

NO. 22222

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

BERNADETTE K. TOM, Plaintiff-Appellant, v. FIRST AMERICAN
TITLE COMPANY, and JOHN MULLEN AND COMPANY,
Employer/Insurance Carrier-Appellee.

APPEAL FROM THE LABOR AND INDUSTRIAL
RELATIONS APPEALS BOARD
(CASE NO. AB 96-375 (2-95-06441))

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Lim, JJ.)

Claimant-Appellant Bernadette K. Tom (Tom) appeals, *in propria persona*, the January 5, 1999 Decision and Order of the Labor and Industrial Relations Appeals Board of the State of Hawai'i (the Board). After a hearing held on October 15, 1997, the Board denied Tom's workers' compensation claim, determining that she did not sustain a stress-related injury arising out of and in the course of her employment with Defendant-Appellee, First American Title Company of Hawaii, Inc. (Employer). The Board also decided that Tom was to reimburse Employer \$62.50 for charges incurred as a result of her failure to attend a scheduled deposition. Except as part and parcel of other issues we discuss below, Tom does not challenge the deposition charge on appeal. Accordingly, we affirm the deposition charge and confine our discussion to the issue of compensability.

In her opening brief, Tom lists twenty points of error and thirty-four questions presented, followed by a brief, one-paragraph argument. The argument summarizes her contentions in eight conclusory statements, without reference to the record or citation to any legal authority. Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (1999) provides that "the appellant shall file an opening brief, containing . . . [t]he argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon."¹ "We will disregard a point of error if the appellant fails to present discernible argument on the alleged error." Bank of Hawai'i v. Shaw, 83 Hawai'i 50, 52, 924 P.2d 544, 546 (App. 1996) (citation omitted). We therefore decline to review Tom's points and questions as presented.

With respect to the points and questions we are able to discern that are relevant and material, upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve them as follows:

1. The opinions of Dr. Byron A. Eliashof (Dr. Eliashof) and Dr. Mark D. Stitham (Dr. Stitham) before the Board

¹ Hawai'i Rules of Appellate Procedure Rule 28(b)(7) was amended effective January 1, 2000, and now provides that "the appellant shall file an opening brief, containing . . . [t]he argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . Points not argued may be deemed waived."

constituted substantial evidence to rebut the presumption of compensability imposed by Hawai'i Revised Statutes (HRS) § 386-85(1) (1993). This, combined with Tom's failure to testify or otherwise present any evidence before the Board, leaves us with no reasonable doubt as to our conclusion that Tom was not entitled to workers' compensation benefits. Korsak v. Hawaii Permanente Medical Group, Inc., 94 Hawai'i 297, 306-9, 12 P.3d 1238, 1248-50 (2000).

2. The opinions of Drs. Eliashof and Stitham, and the statements of Tom's co-workers, were relevant and material and therefore properly admitted as evidence before the Board. HRS § 91-10(1) (1993); Chock v. Bitterman, 5 Haw. App. 59, 65, 678 P.2d 576, 581 (1984)

3. The Board has general authority to issue subpoenas pursuant to HRS § 371-6 (1993), and to access a claimant's relevant medical records pursuant to Hawai'i Administrative Rules (HAR) § 12-10-30(a) (1994). Hence, the Board was not plainly arbitrary or without support in the record in subpoenaing records of treatment for the subject stress-related injury from Tom's psychiatrist, Dr. Stephen B. Kemble. The record indicates that Tom had received all materials relevant and necessary to support her case. Thus, the Board's decisions to deny her requested but unnecessary subpoenas were not plainly arbitrary or without support in the record. Shaw, 83 Hawai'i at 59, 924 P.2d at 553;

Tam v. Kaiser Permanente, 94 Hawai'i 487, 490-91, 17 P.3d 219, 222-23 (2001).

4. Under HAR § 12-10-30(a), Tom consented to the release of her relevant medical records when she submitted her Form WC-5 to the Department of Labor and Industrial Relations. Moreover, there is no physician-patient or psychologist-client privilege "as to a communication relevant to the physical, mental, or emotional condition of the [patient/client] in any proceeding in which the [patient/client] relies upon the condition as an element of the [patient/client]'s claim or defense[.]" Hawai'i Rules of Evidence Rules 504(d)(3) and 504.1(d)(3) (1993). Hence, there was no violation of Tom's right to protect privileged information.

5. Finally, with respect to the presence of Dr. David M. Appleton (Dr. Appleton) during Dr. Eliashof's independent medical examination of Tom, Tom attended the IME voluntarily and was obviously aware of Dr. Appleton's presence, yet she completed the evaluation without objection and did not object to the propriety of her IME until after the Director of the Department of Labor and Industrial Relations rendered the initial decision in favor of Employer. In any event, Tom has failed to demonstrate how she was prejudiced by Dr. Appleton's presence. There was no error by the Board in crediting the report of Dr. Eliashof.

Therefore,

IT IS HEREBY ORDERED that the January 5, 1999 Decision and Order of the Board is affirmed.

DATED: Honolulu, Hawai'i, May 2, 2001.

On the briefs:

Bernadette K. Tom,
plaintiff-appellant,
pro se.

Chief Judge

Clyde Umebayashi and
Muriel M. Taira,
(Kessner Duca Umebayashi
Bain and Matsunaga) for
employer/insurance
carrier-appellee.

Associate Judge

Associate Judge