

Jimenez, Deborah

BOARD

Motion to vacate order on agreement of parties

An agreement may be vacated when a party demonstrated a desire to participate in the appeal and has a legitimate excuse for the failure to participate in the agreement. ...*In re Deborah Jimenez*, BIIA Dec., 01 19072 (2002)

Scroll down for order.

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

IN RE: DEBORAH C. JIMENEZ) DOCKET NO. 01 19072
)
)
CLAIM NO. X-219865) ORDER VACATING ORDER ON AGREEMENT
) PARTIES

The claimant, Deborah C. Jimenez, filed an appeal on August 16, 2001, for an order of the Department of Labor and Industries dated August 3, 2001. the order affirmed an April 2, 2001, order that closed the claim with an award for permanent partial disability equal to Category 2 for the categories for permanent dorso-lumbar and/or lumbosacral impairments. On March 20, 2002, we issued an Order on Agreement of Parties, which reversed the order dated August 3, 2001, and remanded the matter to the Department with directions to close the claim with an award for permanent partial disability equal to Category 3 of the categories for permanent dorso-lumbar and/or lumbosacral impairments.

On March 27, 2002, we received a motion from the employer to vacate the Order on Agreement of Parties. We allowed the Department and the claimant the opportunity to respond. We did not receive a response from either the Department or the claimant. After consideration of the employer's motion and the records and files contained herein, we determine that the employer's motion should be granted.

Our record reflects that the employer, Pro Logistics, Inc., has been represented by Approach Management Services through Michael Tsukada. Mr. Tsukada appeared at conferences held on November 29, 2001 and December 20, 2001, but was not present at a conference held on March 8, 2002. It was during the March 8, 2002 conference that the agreement between the claimant and the Department was reached. This agreement was used as the basis for our Order on Agreement of Parties.

In support of its motion, the employer included the declaration of Mr. Tsukada, who indicated he was, at the time of the March 8, 2002 conference, waiting in his office for a call from the industrial appeals judge. He indicates that when he did not receive a call, approximately twenty minutes after the conference was scheduled to begin, he called and then talked with the industrial appeals judge. Mr. Tsukada was then informed that the other parties had reached an agreement. Mr. Tsukada indicates the he believed the March 8, 2002 proceeding was a scheduling conference to be held by telephone. He based this belief on his experience in another matter in which the scheduling conference was handled by telephone. We note that the notice of conference for the March 8, 2002, proceeding does not indicate that the appearance should be by telephone; rather it directs the parties to appear at a conference at the Board's facility located in Vancouver, Washington.

We believe the circumstances in this appeal are such that the employer's representative should be excused for his non-appearance at the conference. It is apparent that Mr. Tsukada took immediate steps to contact our industrial appeals judge when he was not contacted for the conference and filed a motion once the Order on Agreement of Parties was issued. The employer has cited *In re William E. Carman, Jr.*, Dckt. No. 00 14738 (October 23, 2000) in support if its motion. In that appeal, a Proposed Decision and Order was vacated because the claimant mistakenly had appeared for hearings at our Everett facility rather than our Seattle facility. In another appeal, we excused a self-insured employer's attorney for failing to appeal at a hearing when the attorney, although having received notice of the hearing, had mistakenly confused the

1 appeal with another matter and thought that the hearing had been canceled. The attorney acted
2 diligently once she had realized her mistake. *In re Linda J. Williams*, Dckt. No. 01 14832
3 (February 13, 2002).
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5 Although this is a circumstance where the representative failed to appear at a conference
6 rather than a hearing, we believe the same considerations apply. Mr. Tsukada had actively
7 participated in the appeal, had a prior experience where a scheduling conference was held by
8 telephone rather than in person, and took immediate steps to become involved in the conference
9 once he realized he was not going to receive a call from our industrial appeals judge. He acted
10 diligently to correct his mistake. Under the circumstances, we believe the Order on Agreement of
11 Parties should be vacated and this matter remanded to allow the employer the opportunity to
12 participate in the settlement.
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14 It is so ORDERED.

15 DATED: June 24, 2002.
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17 BOARD OF INDUSTRIAL INSURANCE APPEALS
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23 /s/ _____
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