Hardy, Peggy

BOARD

Motion to vacate order dismissing appeal

Inaccurate advice from an attorney regarding the effect of dismissing an appeal is not a basis on which to vacate the dismissal. **….*In re Peggy Hardy*, BIIA Dec., 96 6361 (1998)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PEGGY S. HARDY	**)**	**DOCKET NO. 96 6361**
	)	
	)	**ORDER DENYING CLAIMANT'S MOTION TO**
CLAIM NO. T-274922	**)**	**VACATE ORDER DISMISSING APPEAL**

The claimant, Peggy S. Hardy, filed an appeal with the Board of Industrial Insurance Appeals on September 19, 1996, from an order of the Department of Labor and Industries dated September 17, 1996. The order denied the claim on the basis that there was no proof of a specific injury at a definite time and place in the course of employment, that the worker's condition was not the result of an industrial injury as defined by the industrial insurance laws, and that the worker's condition is not an occupational disease as contemplated by RCW 51.08.140. On July 21, 1998, we received from the claimant's counsel a motion to vacate the Board's order of dismissal. After consideration of the claimant's motion, the self-insured employer's response, claimant's reply thereto, and the records and files contained herein, we determine that the claimant's motion must be denied.

The record in this matter reflects that on July 21, 1997, we received a letter from Michael Markham, who was then representing Ms. Hardy. The letter requested dismissal of the appeal. Pursuant to that request, on July 21, 1997, an Order Dismissing Appeal was issued by this Board. The claimant, now represented by Christopher Sharpe, filed a motion requesting that the Board vacate its July 21, 1997 order on the grounds that Michael Markham erroneously and negligently represented to Ms. Hardy that she would have seven years to reopen her claim, that Michael Markham dismissed the appeal without Ms. Hardy's informed consent, and that the dismissal of claimant's appeal constituted the unauthorized surrender of a substantial legal right.

As a starting point, we must relay on the basic tenet that once a party has designated an attorney as his or her legal representative, the court and the other parties involved in the action are entitled to rely upon the authority of that attorney to act on the client's behalf until the client's decision to terminate the authority has been brought to the attention of the court and opposing counsel. *See Haller v. Wallis*, 89 Wn.2d 539 (1978).

Ms Hardy first argues that her former attorney Michael Markham was negligent in his representation of her. This allegation of negligence is supported by the statement that claimant was told by Mr. Markham that she would have seven years in which to reapply for reopening of her claim. Because the issue in this appeal was allowance of the claim, it is clear that such information would be erroneous, as there can be no "reopening" of a rejected claim. The self-insured employer, in its response, requests that the Board schedule a hearing for submission of evidence and consideration of the issue of negligence. The self-insured employer argues that it would be error to make a finding of negligence without the benefits of a formal hearing.

We conclude, however, that we do not need to schedule a hearing for submission of evidence because we do not believe that attorney negligence is sufficient grounds for vacation of an order dismissing the appeal. Attorney negligence has not been viewed by the courts as sufficient grounds for vacation of a judgment under CR 60. *Lane v. Brown & Haley*, 81 Wn. App. 102. Review denied, 129 Wn.2d 1028 (1996). In that case, although there was ample evidence of the attorney's negligence in representation of his client, the court did not find that such incompetence or negligence was sufficient grounds to warrant the vacation of the judgment. In the matter before us, if the claimant's counsel is negligent in the advice he gave to the claimant, the

negligence supports an independent cause of action against claimant's former attorney for negligence. It does not allow the Board to vacate its order dismissing the appeal.

Next, the claimant argues that dismissal of the appeal was without her informed consent. Presumably, this argument is based on the negligent misrepresentation which claimant alleges that her prior attorney made to her regarding her ability to reopen the claim within seven years. Apparently, based on this reasoning, it is argued that Michael Markham's dismissal of claimant's appeal constituted the unauthorized surrender of a substantial legal right. If indeed the client has not authorized the attorney to so act, the attorney is without authority to surrender his substantial legal right. *Graves v. P.J. Taggares Co.,* 94 Wn.2d 298 (1980). In that case, the attorney in question entered into a stipulation and compromise with authority of his client. These facts differ from the facts in the instant case. Claimant's attorney did have apparent authority to act on his client's behalf. Ms Hardy has not offered any proof that she did not authorize the dismissal or that she had terminated her relationship with Mr. Markham prior to entry of the dismissal. The fact that she believes she made the decision based on incorrect and inadequate advice from counsel may provide her with a cause of action against her attorney for malpractice but cannot be the basis for vacation of the Board's order of dismissal.

In summation, we do not determine whether or not claimant's allegations rise to the level of accusations of negligence by her former attorney. We conclude only that even accepting that her attorney was negligent, such an allegation is not sufficient basis under CR 60 to vacate the order dismissing the appeal. Accordingly, the claimant's motion must be denied.

It is so ORDERED.

Dated this 2nd day of October, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
JUDITH E. SCHURKE Member