

Merrill, Kenneth

BOARD

Motion to vacate order on agreement of parties

A party who chooses not to participate in proceedings may not have an agreement vacated simply because their consent was not obtained. ...*In re Kenneth Merrill*, BIIA Dec., 06 22417 (2008)

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

1 **IN RE: KENNETH D. MERRILL**

) **DOCKET NO. 06 22417**

2 **CLAIM NO. Y-944601**

) **ORDER DENYING MOTION TO VACATE
ORDER ON AGREEMENT OF PARTIES**

3
4 The claimant, Kenneth D. Merrill, filed an appeal on December 22, 2006, from an order of
5 the Department of Labor and Industries dated November 11, 2006. In this order, the Department
6 affirmed closure of the claim effective October 28, 2005. On December 12, 2007, we issued an
7 Order on Agreement of Parties that reversed the Department order and remanded with directions to
8 provide treatment for the claimant's left leg, accept an aggravation of a pre-existing venous stasis,
9 and pay time-loss compensation for the period November 12, 2004, through November 1, 2006.

10 On April 24, 2008, we received a document from the employer that we treated as a Notice of
11 Appeal from a Department order dated April 14, 2008 (appeal assigned Dckt. No. 08 14015) and,
12 because of statements in the Notice of Appeal, we also construed the document as a request to
13 vacate the Order on Agreement of Parties dated December 12, 2007. This order responds only to
14 the request to vacate our Order on Agreement of Parties.

15 Our record of this appeal reflects that on January 17, 2007, the Building Industry Association
16 of Washington (BIAW), filed a Notice of Appearance as the lay representative for the employer,
17 Tacoma Fixture Company. On February 13, 2007, a settlement telephone conference was held;
18 the BIAW was sent notice, but did not participate. On May 2, 2007, a scheduling telephone
19 conference was held; BIAW was given notice, but did not participate. On November 27, 2007, a
20 settlement telephone conference was held; BIAW was given notice, but did not participate. At this
21 conference, the worker and the Department entered into the agreement to reverse the closure of
22 the claim.

23 The employer asserts that it was not included in the agreement. Our record demonstrates
24 that the employer representative was given notice of all proceedings and did not participate. The
25 representative offered no rationale for not participating in any of the conferences held in this matter.
26 The employer has not asserted it did not receive notice, nor has it asserted that the representative
27 was available for the telephone conference and not called. A party's failure to participate in the
28 proceeding should be interpreted as a waiver of any right to now object to the terms of the
29 agreement. See *In re Dannie Dillard, Dec'd.*, BIIA Dec., 89 3691 (1990).

30 The employer has not established a basis on which to vacate the Order on Agreement of
31 Parties. The request to vacate is denied.

32 It is **ORDERED**.

DATED: July 15, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
CALHOUN DICKINSON Member