referee and subsequently reversed by the Board, thereby granting worker's compensation benefits. The Pennsylvania Commonwealth Court, citing lack of subject matter jurisdiction by the Worker's Compensation Board, vacated the order.

The Board's reliance on *Pennsylvania Nat'l Guard* ignored the issue at hand: "[w]hether the federal government was the decedent's employer for the purpose of computing the amount of compensation to be awarded to his survivors and paid by Salem pursuant to section 309(e), 77 P.S. § 582(e)." *Pennsylvania Nat'l Guard* dealt neither with amount of compensation nor with concurrent employers. Id.

In addition, the employer (Salem) and the Board contended that the word "employer" pursuant to Section 103, 77 P.S. § 21 did not include the federal government. Salem argued that the absence of specifically naming the federal government in the statute provided evidence of an intention to exclude the federal government from enjoying employer status. The Pennsylvania Commonwealth Court interpreted this silence to mean:

> [t]hat the obligations imposed on employers and the rights conferred upon workers by the Act are not to apply to the federal government or its employees. But Section 309(e), 77 P.S. § 582(e), imposes no obligation whatsoever upon an employer other than an employer for whom the injured employee was working, which in this case was Salem, not the federal government.

Hence, while the federal government could not be an employer for purposes of regulation or subjection to the Act, it was nevertheless a concurrent employer for purposes of determining compensation due survivors, paid by Salem (the liable employer). It was the intention of the Pennsylvania Legislature to broaden the definition of employer under the Act so as to "[c]over as many employment relationships in Pennsylvania as possible." *Giannuzzi v. Donninger Metal Prods.*, 585 F. Supp. 1306, 1309 (W.D. Pa. 1984).

Finally, the Pennsylvania Commonwealth Court denied Salem's request for a "set off" (reducing Salem's payments to claimant by the amount of federal compensation available to claimant). There existed no evidence to show that the claimant was receiving federal compensation. Therefore, a set off was not warranted.

The consequences of the *Hughes* decision are to maintain liability on the primary employer for whom the employee was actually working when injured, while preserving claimant's benefits and wages from the secondary employer (the federal government).

Section 309(e) poses a heavy burden on the private employer since the private employer not only assumes sole liability but it also provides no methods of decreasing that liability.

—Pablo Emilio Lense