

Robinson, John

COVERAGE AND EXCLUSIONS

Longshore and Harbor Workers' Compensation Act

A claim should not be rejected on the basis the injury occurred while in the course of employment subject to federal jurisdiction as the last injurious exposure rule was not intended to apply as a basis to deny a state claim. The Department is required to determine the nature and extent of the worker's in-state employment and whether any of such employment impacted the worker's condition and, pursuant to RCW 51.12.100(4), may provide interim benefits pending a final determination. ...***In re John Robinson, BIIA Dec., 91 0741 (1992)*** [*Editor's Note: Accord, Department of Labor & Indus. v. Fankhauser, 121 Wn.2d 304 (1993).*]

Scroll down for order.

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2 Paragraph 1, on page 2, states:

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4 I had a previous Labor and Industries binaural hearing loss claim with the
5 claim number J-191778. This claim was allowed by the Department of
6 Labor and Industries, and awarded me a 17.20% complete loss of hearing
7 in both ears effective March 1, 1983...

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9 Paragraph 2, on page 2, states in part:

10 On December 29, 1989, I was evaluated by Dr. B. Richard Leventhal ... A
11 medical inquiry from the Department of Labor and Industries resulted in
12 Dr. Leventhal rendering an opinion that I currently suffered from a binaural
13 hearing loss impairment of 32.5%...

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15 Further, in the stipulated facts of "Supplemental Pleadings," page 2, number 5 states:

16 Injurious noise exposure occurred while at Todd Shipyards immediately
17 after his rehire and that this exposure occurred while under the jurisdiction
18 of the Longshore and Harbor Workers' Compensation Act.

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20 Based primarily upon these facts, but also on the other stipulated materials, it appears that Mr.
21 Robinson may have worked for employers subject to the provisions of the Washington State Industrial
22 Insurance Act after he had received compensation in 1983, and before his employment beginning on
23 July 12, 1989 in a job subject to federal jurisdiction. Also, the work he did between 1983 and 1989
24 may have subjected Mr. Robinson to further injurious noise exposure. If so, it may well be that Mr.
25 Robinson qualifies for additional state benefits or, if not, he may be entitled to interim benefits pursuant
26 to RCW 51.12.100(4).
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29 In any event, the Department's rejection order constrains us once again to delineate the
30 appropriate circumstances for the application of the "last injurious exposure" rule, WAC 296-14-350(1).
31 Certainly, based on the parties' stipulation, Mr. Robinson's last exposure to injurious occupational
32 noise occurred during employment subsequent to July 12, 1989 which was covered by the Longshore
33 and Harbor Workers' Compensation Act, a federal program. However, in such an instance, we have
34 previously held that the "last injurious exposure" rule is not intended to apply as a basis to deny a state
35 claim. It is a rule which governs the insurance risks and liabilities under the state's Industrial Insurance
36 Act between successive self-insured employers or a self-insured employer and the Department's State
37 Fund. The "last injurious exposure" rule is not to be used as a basis to deny benefits when exposure
38 has occurred under different compensation systems such as in the present case involving the State of
39 Washington and the Federal Longshore and Harbor Workers' Compensation Act. See, 4 A. Larsen,
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1 The Law of Workers' Compensation, § 95 (1990); Todd Shipyards Corp. v. Black, 717 F.2d 1280 (9th
2
3 Cir. 1983); Weyerhaeuser v. Tri, 117 Wn.2d 128 (1991).

4 After consideration of the Proposed Decision and Order, the Department's Petition for Review
5 filed thereto, and a careful review of the entire record before us, we agree with the Proposed Decision
6 and Order's determination that Mr. Robinson's claim may not be rejected out of hand, on the grounds
7 relied upon by the Department order. At a minimum, the Department is required to determine the
8 nature and extent of claimant's in-state employment between March 1, 1983 and July 12, 1989 and to
9 determine whether any of such employment had an adverse effect on the claimant's hearing. It may
10 also be necessary or appropriate to provide interim benefits pending a final federal determination,
11 pursuant to RCW 51.12.100(4). Mr. Robinson's claim will be remanded for such consideration. We,
12 therefore, enter the following Findings of Fact and Conclusions of Law:
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18 **FINDINGS OF FACT**

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20 1. On May 15, 1990 an application for benefits from the claimant, John L.
21 Robinson, was received by the Department of Labor and Industries
22 alleging that as of December 2, 1989, he suffered a worsened bilateral
23 hearing loss due to continuous exposure to injurious levels of noise while
24 in the course of employment with various employers.

25 On August 23, 1990 the Department issued an order which rejected the
26 claim for the reason that the "injury occurred while in the course of
27 employment subject to federal jurisdiction (Longshore and Harbor
28 Workers' Compensation Act)."

29 On September 7, 1990 the Department received claimant's protest and
30 request for reconsideration of its August 23, 1990 order.

31 On October 5, 1990 the Department issued an order which affirmed the
32 provisions of the Department order dated August 23, 1990.

33 On November 16, 1990 the Department issued an order holding its
34 October 5, 1990 order in abeyance pending further consideration.

35 On February 7, 1991 the Department issued an order which affirmed the
36 provisions of the Department order dated October 5, 1990.

37 On February 14, 1991 the claimant filed a Notice of Appeal with the Board
38 of Industrial Insurance Appeals. On March 7, 1991 the Board issued an
39 order granting the appeal.

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43 2. In March, 1983, the claimant had a hearing loss claim allowed by
44 Department of Labor and Industries under our State Industrial Insurance
45 Act, in Claim No. J-191778. He was awarded, based upon this hearing
46 loss, a permanent partial disability award equal to 17.20% complete loss
47 of hearing in both ears by a Department order effective March 1, 1983.

- 1 3. Since 1944, the claimant has been a worker employed as a boilermaker in
2 both state industrial and federal maritime work.
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4 4. The claimant worked at a job immediately prior to July 6, 1989 with IPC in
5 Port Angeles, Washington.
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7 5. The claimant was rehired by Todd Shipyards on July 12, 1989.
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9 6. On December 29, 1989 medical evidence was deduced indicating a
10 binaural hearing loss of 32.5%.
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12 7. Injurious noise exposure occurred while claimant was employed at Todd
13 Shipyards after rehire on July 12, 1989. This exposure occurred while
14 claimant was working under employment subject to the jurisdiction of the
15 Federal Longshore and Harbor Workers' Compensation Act.

16 **CONCLUSIONS OF LAW**

- 17 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
18 and the subject of this appeal.
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20 2. RCW 51.12.100 does not automatically preclude the claimant from
21 receiving benefits under the industrial insurance laws of the State of
22 Washington, in light of the provisions of subsection (4) thereof.
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24 3. The liable insurer for a hearing loss in an occupational disease claim is the
25 last instate employer covered by Title 51 RCW at the time of the last
26 injurious exposure to the injurious substance or hazard of disease which
27 gives rise to a claim for compensation, within the meaning of WAC
28 296-14-350(1).
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30 4. The order of the Department of Labor and Industries dated
31 February 7, 1991, which adhered to the provisions of prior orders rejecting
32 the claim for benefits for the reason that "injury occurred while in the
33 course of employment subject to federal jurisdiction (Longshore and
34 Harbor Workers' Compensation Act)", is incorrect, and is reversed. The
35 claim is remanded to the Department to further investigate, provide interim
36 benefits as may be indicated, and to issue further determinative orders as
37 may be indicated or required by the law and the facts.

38 It is so **ORDERED**.

39 Dated this 29th day of September, 1992

40 BOARD OF INDUSTRIAL INSURANCE APPEALS

41 /s/

42 S. FREDERICK FELLER Chairperson

43 /s/

44 FRANK E. FENNERTY, JR. Member

45 /s/

46 PHILLIP T. BORK Member
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