

NO. 22975

IN THE SUPREME COURT OF THE STATE OF HAWAII

MICHAEL RADKAI, Claimant-Appellant

vs.

KAPALUA BAY HOTEL AND VILLAS, and FIRST INSURANCE COMPANY
OF HAWAII, LTD., Employer/Insurance Carrier-Appellee

and

SPECIAL COMPENSATION FUND, Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 94-358 (M) (7-91-03146))

SUMMARY DISPOSITION ORDER

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

Claimant-Appellant Michael Radkai (Claimant) appeals from the September 10, 1999 Decision and Order of the Labor and Industrial Relations Appeals Board (Appeals Board) affirming the Supplemental Decision dated September 19, 1996 by the Director of Labor and Industrial Relations (Director) awarding Claimant:

(1) temporary total disability (TTD) benefits from May 13, 1991 through August 2, 1993; (2) 35% permanent partial disability (PPD) of the whole person; (3) 12% PPD of the right leg; and (4) \$500.00 for disfigurement. The Claimant also appeals the Appeals Board's order denying Claimant's motion for reconsideration or reopening filed October 21, 1999. The Director also granted the motion of Insurance Carrier-Appellee

First Insurance Company of Hawaii, Ltd. (First Insurance) for apportionment with Appellee Special Compensation Fund (Special Fund) and limited First Insurance's responsibility for PPD benefits to 104 weeks of compensation, with the Special Fund liable for the balance.

On appeal, Claimant argues that the Appeals Board erred: (1) in not finding that his left hip and left knee conditions were related to his compensable back injury; (2) in not crediting medical reports he submitted from five physicians; (3) when it relied on an impeached medical report by Lorne K. Direnfeld, M.D.; (4) when it found and concluded that he was not entitled to TTD benefits after August 2, 1993; (5) in finding that he is not permanently and totally disabled as a result of his May 10, 1991 work injury; and (6) in denying his motion to reconsider or reopen his case.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows: (1) we cannot reach the merits of Claimant's contention that the Appeals Board erred in finding that his left hip and left knee conditions were not related to his compensable low back injury of May 10, 1991 because Claimant failed to timely appeal the Appeals Board's February 27, 1996 Decision and Order (Appeals Board's First Decision), which specifically found that Claimant's

left hip and left knee conditions were not related to his compensable low back injury. This finding was an appealable final order under Hawai'i Revised Statutes (HRS) § 91-14(a). Bocalbos v. Kapiolani Medical Center for Women and Children, 89 Hawai'i 436, 443, 974 P.2d 1026, 1033 (1999). Pursuant to HRS § 386-88 (1993), the Decision of the Appeals Board became final and conclusive when an appeal was not filed within thirty (30) days. Claimant failed to appeal the February 27, 1996 Decision and Order. Assuming arguendo that this court could reach the merits of the issue of compensability of Claimant's left hip and left knee conditions, the Appeals Board's First Decision's finding that Claimant's left hip and left knee conditions were not related to his compensable low back injury was not clearly erroneous, inasmuch as it was supported by substantial medical evidence, including evidence provided by John Frauens, M.D., one of Claimant's treating physicians, and Jeffery Lee, M.D.; (2) the Appeals Board did not abuse its discretion in not crediting the five medical reports Claimant submitted in the second Appeals Board Hearing. These medical reports related to the issue of compensability of, and extent of disability from, Claimant's left hip and left knee conditions, which the Appeals Board had previously decided in the Appeals Board's First Decision, a decision which, as discussed above, was not appealed by Claimant; (3) the Appeals Board did not abuse its discretion when it

considered a medical report of Lorne K. Direnfeld, M.D., a report which Claimant contended had been impeached. The credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal. Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001); (4) the Appeals Board's finding that Claimant was not entitled to TTD benefits after August 2, 1993 was not clearly erroneous, because it was supported by substantial medical evidence, including evidence provided by William Hammon, M.D. and Gonzalo Chong, M.D., two of Claimant's treating physicians, that Claimant was able to work months before his TTD benefits were terminated on August 2, 1993; (5) the Appeals Board's finding that Claimant was not permanently and totally disabled as a result of his May 10, 1991 work injury was not clearly erroneous, because there was substantial medical evidence that any disability of the Claimant after August 2, 1993 was due to Claimant's left hip and left knee conditions, which were not related to his compensable low back injury; and (6) the Appeals Board did not abuse its discretion when it denied Claimant's motion to reconsider its September 10, 1999 Decision and Order or reopen his case, inasmuch as Claimant offered no new credible evidence regarding the issue decided in the September 10, 1999 Decision and Order, but rather was attempting to relitigate the Appeals Board's First Decision of February 27,

1996, which specifically found that Claimant's left hip and left knee conditions were not related to his compensable low back injury and which Claimant failed to timely appeal. Therefore,

IT IS HEREBY ORDERED that the Appeals Board's September 10, 1999 Decision and Order and October 21, 1999 Order denying Claimant's motion for reconsideration or reopening are affirmed.

DATED: Honolulu, Hawai'i, February 19, 2004.

On the briefs:

Michael Radkai,
Claimant-Appellant
Pro Se

Paul A. Brooke, for
Employer-Appellee Kapalua
Bay Hotel and Villas and
Insurance-Carrier Appellee
First Insurance Company
of Hawaii, Ltd.

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Compensation Fund