

Baker-Nolden, Theresa

BOARD

Motion to vacate order on agreement of parties

An order on agreement of parties can only be vacated by a subsequent or additional order of the Board. An industrial appeals judge is without authority, on a party's motion, to vacate an order on agreement of parties and issue a proposed decision and order reaching the same result. In that circumstance, the proposed decision and order is a nullity.***In re Theresa Baker-Nolden, BIIA Dec., 90 4968 (1992)*** [special concurring opinion] [Editor's Note: See *Wells v. Olsten Corp.*, 104 Wa. App. 135 (2001). The Board has authority to consider motions under CR 59 and CR 60). CR 60(a) applies in instances of clerical error. See *Marriage of Stein*, 68 Wn. App. 922 (1992); *Marriage of King*, 66 Wn. App. 134 (1992). Otherwise, CR 60(b) applies. *Northwest Investment v. New West Fed.*, 64 Wn. App. 938 (1992).]

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

1 **IN RE: THERESA D. BAKER-NOLDEN) DOCKET NO. 90 4968**
2)
3) **ORDER VACATING ORDER ON**
4) **AGREEMENT OF PARTIES AND PROPOSED**
5) **DECISION AND ORDER AND REMANDING**
6) **APPEAL FOR FURTHER PROCEEDINGS**
7 **CLAIM NO. K-599081**)

8 **APPEARANCES:**

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10 Claimant, Theresa D. Baker-Nolden, by
11 Finer & Pugsley, P.S., per
12 Robyn L. Pugsley, Attorney, and Annie Cole, Legal Intern

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14 Employer, Hospitality Association, Inc.,
15 None

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17 Department of Labor and Industries, by
18 The Attorney General, per
19 Gary McGuire, Paralegal
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21 This is an appeal filed by the claimant, Theresa D. Baker-Nolden. Claimant's appeal was
22 placed in the United States mail in a properly addressed envelope containing correct postage on
23 September 14, 1990. Claimant appeals a Department order dated July 10, 1990 which was received
24 by the claimant on July 16, 1990. The Department order dated July 10, 1990 affirmed a prior order
25 dated December 6, 1989 which closed the claim with no award for permanent partial disability.

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27 **REMANDED FOR FURTHER PROCEEDINGS.**

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30 **DECISION**

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32 Preliminarily this matter appears to be before the Board pursuant to RCW 51.52.104 and RCW
33 51.52.106, for review and decision on a Petition for Review filed by the claimant to a Proposed
34 Decision and Order issued on October 28, 1991 in which the order of the Department dated July 10,
35 1990 was reversed and this matter remanded to the Department with instructions to issue an order
36 paying the claimant time-loss compensation for the period from December 6, 1989 through July 10,
37 1990 and awarding the claimant a permanent partial disability award consistent with Category 2 of
38 WAC 296-20-280 for low back impairment, and to thereupon close the claim.

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40 Prior to the issuance of the Proposed Decision and Order of October 28, 1991 and the Petition
41 for Review filed thereto, there was a previous Order on Agreement of Parties issued by this Board in
42 this matter. The Order on Agreement of Parties was the result of an agreement between the claimant
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1 and the Department of Labor and Industries, at a mediation conference on February 12, 1991, to
2 resolve the issues raised by claimant's appeal by the use of this Board's procedure to sponsor an
3 additional medical examination. The purpose of sponsoring an additional and independent medical
4 examination at the Board's expense is to encourage resolution of the appeal by the parties agreeing to
5 be bound by the findings of such an examination. The parties agree to the doctor doing the
6 examination and they agree to the questions or issues to be posed to the doctor. There is an element
7 of risk in that neither party can be sure what the independent examiner may conclude but they agree
8 to be bound by the determination that is made to obtain a quick and cost effective (no charge to the
9 parties for the medical examination) resolution of the dispute.
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12 Ms. Theresa Baker-Nolden was seen, as noted, by agreement of the parties, and at this
13 Board's expense, by Dr. James Ayers on May 21, 1991. Dr. Ayers conducted a medical examination
14 and found her condition related to her industrial injury to be fixed and stable. Dr. Ayers also found that
15 the claimant was totally temporarily disabled for the period December 1989 through July 10, 1990, and
16 that she had sustained a low back impairment best described by Category 2 for low back impairment
17 pursuant to WAC 296-20-280. These opinions answered fully the questions posed to the doctor.
18 Since the parties had agreed to use Dr. Ayers' medical report as the basis for an Order on Agreement
19 of Parties resolving the issues in this appeal, an Order on Agreement of Parties, in conformity with Dr.
20 Ayers' opinions, was signed and entered by the Board on July 5, 1991.
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23 Having received and read the Order on Agreement of Parties, the claimant's counsel appears
24 to have re-thought the previous agreement and on July 15, 1991 filed a Motion to Vacate the Order.
25 Claimant's Motion to Vacate the Order on Agreement of Parties asked to have the claim remanded to
26 the Department to not only pay the time-loss compensation, but also to provide vocational
27 rehabilitation, and to thereafter re-close the claim with the low back permanent disability award.
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30 Our industrial appeals judge held a conference on August 22, 1991 to consider the claimant's
31 Motion to Vacate the Order on Agreement of Parties. The judge indicated on the record at that
32 conference that he would grant claimant's Motion to Vacate the Order on Agreement of Parties, and,
33 pursuant to a further agreement of the parties, he would issue a Proposed Decision and Order based
34 on the Board's record and additional materials submitted by both claimant's counsel and the
35 Department.
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38 After the conference on August 22, 1991, no order was issued vacating the Board's Order on
39 Agreement of Parties. This matter was not referred to the Board for action on the motion, and no
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1 subsequent order was issued by the Board. The Proposed Decision and Order issued on October 28,
2 1991 purported to vacate the Order on Agreement of Parties consistent with the judge's statement on
3 the record at the August 22nd conference.
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5 On the merits of the appeal, the October 28th Proposed Decision and Order came to the same
6 result as the previous Order on Agreement of Parties. That is, the Proposed Decision and Order
7 awarded a permanent partial disability award for Category 2 low back impairment and time-loss
8 compensation for the period December 6, 1989 through July 10, 1990. Since the claimant had raised
9 the issue of vocational rehabilitation by way of the motion to vacate the Order on Agreement of
10 Parties, the industrial appeals judge resolved the vocational rehabilitation issue by determining that the
11 decision to provide vocational rehabilitation is at the discretion of the Director of the Department of
12 Labor and Industries. Since the claimant had presented no evidence of an abuse of discretion by the
13 Director, our industrial appeals judge gave no further consideration to the request for vocational
14 services.
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16 Apparently still not satisfied with the result arrived at by the Proposed Decision and Order, the
17 claimant, through her counsel, filed a "Petition for Review" of the order, and added to the issues
18 previously identified, the contention that Ms. Baker-Nolden was a totally and permanently disabled
19 worker.
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21 At this juncture there are two orders entered in this appeal, the final Board order, which is an
22 Order on Agreement of Parties dated July 5, 1991, and the Proposed Decision and Order issued by
23 our industrial appeals judge on October 28, 1991. The claimant, by way of the Petition for Review, is
24 seeking an additional "final" Board order.
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26 The Order on Agreement of Parties entered on July 5, 1991 is a final Board order and can only
27 be vacated by a subsequent or additional order of this Board! Our industrial appeals judge had no
28 authority to issue an order setting aside a final Board order. His statement on August 22, 1991 could
29 only have been in the nature of a recommendation to the Board on how to resolve claimant's motion to
30 vacate. As the existence of the October Proposed Decision and Order is inconsistent with the Board's
31 earlier Order on Agreement of Parties, we will consider the "Petition for Review" filed in this matter on
32 December 24, 1991, in effect, a reassertion by the claimant regarding the Motion to Vacate the Order
33 on Agreement of Parties. Since the Order on Agreement of Parties is our final order and can only be
34 vacated by this Board, the Proposed Decision and Order issued on October 28, 1991 is a nullity. Our
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1 industrial appeals judges have no authority to vacate our final orders nor do they have the authority to
2 issue further decisions of any nature following our final dispositive order in any case.
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4 We turn now to the circumstances which prompted this unusual pattern of orders and
5 proceedings. We are disturbed by the approach taken by claimant's counsel in this matter. In the
6 transcript of the February 12, 1991 conference in which the questions and issues to be presented for
7 the binding medical examination were set forth, the parties clearly agreed there were just three issues
8 to be decided: (1) whether the claimant was entitled to time-loss compensation from December 6,
9 1989 to July 10, 1990; (2) whether further treatment was indicated for conditions related to the August
10 31, 1988 injury; and if not, (3) the extent of permanent partial disability due to related conditions. See
11 also, the transcript of the first mediation conference on January 22, 1991, where those same three
12 issues in this appeal were identified. There was no discussion by the parties regarding the issue of
13 vocational rehabilitation. That issue was first raised in the original Motion to Vacate the Order on
14 Agreement of Parties.
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16 Raising new issues after a previous agreement to settle a case by means of an agreed medical
17 examination is a practice of which we do not approve. Both parties were provided ample opportunity
18 to raise any and all issues which should properly be considered by the Board prior to the medical
19 examination and the Order on Agreement of Parties. The purpose of an agreed or stipulated
20 resolution of an appeal is to bring closure to the dispute. Raising new issues after such an agreement
21 is contrary to the intended purposes of the mediation and binding examination processes.
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23 Interestingly enough, the first time the issue of permanent total disability was mentioned was in
24 the Petition for Review of the abortive Proposed Decision and Order, filed on December 24, 1991,
25 more than 15 months after this appeal was commenced. The claimant's counsel has apparently tried
26 to use the information obtained through Dr. Ayers' examination, at the Board's expense, to further
27 develop her case and raise belated issues she never thought of before. She is now arguing that a
28 correct interpretation of Dr. Ayers' report would be prima facie sufficient to find her client a totally and
29 permanently disabled worker. This, of course, without prior notice of this issue and without any
30 opportunity by the Department to present evidence on the issue of permanent total disability or on the
31 previously raised issue of vocational rehabilitation.
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33 We do not condone these tactics by claimant's counsel. Although we find her conduct
34 regarding the agreed medical examination quite disconcerting, we believe it is now in the best interest
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1 of each of the parties to remand this matter to the hearing process for a full and fair hearing on all the
2 issues so far raised in this case.
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4 Therefore the Order on Agreement of Parties issued on July 5, 1991 is vacated, as is the
5 Proposed Decision and Order dated October 28, 1991, since it was a nullity. This matter is remanded
6 to the hearing process for further proceedings. Unless the appeal is dismissed or perhaps resolved by
7 agreement of the parties, a further Proposed Decision and Order shall be entered after the parties to
8 these proceedings have had an adequate opportunity to present such evidence as is appropriate to
9 the issues herein. The Proposed Decision and Order shall be entered upon the entire record to be
10 hereafter developed, and the parties shall have the right, pursuant to RCW 51.52.104, to petition for
11 review of such further Proposed Decision and Order.
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16 It is so **ORDERED**.

17 Dated this 20th day of April, 1992.
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19 BOARD OF INDUSTRIAL INSURANCE APPEALS
20

21 /s/
22 S. FREDERICK FELLER Chairperson
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24 /s/
25 FRANK E. FENNERTY, JR. Member
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27 /s/
28 PHILLIP T. BORK Member
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31 I have signed the foregoing order. However, I would add a further condition, namely, that
32 neither party may present the testimony of Dr. Ayers at the further proceedings herein, without first
33 reimbursing this Board for the cost expended for his examination and report. This is essential, since
34 this neutral quasi-judicial body should not and cannot be placed in the position of deciding a contested
35 case, while at the same time financing part of the litigation costs of one of the contesting parties
36 appearing before us. This would not be appropriate to our impartial status, nor would it be proper use
37 of our budgetary appropriation which is subject to audit.
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42 Dated this 20th day of April, 1992.
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44 /s/
45 PHILLIP T. BORK Member
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