

NO. 28646

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

EUGENE BALDAUF, Claimant-Appellant,

v.

AOAO REGENCY PARK, and DAI-TOKYO ROYAL INSURANCE CO.,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2004-217 (2-01-17688))

ORDER DENYING MOTION FOR RECONSIDERATION

By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon consideration of the motion for reconsideration of the order denying request for fees and granting reduced costs submitted by Edie A. Feldman, attorney for Claimant-Appellant Eugene Baldauf (Baldauf), the papers in support, and the records and files herein, it appears that:

(1) Baldauf asserts that HRS § 386-93(b)¹ mandates an assessment of fees and costs in favor of the claimant and against an employer despite the fact that employer did not appeal to the appellate court, based upon arguments advanced for the first time on reconsideration that (a) the appeal is final, so as to permit assessment of fees, pursuant to Kapuwai v. City and County of

¹ HRS 386-94(b) (Supp. 2008), effective for the period in which fees are requested states:

(b) If an employer appeals a decision of the director or appellate board, the costs of the proceedings of the appellate board or the appellate court, together with reasonable attorney's fees, shall be assessed against the employer if the employer loses; provided that if an employer or an insurance carrier, other than the employer who appealed, is held liable for compensation, the costs of the proceedings of the appellate board or the appellate court, together with reasonable attorney's fees, shall be assessed against the party held liable for the compensation.

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Honolulu Dept. of Parks and Recreation, 21 Hawai'i 33, 211 P.3d 750 (2009), and (b) Lindinha v. Hilo Coast Processing Co., 104 Hawai'i 164, 86 P.3d 973 (2004) requires that a claimant be paid attorney's fees by an employer even where claimant appealed to the appellate court, because the appellate court appeal was necessitated by the appeal filed by the employer with the Labor and Industrial Relations Appeal Board (LIRAB);

(2) the determination of whether the employer has lost the appeal under HRS § 386-93(b) and is thus required to pay attorney's fees and costs is premature where the appeal in this case is not final because this court remanded the case to the LIRAB for further proceedings, and because this case is still pending before the Hawai'i Supreme Court on an application for writ of certiorari (Kapuwai v. City and County of Honolulu Dept. of Parks and Recreation, 121 Hawai'i 33, 43, 211 P.3d 750, 760 (2009));

(3) Lindinha, 104 Hawai'i at 166-67, 170-72, 86 P.3d at 975-76, 979-81, focused upon fees incurred and requested at LIRAB rather than fees incurred and requested at the appellate court, and Lindinha addressed the point at which the ultimate prevailing party can be determined and did not address which party is considered the appellant in the appellate court appeal for purposes of HRS § 386-93(b);

(4) The language and legislative history of HRS § 386-93(b) do not support Baldauf's contention the statute mandates that claimant be paid attorney's fees by an employer

even where claimant appealed to the appellate court where the appellate court appeal was necessitated by the appeal filed by the employer with the LIRAB; and

(5) Baldauf presented no other separate argument in support of reconsideration of costs.

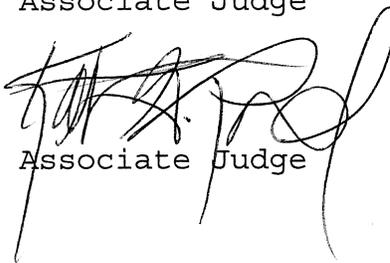
Therefore, IT IS HEREBY ORDERED that the motion for reconsideration is denied.

DATED: Honolulu, Hawai'i, October 30, 2009.

Edie A. Feldman,
for Claimant-Appellant
on the motion


Presiding Judge


Associate Judge


Associate Judge