

***** NOT FOR PUBLICATION *****

NO. 24410
(Consolidated Nos. 24410 and 24411)

IN THE SUPREME COURT OF THE STATE OF HAWAII

CALVERT A. WILLIAMSON,
Claimant-Appellant,

vs.

REYNOLDS METALS COMPANY, Employer-Appellee,
and CIGNA, Insurance Carrier-Appellee.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NOS. AB 98-081 (2-95-20924) and 98-097 (2-95-13502))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Ramil,¹ and Acoba, JJ.)

Claimant-appellant Calvert Williamson appeals these worker's compensation cases from related decisions and orders of the Labor and Industrial Relations Appeals Board [hereinafter, "the appeals board"].

In Case No. AB 98-097, Williamson appealed the labor director's decision regarding his June 1, 1995 elbow injury. The appeals board affirmed the director's decision determining that Williamson was not entitled to temporary total disability (TTD) benefits and vocational rehabilitation (VR) services. The decision and order of the appeals board was entered on June 12, 2001.

In Case No. AB 98-081, Williamson appealed the labor director's decision regarding his psychiatric injury arising on or about August 4, 1995. The appeals board affirmed the

¹ Oral argument in the present matter occurred prior to the retirement of Associate Justice Mario Ramil.

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director's decision determining the psychiatric injury was compensable, but modified the award of TTD benefits from open-ended to approximately one month. The decision and order of the appeals board was entered on June 12, 2001.

Notices of appeal from the June 12, 2001 decisions and orders were filed timely by Williamson on July 11, 2001, within the thirty-day period for appeal prescribed by HRS § 386-88. The appeals were docketed as No. 24410 (Case No. AB 98-081) and No. 24411 (Case No. AB 98-097) and were consolidated.

Oral argument was heard before this court on November 13, 2002.

The issues presented on appeal are: (1) Whether the appeals board erred in determining that Williamson was not entitled to VR services based in his June 1, 1995 elbow injury; (2) Whether the appeals board erred in modifying Williamson's TTD benefits based on his August 4, 1995 psychiatric injury; and (3) Whether the appeals board erred in not awarding Williamson attorney's fees.

Upon carefully reviewing the record and briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the appeals board did not err by affirming the director's decisions determining that Williamson was not entitled to VR services based on his June 1, 1995 work injury. We also affirm the appeals board's determination that Williamson's psychiatric injury was compensable for only one month. Finally, we affirm the appeals board's decision approving attorney's fees as a lien on compensation.

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1. Case No. AB 98-097 (Elbow Injury)

In Case No. 98-079, Williamson appealed the director's decision regarding the June 1, 1995 work injury. The relevant statute with regards to Williamson's claim for VR services based on his elbow injury is HRS § 386-25, which provides in relevant part:

(b) The director may refer employees who may have or have suffered permanent disability as a result of work injuries and who in the director's opinion can be vocationally rehabilitated to the department of human services or to private providers of rehabilitation services for vocational rehabilitation services that are feasible.

Here, there was no showing that Williamson had suffered or might suffer permanent disability (PD) as a result of his elbow injury at the time he was terminated.² Up until the time of his discharge, Williamson was not entitled to VR services, because he was performing available light duty work and was not permanently disabled.

2. Case No. AB 98-081 (Psychiatric Injury)

In Case No. AB 98-081, Williamson appealed the director's decision regarding a psychiatric injury arising on or about August 4, 1995. We affirm the appeals board's decision to limit the receipt of TTD benefits on Williamson's stress injury to approximately one month, based on the certification of disability issued by John S.F. Guo, M.D., Williamson's attending psychiatrist. Dr. Guo treated Claimant and certified his disability from work from October 18, 1995 through November 13, 1995. Dr. Guo released Williamson to work on November 14, 1995. Therefore, Williamson was no longer under any disability at that

² We note, however, that, in the event that Williamson suffers permanent disability at a later date, he may reopen his claim.

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time. On November 20, 1995, Employer terminated Williamson for insubordination. Given the certification of disability from Dr. Guo, we conclude that Williamson is entitled to TTD benefits approximately from October 18, 1995 to November 14, 1995. Williamson's alleged psychiatric disability after November 20, 1995, was not related to the August 4, 1995 work injury, but to Williamson's termination due to misconduct. Our conclusion is based on our review of the records of Shepard Ginandes, M.D., a psychiatrist.

3. Attorney's Fees

Williamson claims that the appeal board erred in not awarding him attorney's fees. HRS § 386-93(b) provides in relevant part:

(b) If an employer appeals a decision of the director . . . the costs of the proceedings of the appellate board . . . together with reasonable attorney's fees shall be assessed against the employer, if the employer loses

Here, Williamson prevailed at the DCD level in that his psychological stress claim was found to be compensable. Employer appealed this aspect of the director's decision. The appeals board affirmed the director's decision, but modified the award of TTD benefits from open-ended benefits to benefits for approximately one month. Therefore, the employer is considered to have "lost" the appeal, by virtue of the appeals board's ultimate conclusion that the psychiatric injury was compensable. However, this is not the end of the analysis. HRS § 386-94 provides in relevant part:

Claims for services shall not be valid unless approved by . . . the appellate board Any claim so approved shall be a lien upon the compensation in the manner and to the extent fixed by the director, the appellate board, or the court.

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(Emphasis added.) Furthermore, Hawai'i Administrative Rules (HAR) § 12-47-55 states that:

Within ten calendar days following the filing of a final decision and order . . . attorneys seeking approval of fees pursuant to section 386-94, HRS, shall file with the board a request for approval of attorney's fees setting forth the various activities performed together with the time expended by the attorney in each activity. The request shall be served on those parties against whom the fees are to be assessed. Any party objecting to approval of a request may file a written objection thereto no later than ten calendar days following service. No request for approval of attorney's fees or agreement to pay attorney's fees shall be valid until approved by the board.

(Emphasis added.) Here, Williamson's attorney committed procedural errors resulting in Williamson's ineligibility to receive attorney's fees from employer. First, Williamson's attorney did not serve upon Employer his request for attorney's fees as mandated by HAR § 12-47-55: Instead, the June 15, 2001 request for attorney's fees was served upon Claimant Williamson alone as the party against whom the fees should be assessed. Thus, because the employer was never served a copy of the request, it did not have an opportunity to object. Second, HAR § 12-47-55 mandates that "[a]ny party objecting to approval of a request may file a written objection thereto no later than ten calendar days following service." Thus, if Williamson objected to the terms of the appeals board's decision, he should have filed a written objection no later than ten days after he was served by his attorney. The fact that Williamson did not timely object effectively serves as a waiver of his right to object. Accordingly, because the request was for the fees to be assessed against the claimant, the appeals board did not err in

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approving attorney's fees as a lien on compensation rather than as assessed against the employer.

For the foregoing reasons, the appeals board's decisions and orders are hereby affirmed.

DATED: Honolulu, Hawai'i, July 14, 2003.

David J. Mikonczyk for
Claimant-Appellee
Calvert A. Williamson

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(Sidney J. Y. Wong with
her on the brief) of
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Carrier-Appellant