

NO. 22995

IN THE SUPREME COURT OF THE STATE OF HAWAII

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FRANK C. ANNY, Claimant-Appellant

vs.

ROBERT McMULLAN & SON, INC., and TIG INSURANCE COMPANY,  
Employer/Insurance Carrier-Appellee

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD  
(CASE NO. AB 99-019 (2-93-11754))

SUMMARY DISPOSITION ORDER

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

Claimant-Appellant Frank C. Anny (Claimant) appeals from the Order Adopting Proposed Decision and Order Filed October 21, 1999 by the Labor and Industrial Relations Appeals Board (Appeals Board) reversing the December 15, 1998 Decision of the Director of Labor and Industrial Relations (Director) which found that Employer-Appellee Robert McMullan & Son, Inc. and Insurance Carrier-Appellee TIG Insurance [collectively, Employer/Carrier] voluntarily accepted liability for the removal of a mitek screw and bone anchor [hereinafter, surgical hardware] from Claimant's right shoulder.

On appeal, Claimant argues that: (1) the Appeals Board erred in failing to dismiss the appeal on the ground that Employer/Carrier was estopped from renegeing on its acceptance of liability; (2) the Appeals Board erred in failing to dismiss the

appeal on the ground that there was no justiciable controversy and that Employer/Carrier lacked standing to appeal; (3) Claimant was deprived of due process with respect to the ruling of the Appeals Board on videotape evidence; (4) having admitted the videotapes into evidence, the Appeals Board erred in failing to view the videotapes as a part of the complete record; (5) the Appeals Board erred in concluding that Employer/Carrier was not liable for the removal of surgical hardware from Claimant's shoulder.

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 that the Appeals Board abused its discretion when it denied Claimant's April 21, 1999 motion to dismiss Employer/Carrier's appeal on the basis that Employer/Carrier was estopped from denying liability under the facts of this case.

On October 27, 1998, the Director held a hearing on the sole issue of Employer/Carrier's denial of Claimant's request, supported by his treating physician, for removal of surgical hardware from Claimant's right shoulder. The surgical hardware was previously inserted in the treatment of an undisputed work injury.

The Director's Decision, dated December 15, 1998 found that Employer/Carrier was liable for Claimant's surgery based

upon the Employer/Carrier's November 2, 1998 written acceptance of liability for the surgery, and the October 7, 1998 independent medical examination (IME) physician's report that the surgery "may be helpful." When Employer/Carrier accepted liability for the surgery on November 2, 1998, Employer/Carrier had in its possession surveillance reports and videotapes that ostensibly showed Claimant performing physical activities inconsistent with the need for the surgery requested. Employer/Carrier did not disclose the videotapes to its IME physician until after he submitted his report dated October 7, 1998. After reviewing the videotapes, the IME physician issued an amended report dated October 16, 1998 in which he changed his opinion and concluded that surgery was not necessary. While the IME physician's amended report was dated October 16, 1998 Employer/Carrier contends that it did not receive this report until November 3, 1998, the day after it accepted liability. In any event, Employer/Carrier admitted that it intentionally decided not to disclose the IME physician's amended report of October 16, 1998 (which referenced the sub rosa videotapes) to either the Director or the Claimant until it could take Claimant's deposition "in order to preserve the evidentiary record and test the veracity of Claimant's testimony." The October 16, 1998 amended IME report with its change of opinion on the sole issue in dispute should have been disclosed to the Director and Claimant. In addition to

the Claimant being entitled to have a copy of the report under Rule 35 of the Hawai'i Rules of Civil Procedure, Employer/Carrier's intentional failure to disclose the October 16, 1998 amended IME report was contrary to manifest justice and considerations of the orderliness, regularity, and expedition of litigation, as it caused the Director to issue a Decision based upon (1) Employer/Carrier's written acceptance of liability on November 2, 1998, a position which Employer/Carrier did not intend to honor at the time the Decision was entered; and (2) the IME physician's original report dated October 7, 1998 which did not dispute the reasonableness or necessity of the surgery and indeed stated that the surgery "may be helpful." All evidence disputing the need for Claimant's surgery - the IME physician's amended report dated October 16, 1998 and the investigative reports and surveillance videotapes - were in the sole and exclusive possession of Employer/Carrier, who intentionally failed to disclose this evidence to the Director or Claimant before the Director issued her decision. Employer/Carrier played "fast and loose" with the Director and Claimant in this matter, and is judicially estopped from denying liability for the surgery under the facts of this case. See Roxas v. Marcos, 89 Hawai'i 91, 126, 989 P.2d 1209, 1244 (1998). Therefore,

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

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IT IS HEREBY ORDERED that the Appeals Board's Order Adopting Proposed Decision and Order Filed October 21, 1999 is reversed.

DATED: Honolulu, Hawai'i, March 10, 2004.

On the briefs:

Wayne H. Mukaida,  
for Claimant-Appellant  
Frank C. Anny

Robin R. Horner,  
for Employer-Appellee  
Robert McMullan & Son,  
Inc. and Insurance  
Carrier-Appellee TIG  
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