

## **Sikes, John**

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### **COVERAGE AND EXCLUSIONS**

#### **Federal Employees Compensation Act**

Allowance of a federal hearing loss claim precludes acceptance of a state claim. A worker loses any right to benefits under Title 51 if the person has a valid claim arising from the Federal Employees Compensation Act. ...***In re John Sikes, BIA Dec., 02 13513 (2004)*** [*Editor's Note: The Board's decision was appealed to superior court under Clallam County Cause No. 04-2-00669-7.*]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE: JOHN R. SIKES** ) **DOCKET NO. 02 13513**  
2 )  
3 **CLAIM NO. W-351394** ) **DECISION AND ORDER**  
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5 **APPEARANCES:**

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7 Claimant, John R. Sikes, Pro Se

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9 Self-Insured Employer, Clallam County, by  
10 Reeve Shima, per  
11 Mary E. Shima

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13 Department of Labor and Industries, by  
14 The Office of the Attorney General, per  
15 David I. Matlick, Assistant

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17 The employer, Clallam County, filed an appeal with the Board of Industrial Insurance  
18 Appeals on April 26, 2002, from an order of the Department of Labor and Industries dated March 1,  
19 2002. In this order, the Department ordered the employer to accept the claim for occupational  
20 hearing loss and close the claim with an award for permanent partial disability equivalent to  
21 14.88 percent of complete loss of hearing in both ears (which included tinnitus). The Department  
22 further directed the employer to be responsible for the purchase and maintenance of hearing aids.  
23 The Department based its order on the results of the January 21, 2002 audiogram. The  
24 Department order is **REVERSED AND REMANDED**.  
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29 **DECISION**

30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
32 issued on January 20, 2004, in which the industrial appeals judge reversed and remanded the order  
33 of the Department dated March 1, 2002, with directions to reject the claim.  
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36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
37 no prejudicial error was committed. The rulings are affirmed. We agree with the proposed decision  
38 reached by our industrial appeals judge. We have granted review to draw attention to the unique  
39 body of law as it applies to federal hearing loss claims. In 1980, the claimant, John R. Sikes, began  
40 working as a wastewater technician at the wastewater treatment plant in Clallam Bay. For the next  
41 eleven years, he performed such duties as washing down clarifiers, checking the operation of  
42 high-speed air-compressors, paint chipping, and operating sanders, grinders, and other power  
43 tools. He spent 50 percent of the time working near unmuffled compressors, with the noise directed  
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1 at his right ear. He used ear protection when it was available, including plugs and muffs. After  
2 leaving Clallam County, Mr. Sikes worked as a charter fisherman, a heavy equipment operator, and  
3 he also erected scaffolding. In 1998, Mr. Sikes went to work for the National Oceanic and  
4 Atmospheric Administration (hereinafter NOAA) as a professional fisherman.  
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7 Before Mr. Sikes began working with NOAA, he passed a hearing test. After working with  
8 NOAA for a number of years, a physical given by the employer revealed that Mr. Sikes had  
9 developed hearing loss. Mr. Sikes' work with NOAA involved significant exposure to hydraulic  
10 motors, loud engines, and air compressors. Mr. Sikes explained that his hearing loss is greater on  
11 the right because the motor was on his right side when he operated the reel. Mr. Sikes found that  
12 the ship was noisy even when he wore his ear protection. In early 2001, the claimant failed a  
13 hearing test. By mid-2001, his hearing deteriorated to the point where he was no longer permitted  
14 to pilot or operate vessels for the U.S. government. On January 19, 2002, Mr. Sikes filed a hearing  
15 loss claim with the U.S. Department of Labor, Office of Workers' Compensation Program. That  
16 claim was accepted on July 1, 2002, for the diagnosed condition of binaural hearing loss.  
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20 In this case, the employer bears the burden of proving that the order under appeal is  
21 incorrect. *In re Christine Guttromson*, BIIA Dec., 55,804 (1981). The employer has carried that  
22 burden through the uncontroverted testimony of otolaryngologist Dr. Gerald Guy Randolph.  
23 Dr. Randolph met with the claimant on June 5, 2002. At that time, he had a number of records  
24 available for review, including audiograms of April 1998, June 2001, and January 2002. He also  
25 performed an audiogram on the date of the examination. Dr. Randolph took an employment history  
26 from Mr. Sikes to ascertain the extent of his prior industrial noise exposure. It was his opinion that  
27 the 1998 audiogram (the pre-employment test for the NOAA) was valid. That audiogram showed a  
28 ratable hearing loss in the right ear of 3.75 percent, 0 percent in the left ear, with a binaural hearing  
29 loss ratable at 0.63 percent. Dr. Randolph believed that this hearing loss was attributable to the  
30 claimant's work and life activities prior to the date of the audiogram. The doctor explained that  
31 hearing loss due to noise exposure occurs at the time of the exposure. This exposure would  
32 include Mr. Sikes' work for Clallam County from 1980 to 1991.  
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36 Dr. Randolph did not believe either the June 2001 or January 2002 (showing a binaural  
37 hearing loss of 11.9 percent) audiograms were administered accurately. Dr. Randolph's testimony  
38 on that point is uncontroverted by the Department. Dr. Randolph administered a valid audiogram  
39 on June 5, 2002, which rated the claimant's hearing loss at 31.875 percent in the right ear,  
40 0 percent in the left, and a ratable binaural hearing loss of 5.31 percent. Dr. Randolph believed  
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1 there was no additional ratable impairment for tinnitus. According to the doctor, this increase in the  
2 claimant's hearing loss was the result of aggravation caused by the claimant's employment at  
3 NOAA.  
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5 In 1993 (effective 1/1/94), WAC 296-14-350(1) was amended to read:  
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7 (1) The liable insurer in occupational disease cases is the insurer on risk  
8 at the time of the last injurious exposure to the injurious substance or  
9 hazard of disease during employment within the coverage of  
10 Title 51 RCW which gave rise to the claim for compensation. Such  
11 Title 51 RCW insurer shall not be liable, however, if the worker has a  
12 claim arising from the occupational disease that is allowed for benefits  
13 under the maritime laws or Federal Employees' Compensation Act.  
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15 (Emphasis added.) RCW 51.12.100(1) provides, "The provisions of this title shall not apply to a  
16 master or member of a crew of any vessel, or to employers and workers for whom a right or  
17 obligation exists under the maritime laws or federal employees' compensation act for personal  
18 injuries or death of such workers." See also, *Esparza v. Skyreach Equipment, Inc.*,  
19 103 Wn. App. 916, 937 (2000). This statute and the regulation promulgated to conform to it  
20 eliminates any right to benefits under Title 51, for those like Mr. Sikes who come within its purview.  
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22 Here, given Dr. Randolph's testimony, it is clear that, within the meaning of  
23 RCW 51.12.100(1) and WAC 296-14-350(1), "the insurer on risk at the time of the last injurious  
24 exposure to the . . . hazard of disease during employment" is NOAA. It is also clear that Mr. Sikes'  
25 claim "arising from the occupational disease" of hearing loss has been "allowed for benefits under  
26 the . . . Federal Employees' Compensation Act." Since the allowance of the Federal claim  
27 precludes acceptance of a state claim, the March 1, 2002 allowance order must be reversed and  
28 the claim remanded to the Department to issue an order rejecting the claim.  
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### 35 FINDINGS OF FACT

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- 37 1. On November 9, 2001, an application for benefits was filed with the  
38 Department of Labor and Industries alleging the claimant had sustained  
39 the occupational disease of hearing loss during the course of his  
40 employment with Clallam County. The self-insured employer received  
41 the application for benefits on September 24, 2001. On November 27,  
42 2001, the Department issued an order allowing the claim and directing  
43 the self-insured employer to pay all medical and time loss benefits as  
44 may be indicated in accordance with the industrial insurance laws. On  
45 January 22, 2002, the employer filed a Protest and Request for  
46 Reconsideration of the November 27, 2001 order with the Department.  
47 On February 15, 2002, the Department issued an order holding the  
November 27, 2001 Department order in abeyance. On March 1, 2002,

1 the Department issued an order directing the self-insured employer to  
2 accept the claim for occupational hearing loss; closing the claim as the  
3 covered medical condition was stable; directing the self-insured  
4 employer to pay an award for permanent partial disability of  
5 14.88 percent for complete loss of hearing in both ears; directing the  
6 self-insured employer to be responsible for the purchase and  
7 maintenance of hearing aids, based the decision on the results of an  
8 audiogram dated January 21, 2002; and stating that the condition of  
9 tinnitus has been factored into the formula used to determine the  
10 permanent partial disability.  
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12 On April 26, 2002, the self-insured employer filed a Notice of Appeal  
13 from the March 1, 2002 Department order with the Board of Industrial  
14 Insurance Appeals. On May 13, 2002, the Board issued an order  
15 granting the self-insured employer's appeal, assigning Docket  
16 No. 02 13513, and ordering that further proceedings be held in this  
17 matter.  
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- 19 2. Between 1980 and 1991, the claimant was employed by Clallam County  
20 as a wastewater technician. Between 1991 and April 8, 1998, Mr. Sikes  
21 worked as a charter fisherman, erected scaffolding, and ran heavy  
22 equipment for the Clallam Conservation District.  
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- 24 3. As of April 8, 1998, the claimant had a ratable hearing loss in the right  
25 ear of 3.75 percent, 0 percent in the left ear, with a binaural hearing loss  
26 ratable at 0.63 percent. This hearing loss is attributable to all of the  
27 claimant's work and life activities prior to April 8, 1998, including  
28 Mr. Sikes' work for Clallam County from 1980 to 1991 as a wastewater  
29 technician.  
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- 31 4. Injurious noise exposure occurred after April 8, 1998, while the claimant  
32 was employed by the National Oceanic and Atmospheric Administration.  
33 This exposure occurred while the claimant was working in employment  
34 subject to the jurisdiction of the Federal Employees' Compensation Act.  
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- 36 5. On January 19, 2002, the claimant filed a claim for benefits with the U.S.  
37 Department of Labor, alleging occupational hearing loss arising during  
38 the course of his employment with the NOAA.  
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- 40 6. On July 1, 2002, Mr. Sikes' claim for occupational hearing loss arising  
41 during the course of his employment with the NOAA was allowed for  
42 benefits under the Federal Employees' Compensation Act.  
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#### 44 **CONCLUSIONS OF LAW**

- 45 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
46 parties to and subject matter of this appeal.  
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- 1 2. Because Mr. Sikes' claim arising from the occupational disease of  
2 hearing loss has been allowed pursuant to the Federal Employees'  
3 Compensation Act, RCW 51.12.100(1) and WAC 296-14-350(1)  
4 preclude him from receiving benefits for the occupational disease under  
5 the industrial insurance laws of the State of Washington.  
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7 3. The Department order issued March 1, 2002, is incorrect and is  
8 reversed. This matter is remanded to the Department with direction to  
9 issue an order rejecting the claim.

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11 It is so **ORDERED**.

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13 Dated this 13<sup>th</sup> day of July, 2004.

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15 BOARD OF INDUSTRIAL INSURANCE APPEALS

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19 /s/ \_\_\_\_\_  
20 THOMAS E. EGAN Chairperson

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23 /s/ \_\_\_\_\_  
24 CALHOUN DICKINSON Member