

Sikes, John

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.*]

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**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 13th 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