Alaniz, Hector

BOARD

Motion to vacate order on agreement of parties

Mutual mistake for purposes of vacating an Order on Agreement of Parties can be established where it is demonstrated the resolution was not based on a meeting of the minds.In re Hector Alaniz, BIIA Dec., 00 19916 (2001)

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: HECTOR G. ALANIZ) DOCKET NO. 00 19916
)
) ORDER GRANTING MOTION TO VACATE
CLAIM NO. N-897369) ORDER ON AGREEMENT OF PARTIES

This is an appeal filed by the claimant, Hector G. Alaniz, on September 13, 2000, from an order of the Department of Labor and Industries dated September 1, 2000. The order closed the claim with a determination that claimant's permanent partial disability was best described by Category 4 of the categories for permanent dorso-lumbar and/or lumbosacral impairments; and that the claimant had a prior disability equal to Category 4 of the categories for permanent dorso-lumbar and/or lumbosacral impairments.

At a conference held on November 8, 2000, the parties entered into a stipulation that included an agreement that the Board should issue an order reversing the order dated September 1, 2000, and remand the matter to the Department with directions to issue an order closing the claim with a permanent partial disability award equal to Category 5, permanent dorso-lumbar and/or lumbosacral impairments, less a pre-existing permanent impairment equal to Category 4, permanent dorso-lumbar and/or lumbosacral impairments as paid under another claim. We issued an Order on Agreement of Parties on December 28, 2000, consistent with the parties' stipulation.

On January 22, 2001, we received from the claimant, a motion to vacate the Order on Agreement of Parties on the basis that it was based upon mutual mistake and misunderstanding. We have considered this a motion filed pursuant to CR 60(b). Although invited to respond, on January 30, 2001, the Department's representative sent a letter indicating that the Department would not respond to the motion to vacate not did the Department wish to join the motion. After consideration of the claimant's motion and the records and files contained herein, we determine that the motion must be granted.

Counsel's declaration, in support of the motion, indicates that he believed that by entering into the Order on Agreement of Parties, Mr. Alaniz would be entitled to an award for Category 5 low back impairment, based on schedules established for his latest injury, less the actual amount paid for a Category 4 low back impairment paid on the prior claim. Counsel indicated that further checking with the Department's representative revealed a different outcome. A line of court and Board decisions provide that when a pre-existing disability to the same body part must be considered, and different schedules of benefits are involved, the Department must subtract the percentage of totally bodily impairment resulting from the first injury from the percentage of total bodily impairment representing the claimant's disability following the second injury. The difference is then paid to the claimant according to the schedule of benefits in effect on the date of the latter injury. Corak v. Department of Labor & Indus., 2 Wn. App. 792 (1970); In re Michael Midkiff, BIIA Dec., 95 4715 (1997). It is this calculation that prompted claimant's motion.

CR 60(b)(1) provides for relief from a judgment for the following reasons:

Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.

In this instance, counsel filed the motion shortly after he determined the actual monetary benefits were not what had been anticipated at the time of the agreement. His understanding of the agreement, although not consistent with prior case law, may not have been unreasonable in the

context of the settlement discussions. The mistake made by counsel, regarding the calculation of benefits is not the same as a circumstance where counsel, in hindsight, is dissatisfied with choices deliberately made. *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986). We believe there was no deliberate decision to resolve this appeal for approximately \$10,000. Instead, we believe this is an instance where counsel was not fully aware of the implications of the settlement and had he been so, would not have entered into the agreed resolution.

Similarly, this is not an instance where the party seeks vacation of an agreed order on the basis counsel exceeded his authority. *Haller v. Wallis*, 89 Wn.2d 539 (1978). In *Wallis*, counsel settled an action, and the client, upon discovering the settlement amount, moved to vacate the agreed resolution. The Supreme Court noted that mutual mistake may support vacation of a settlement judgment. 89 Wn.2d at 544. In this matter, since we do not have a response from the Department's representative, we are unable to determine whether the mistake was mutual. Since consideration of motions to vacate is addressed to our discretion, we conclude the actual calculation of the settlement amount constituted a mistake sufficient to justify relief from the order. *Cf. Ebsary v. Pioneer Human Services*, 59 Wn.App 218 (1990).

After a careful review of the record and claimant's motion, particularly since the Department's representative elected not to explain its perspective on the agreement, we believe that claimant has established a basis on which we can vacate the Order on Agreement of Parties. Accordingly, pursuant to CR 60(b), we are vacating the Order on Agreement of parties dated December 28, 2000 and this matter will be remanded to the mediation process for further action as required.

/s/

It is so ORDERED.

DATED: April 2, 2001.

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