

NO. 27308

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KIPENI L. LUTU, Claimant-Appellant
vs.
OAHU TRANSIT SERVICES, INC., and
JOHN MULLEN AND COMPANY,
Employer/Insurance Adjuster-Appellee,
and
OAHU TRANSIT SERVICES, INC. and
ADJUSTING SERVICES OF HAWAII, INC.,
Employer/Insurance Adjuster-Appellee,
and
SPECIAL COMPENSATION FUND, Appellee

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2003-480 (2-94-08927) (2-00-14673))

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura, and Fujise, JJ.)

Claimant-Appellant Kipeni L. Lutu was employed by Oahu Transit Services, Inc. (OTS) as a bus driver. In 1993 and 1994, Lutu suffered injuries to his neck and shoulder as a result of two work-related motor vehicle accidents and one non-work accident in which he was hit by a car while riding a bicycle. In December of 1994, Lutu underwent surgery consisting of an anterocervical diskectomy with fusion at C3-4, C4-5, and C5-6. He remained symptomatic after the surgery with chronic neck pain, bilateral shoulder and arm pain, and headaches. In September 1999, Lutu settled his workers' compensation claims arising out of the work-related 1993 and 1994 injuries with OTS and John Mullen and Company, Inc. (John Mullen), OTS's workers' compensation insurance adjuster for those injuries.

On October 6, 2000, Lutu slipped on a wet floor and fell backwards at work. He sought workers' compensation benefits for injuries arising out of this fall. Adjusting Services of Hawaii, Inc. (ASH) was OTS's workers' compensation insurance adjuster for the October 6, 2000, accident.

The Labor and Industrial Relations Appeals Board (LIRAB) determined that: 1) the October 6, 2000, work injury temporarily aggravated Lutu's preexisting cervical condition and that he returned to his pre-injury status by November 6, 2000; 2) Lutu did not suffer any permanent disability or disfigurement as a result of the October 6, 2000, injury; and 3) a C6-7 disc herniation (found in a January 9, 2001, MRI) and a suspected left shoulder labral tear (found in a July 22, 2003, MRI) were not related to the October 6, 2000, accident. The LIRAB further determined that OTS/John Mullen, and not OTS/ASH, was liable for Lutu's cervical problems after November 5, 2000, and that OTS/John Mullen was required to reimburse OTS/ASH for any benefits OTS/ASH had paid after November 5, 2000.¹

Lutu appeals from the LIRAB's April 25, 2005, Decision and Order, as amended by its May 3, 2005, Amended Decision and Order.² Lutu argues that the LIRAB erred in: 1) determining that he only suffered a 30-day temporary aggravation of his preexisting cervical condition, and not a permanent aggravation, permanent disability, or new injury, as a result of his October 6, 2000, work accident; 2) determining that the C6-7 disc herniation and the suspected left shoulder labral tear were not related to the October 6, 2000, accident; 3) failing to apply the presumption of workers' compensation coverage under Hawaii Revised Statutes (HRS) § 386-85 (1993), to liberally construe the

¹ Except for a slight modification to the period of total temporary disability attributable to the October 6, 2000, accident, the Labor and Industrial Relations Appeals Board (LIRAB) affirmed the prior decision entered by the Director of the Department of Labor and Industrial Relations.

² The Amended Decision and Order amended Conclusion of Law #5 by correcting a typographical error in one of the dates mentioned.

provisions of the Hawai'i Workers' Compensation Law, and to provide benefits as mandated by that law; and 4) making numerous findings of fact and conclusions of law on which its decision was based.

I.

After a careful review of the record and the briefs submitted by the parties, we conclude that Lutu's arguments are without merit.

There was substantial evidence in the record to support the LIRAB's findings that Lutu only suffered a 30-day temporary aggravation of his preexisting cervical condition, and not a permanent aggravation, permanent disability, or new injury, as a result of the October 6, 2000, work accident. The LIRAB properly relied on the opinions of Dr. Mauro, Dr. Lau, Dr. Kienitz, and Dr. Smith in determining that Lutu's October 6, 2000, accident was a minor incident which only resulted in a temporary aggravation of Lutu's pre-existing condition. The record shows that Lutu continued to work after the accident, performing full duty between October 6, 2000, and October 27, 2000. Lutu was taken off work for three days at his request, but returned to full duty on November 2, 2000, and reported to his doctor that he was doing well. The opinion of Dr. Kienitz and evidence in the medical records support the LIRAB's determination that Lutu had returned to his pre-injury status by November 6, 2000.³

³ We note that on appeal, Employer/Insurance Adjuster-Appellee Oahu Transit Services, Inc. and John Mullen and Company, Inc. (OTS/John Mullen) joined Claimant-Appellant Kipeni L. Lutu (Lutu) in attacking the LIRAB's determination that Lutu's October 6, 2000, work injury was a temporary aggravation that had resolved by November 6, 2000. OTS/John Mullen additionally argued, in its answering brief, that the LIRAB erred in ordering OTS/John Mullen to reimburse OTS and Adjusting Services of Hawaii, Inc. (OTS/ASH) for benefits OTC/ASH paid after November 5, 2000. OTS/John Mullen, however, did not appeal the LIRAB's decision. Generally, an appellee is not entitled to attack a judgment or final decision without a cross appeal. Shoemaker v. Takai, 57 Haw. 599, 607, 561 P.2d 1286, 1291 (1997). In any event, our conclusion that the LIRAB did not err in determining that Lutu's October 6, 2000, work injury was a temporary aggravation that had resolved by November 6, 2000, disposes of OTS/John Mullen's contentions.

There was also substantial evidence in the record to support the LIRAB's determination that Lutu's C6-7 disc herniation and his suspected left shoulder labral tear were not related to the October 6, 2000, accident. Abnormalities in Lutu's C6-7 disc had been documented in his medical records before October 6, 2000. The opinions of Dr. Mauro, Dr. Lau, and Dr. Smith supported the view that Lutu's C6-7 disc herniation was part of a natural progression relating to his preexisting degenerative cervical condition, and not the result of any injury sustained on October 6, 2000.

With respect to the suspected left shoulder labral tear, the record shows that the suspected tear was not discovered until an MRI taken in July 2003. Prior to that time, Lutu had undergone a medical evaluation in March 2002 during which he had full range of motion in both shoulders and a functional capacity evaluation in June 2002 during which he had been able to lift 20 pounds overhead. Dr. Lau and Dr. Smith opined that Lutu's suspected left shoulder labral tear was not related to the October 6, 2000, accident.

We reject Lutu's claim that the LIRAB's decision was based on erroneous findings of fact and conclusions of law. We conclude that in rendering its decision, the LIRAB relied upon factual findings that were supported by substantial evidence and were not clearly erroneous. See Igawa v. Koa House Restaurant, 97 Hawai'i 402, 405-06, 38 P.3d 570, 573-74 (2001). We further conclude that the LIRAB properly applied the Hawai'i Workers' Compensation Law, HRS Chapter 386, including the presumption of workers' compensation coverage under HRS § 386-85. See Igawa, 97 Hawai'i at 406-10, 38 P.3d at 574-78.

II.

The LIRAB's April 25, 2005, Decision and Order, as amended by its May 3, 2005, Amended Decision and Order, is affirmed.

DATED: Honolulu, Hawai'i, September 28, 2007.

On the briefs:

David J. Mikonczyk,
for KIPENI L. LUTU,
Claimant-Appellant


Presiding Judge

Wayne W.H. Wong,
for OAHU TRANSIT SERVICES, INC.
and JOHN MULLEN AND COMPANY,
Employer/Insurance Adjuster-
Appellee


Associate Judge

Robert C. Kessner
Kathy K. Higham
Sylvia K. Higashi
for OAHU TRANSIT SERVICES, INC.
and ADJUSTING SERVICES OF
HAWAII, INC., Employer/Insurance
Adjuster-Appellee


Associate Judge

Frances E.H. Lum
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Deputy Attorneys General,
for SPECIAL COMPENSATION
FUND, Appellee