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Recent Developments: Hughes v. Workmen's Compensation Appeals Board: Payment of Workers' Compensation Benefits under Concurrent Employment

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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'être* 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 Garrity 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 "em-

ployer" 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

