*****NOT FOR PUBLICATION*****

NO. 24148

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROBERT R. MANLEY, Claimant-Appellant

vs.

JACK DIXON, INC. and ARGONAUT INSURANCE COMPANY,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 97-343(M) (7-94-02901))

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama,
Acoba, and Duffy, JJ.)

Claimant-Appellant Robert Russell Manley (Appellant) appeals from the March 2, 2001 Decision and Order of the Labor and Industrial Relations Appeals Board (the Board) affirming the supplemental decisions, entered on May 6, 1997, July 18, 1997, and February 3, 1998, by the Director of Labor and Industrial Relations (Director).

On March 2, 2001, the Board determined that (1) Appellant's average weekly wage (AWW) was correctly calculated to be $520.00; (2) Respondent-Appellee Jack Dixon, Inc. (Dixon) was not liable for reimbursement to the Veteran's Administration; (3) the Director did not err in dismissing Appellant's fraud complaint against Respondent-Appellee Argonaut Insurance Co. (Argonaut); (4) the Director did not err in denying

Appellant's request for a forty-five-day extension of time to select a new physician; (5) Appellant reached medical stability on July 18, 1997; and (6) Appellant was entitled to temporary total disability (TTD) through July 18, 1997. On March 12, 2001, Appellant appealed the Board's decision and order.

Appellant argues on this appeal that (1) he was fraudulently denied a "Benefits Facilitator" at the Maui DCD, pursuant to Hawai'i Revised Statutes (HRS) § 386-71.6 (Supp. 2002)[1]; (2) the DCD and the Board falsified the record; (3) Appellant had no access to the administrative process; (4) Appellant's AWW was incorrectly calculated; and (5) the Department of Labor and Industrial Relations Disability Compensation Board (DCD) and the Board incorrectly determined that Appellant was medically stable.

Appellant's opening brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28. This court has held that an appellant's "failure to conform his brief to the requirements of HRAP Rule 28(b) burdens both the parties compelled to respond to the brief and the appellate court

[1] HRS § 386-71.6, entitled "Workers' compensation benefits facilitator unit," read as follows:

> (a) There is established within the department of labor and industrial relations the workers' compensation benefits facilitator unit. . . .
> (b) Facilitators of the unit shall have the following duties and responsibilities:
> (1) Assist injured workers in filing their workers' compensation claims under this chapter;
> (2) Assist insurers, employers, and providers; and
> (3) Facilitate the workers' compensation claims process.
> . . . .

attempting to render an informed judgment." Housing Fin. Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999) (citation omitted). However, Appellant appears before this court as a pro se litigant, and "this court has consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible . . . ." Id. at 85-86, 979 P.2d at 1111-12 (citation and internal quotation marks omitted). Thus, we address the issues raised by Appellant despite his failure to comply with HRAP Rule 28.

Appellees assert that Appellant raises issues in this appeal that he failed to raise before the Board. In his opening brief, Appellant only addresses two of the six issues previously presented to the Board: (1) the calculation of Appellant's AWW and (2) the determination of Appellant's medical stability. "This court will not consider issues for the first time which were not presented to the Appeals Board." Kalapodes v. E.E. Black, Ltd., 66 Haw. 561, 565, 669 P.2d 635, 637 (1983) (citing Demond v. University of Hawaii, 54 Haw. 98, 103, 503 P.2d 434, 437 (1972)). Thus, this court will only address the merits of Appellant's arguments regarding the calculation of Appellant's AWW and the determination of medical stability.

The standard of review for agency decisions is set forth in HRS § 91-14(g) (1993) as follows:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the

> administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphasis added.) Also, "[u]nder HRS § 91-14(g), findings of fact are reviewable under subsection (5) . . . ." Potter v. Hawai'i Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62 (1999) (citations, internal quotation marks, and block quote format omitted).

An examination of the evidence reveals that the Board's determination of Appellant's AWW is not clearly erroneous. Based upon the DCD's decision, the Board found that, pursuant to HRS § 386-31(b) (1993),[2] Dixon owed Appellant $346.68 for TTD. The DCD arrived at this figure by calculating sixty-six and two-thirds percent of Appellant's AWW. Consequently, the DCD determined that Appellant's AWW was $520.00. The Board concluded that Appellant's AWW was determined by multiplying the average number of hours worked per week by the hourly wage.

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[2] HRS § 386-31 reads in relevant part as follows:

> (b) Temporary total disability. Where a work injury causes total disability not determined to be permanent in character, the employer . . . shall pay the injured employee a weekly benefit at the rate of sixty-six and two-thirds [percent] of the employee's average weekly wages . . . .

(Emphases added.)

The Board also found that Appellant wrote several letters to Appellees, alleging that the overtime hours that he worked should have been included in the AWW calculation. The Board studied the Dixon's payroll journals and concluded that Appellant worked an average of 35.6 hours per week. The Board pointed out that Appellee agreed to pay Appellant benefits based upon a forty-hour work week even though he worked less than forty hours per week on average. The Board also explained that Appellant did not appear for trial or submit a position statement announcing his position on AWW; nor did he offer "any affidavits or documentary evidence to substantiate the overtime hours he allegedly worked while employed . . . ." The Board concluded that there was "no evidence from [Appellant] to show that he worked more than an average of [forty] hours per week . . . ." Therefore, under the circumstances, the evidence supports the Board's determination regarding Appellant's AWW, and the Board's decision is not clearly erroneous. Additionally, Appellant offers no new argument in this appeal to show that the DCD miscalculated his AWW. Hence, the Board's decision and order regarding AWW must be affirmed.

Appellant also maintains that "the Board grossly misunderstands how medical stability is determined . . . ." Based upon the opinions of Doctors Ronald Kienitz and Lorne Direnfeld, who evaluated Appellant, and the record, the Board found that Appellant reached medical stability by July 18, 1997.

The Board based its conclusion on reliable evidence in the record; the finding that Appellant reached medical stability by July 18, 1997 is not clearly erroneous. Appellant offers no new argument to rebut the Board's decision. Therefore,

IT IS HEREBY ORDERED that the LIRAB's March 2, 2001 decision and order is affirmed.

DATED: Honolulu, Hawai'i, October 7, 2003.

On the briefs:

Robert Russell Manley,
claimant-appellant,
pro se.

Roy Y. Yempuku for
employer-appellee and
insurance carrier-appellee.