# Wiyrick, Robert

# **BOARD**

#### Motion to vacate order adopting proposed decision and order

Failure of a law office to correctly calendar the due date for filing a petition for review is not excusable neglect. *....In re Robert Wiyrick*, BIIA Dec., 01 11323 (2003)

Scroll down for order.

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

)

**IN RE: ROBERT A. WIYRICK** 

DOCKET NOS. 01 11323 & 01 12028

ORDER DENYING MOTION TO VACATE ORDER ADOPTING PROPOSED DECISION AND ORDER

## CLAIM NO. K-592340

APPEARANCES:

Claimant, Robert A. Wiyrick, by Madsen Law Office, per Dana C. Madsen

Employer, Lasco Distributing, Inc., None

Department of Labor and Industries, by The Office of the Attorney General, per Jacquelyn R. Findley, Assistant

The claimant, Robert A. Wiyrick, filed an appeal with the Board of Industrial Insurance Appeals on February 1, 2001, from an order of the Department of Labor and Industries dated January 23, 2001. In that order, the Department closed the claim with no additional award for permanent partial disability. This appeal was assigned Docket No. 01 11323. The claimant also filed an appeal on February 20, 2001, for an order of the Department of Labor and Industries dated January 17, 2001. In that order, the Department affirmed its order dated December 19, 2000, which terminated time-loss compensation as paid through December 15, 2000, on the ground that vocational services had ended. on February 25, 2002, our industrial appeals judge issued a Proposed Decision and Order that remanded to the Department with directions to grant claimant an award for additional cervical permanent partial disability equal to Category 3 of WAC 296-20-240, to grant an award for permanent psychiatric disability equal to Category 2 of WAC 296-20-340, and to thereupon close the claim with time-loss compensation as paid. On March 14, 2002, we received a request for an extension of time in which to file a petition for review. The time was extended until April 17, 2002. A petition for review was filed on April 19, 2002, but was not considered timely. Pursuant to RCW 51.52.104, on April 24, 2002, the Board issued an Order Adopting Proposed Decision and Order as the final order of the Board.

On April 17, 2003, we received from the claimant a facsimile of a Motion to Vacate Order Adopting Proposed Decision and Order Pursuant to CR 60 and an affidavit of Marci Pope. We acknowledged receipt of the motion to vacate and the Department was given the opportunity to respond. After consideration of the claimant's motion, the response of the Department, the claimant's Memorandum of Authorities in support of its motion to vacate, and the records and files contained therein, we determine that the motion must be denied.

44 CR 60(b)(1) provides that upon a motion of a party the court may relieve the party or his 45 legal representative from a final judgment, order, or proceedings for the reason of mistake, 46 inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order. In 47 requesting relief from the Order Adopting Proposed Decision and Order, the claimant's attorney has 46 indicated that, after receiving the transcripts and the letter granting the extension of time in which to 47 file a petition for review, the time for which the extension had been granted was not calendared properly. Due to this mistake, the time in which to file a petition for review was not noted within the appropriate time for the claimant to file the petition for review. This motion should be analyzed in the context of whether the claimant's failure to file a timely petition for review was due to excusable neglect.

Our review of the appellate authority in this area suggests that the failure to file a timely petition for review due to a breakdown of office procedures is not considered excusable neglect. *B* & *J Roofing, Inc. v. Board of Industrial Ins. Appeals*, 66 Wn. App. 871 (1992). In that case, B & J Roofing filed a petition for review with the attorney general's office, but not with the Board. As in this circumstance, having received not petition for review, the Board issued an order that adopted the Proposed Decision and Order as the final order of the Board. B & J Roofing requested reconsideration from the Board, claiming that the petition for review was misdirected to the attorney general's office due to secretarial error. The Board denied the request. The matter was ultimately resolved in the Court of Appeals. The court concluded that the misfiling of B & J Roofing's petition for review does not amount to excusable neglect. *See also, Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194 (1990). In addition, our Supreme Court has found that inadequate office procedures do not serve as an excuse for failure to timely file a notice of appeal. *Beckman v. Department of Soc. & Health Servs.*, 102 Wn. App. 687 (2000). The breakdown of office procedures or secretarial error, which results in claimant's failure to file a timely petition for review, cannot be considered excusable neglect.

Claimant has also argued CR 60(a) as a basis for vacating the Order Adopting Proposed Decision and Order. Cases interpreting this rule indicate that to determine whether a clerical error exists in the record, judgment, or order of the court, it is necessary to address the intention of the court in issuing the order or judgment. The rule itself, and interpreting case law, however, makes it clear the CR 60(a) does not apply to an attorney's failure to meet a deadline, but instead, applies to mistakes contained in the judgment, order, or on the record, which appear to alter the intentions of the court.

Finally, claimant argues that the Board should exercise its discretion in providing relief from the Order Adopting Proposed Decision and Order. The authority cited by the claimant in support of this proposition does not include cases under similar situations. Pursuant to statute, once the time for filing a petition for review has expired, the Proposed Decision and Order is deemed adopted as the Board's final decision. RCW 51.52.104. The Board does not have discretion to determine that the clear terms of the statute shall not apply.

Because the claimant has not established any reason, pursuant to CR 60(a) or CR 60(b), for vacating the Order Adopting Proposed Decision and Order, it is hereby ORDERED that the motion is denied.

DATED: August 26, 2003.

/s/ \_\_\_\_

THOMAS E. EGAN

Chairperson

/s/ \_

FRANK E. FENNERTY, JR.

Member