NO. 23928

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

WILLIAM H. BARKER, III, Claimant-Appellant, v.
MAC FARMS OF HAWAII, INC., and
PACIFIC INSURANCE COMPANY, LTD.,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL
RELATIONS APPEALS BOARD
(CASE NO. AB 98-500 (WH)(9-87-02288))

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

In this workers' compensation case, Claimant-Appellant William H. Barker, III (Claimant) appeals, *pro se*, the November 27, 2000 decision and order of the Labor and Industrial Relations Appeals Board of the State of Hawaiʻi (the Board), that affirmed the October 2, 1998 decision of the Director of Labor and Industrial Relations (the Director) in favor of Employer/Insurance Carrier-Appellees Mac Farms of Hawaii, Inc. and Pacific Insurance Company, Ltd. (collectively, the Employer). We affirm.

I. Background.

Claimant began receiving workers' compensation benefits soon after October 26, 1987, when he strained his left shoulder while tightening a bolt on a factory machine at work. The

Director's October 2, 1998 decision was issued after an August 18, 1998 hearing. The decision suspended Claimant's workers' compensation benefits from March 20, 1998 to August 18, 1998, held the Employer not liable for any medical treatment, services and supplies Claimant received after March 20, 1998, and assessed Claimant a $250.00 "no-show fee," all because Claimant failed to attend a March 20, 1998 independent medical examination (IME) requested by the Employer and ordered by the Director.[1] The Director suspended Claimant's workers' compensation benefits only until the date of the hearing, August 18, 1998, because Claimant agreed at the hearing to attend a rescheduled IME. As an additional reason for holding the Employer not liable for medical costs Claimant incurred after March 20, 1998, the Director cited Claimant's failure to request approval before he sought medical care from new providers and not from his attending physician.[2]

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[1] Hawaii Revised Statutes (HRS) § 386-79 (Supp. 2001) provides, in pertinent part, that "[i]f an employee refuses to submit to, or in any way obstructs [an independent medical examination (IME)], the employee's right to claim compensation for the work injury shall be suspended until the refusal or obstruction ceases and no compensation shall be payable for the period during which the refusal or obstruction continues." See also Tam v. Kaiser Permanente, 94 Hawai'i 487, 489 n.1, 17 P.3d 219, 221 n.1 (2001). Hawai'i Administrative Rules (HAR) § 12-10-75(c) (1999) provides, in relevant part, that "[t]he [order for an IME issued by the Director of Labor and Industrial Relations (the Director)] shall not be appealable and will inform the claimant that compensation may be suspended for failure to submit to the examination without good cause. The injured employee may be responsible for a reasonable no-show fee not to exceed $250 charged by the physician." See also Tam, 94 Hawai'i at 490 n.2, 17 P.3d at 222 n.2.

[2] HAR § 12-15-38(a) (2002) provides that "[i]n the event an injured employee elects to change attending physicians, the employee shall notify the employer prior to initiating the change. . . . Changes in attending physician by the injured employee subsequent to the first change require prior approval by the [D]irector or employer."

II. Discussion.

In his almost wholly nonconforming, six-page opening brief,[3] Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), Claimant makes numerous, general and conclusory allegations of bias, partiality, unfairness, fabrication, falsification, expediency and collusion among the Board, the Department of Labor and Industrial Relations (the Department), the Director and other employees of the Department, and the Employer. For example, the following:

> [The Board] is suppose [(sic)] to be fair and impartial and de novo of the facts [(sic)]. This board is totally unfair, unjust and bias [(sic)] and makes up facts to justify their [(sic)] decisions. They are only trying to protect their fellow employees of [the Department] and friends of the insurance industry.
> These actions by [the Department and the Board] are deliberately done to deny and delay any type on [(sic)] treatments to the [C]laimant so that the insurance company will not have to pay out benefits that the [C]laimant is entitled to.

Except as he explains in the enumerated points of error quoted *infra*, Claimant does not detail or describe the acts, omissions or circumstances giving rise to the general wrongs he complains of. HRAP Rule 28((b)(1).[4] He does not present argument on or

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[3] Claimant-Appellant William H. Barker, III (Claimant) did not file a reply brief in this appeal.

[4] Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(1) (2000) provides, in pertinent part, that the opening brief on appeal shall contain "[a] concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings." See also Wright v. Chatman, 2 Haw. App. 74, 76, 625 P.2d 1060, 1062 (1981) ("[The predecessor rule to HRAP Rule 28(b)] compels the appellant to specifically set forth what is being appealed and why.

authorities for his general allegations of wrongdoing. HRAP Rule 28(b)(7).[5] Nor does he show us where in the record the alleged wrongdoings can be descried. HRAP Rule 28(b)(4).[6] We therefore decline to search the record and the law in order to guess at the specific substance of Claimant's general allegations of wrongdoing. Wright v. Chatman, 2 Haw. App. 74, 76, 625 P.2d 1060, 1062 (1981) ("[The predecessor rule to HRAP Rule 28(b)] compels the appellant to specifically set forth what is being appealed and why. Noncompliance forces this court to speculate on the what and the why of the appeal. It also forces us to do the work that is more properly done by the appellant.").

We now turn to Claimant's specific, enumerated points of error on appeal.

Noncompliance forces this court to speculate on the what and the why of the appeal. It also forces us to do the work that is more properly done by the appellant.").

[5] HRAP Rule 28(b)(7) (2000) provides, in relevant part, that the opening brief on appeal shall contain "[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. The argument may be preceded by a concise summary. Points not argued may be deemed waived." See also Weinberg v. Mauch, 78 Hawai'i 40, 49, 890 P.2d 277, 286 (1995) (failure to present argument on a point of appeal in accordance with HRAP Rule 28(b)(7) renders point "not subject to review" by the appellate court).

[6] HRAP Rule 28(B)(4) (2000) provides, in pertinent part, that the opening brief on appeal shall show "where in the record the alleged error occurred[.] . . . . Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." See also Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 234-35, 948 P.2d 1055, 1075-76 (1997) (where the appellants did not comply with HRAP Rule 28(b)(4) by, *inter alia*, failing "to show where in the record" the allegedly defective jury instruction occurred, the point on appeal was waived).

First:

> Did [the Board] error [(sic)] in failing to list all the issues that were not agreed to at the Pre trail [(sic)] Hearing?
> [The Board] deliberately left out these issues. [The Board] had no intention to give [Claimant] any type of fair trail [(sic)].
> Pretrial Order filed 12/23/1998 (doc 382).
> LAB Rule 12-47-22 LIRAB: Pre Trail [(sic)] Order fails to mention the lack of stipulation by the Claimant of any evidence or documents. The Order does state the Counsel for the Employer was present at this hearing even though Counsel was not there. Board member tried a few times on the phone but was unable to reach counsel.
> Claimant wrote to [the Board] to notify them of the mistakes and omission on the Pretrial Order. (doc 383) 4/7/1999 [Board] letter states that all the files are already part of the record regardless that [C]laimant did not stipulate them into evidence. (doc 385) [The Board] stated it only takes on [(sic)] side to stipulate any document into evidence.

With respect to Claimant's allegation that the Board "deliberately left out" certain issues for the February 1, 2000 hearing, Claimant fails to identify those issues or where in the record they and the Board's alleged refusal to set them for hearing are manifest. Claimant fails to explain or argue how inclusion of those issues would have affected the hearing or the Board's ultimate decision and order. Our independent review of the record does not in any wise remedy these lacunae. Accordingly, this point of error is not subject to our review. Claimant's reference to the alleged absence of Employer's counsel from the pretrial conference is similarly unavailing. HRAP Rule 28(b)(1); Wright, 2 Haw. App. at 76, 625 P.2d at 1062; HRAP Rule 28(b)(7); Weinberg v. Mauch, 78 Hawai'i 40, 49, 890 P.2d 277, 286 (1995); HRAP Rule 28(B)(4); Kawamata Farms v. United Agri

Products, 86 Hawai‘i 214, 234-35, 948 P.2d 1055, 1075-76 (1997).

Claimant's complaint -- that the December 23, 1998 pretrial order of the Board "fails to mention the lack of stipulation by the Claimant of any evidence or documents" -- continues on in his next point of error on appeal.

Second:

> Did [the Board] error [(sic)] in entering all files into the record knowing that [Claimant] did not stipulate to them.
> [HAR] Rule 12-47-21 #3 LIRAB Pre Trial Procedures for Initial conference.
> The possibility of obtaining stipulations of fact and documents to avoid unnecessary proof. Pretrial conference was held on 12/16/1998 via phone. (doc. 596)
> Claimant did not stipulate to any of the facts or documents and requested that these documents be introduced at trial by the actual persons involved with them so that [C]laimant could cross examine these witnesses for truth and facts. Board member said ok. 4/17/1999 [Board] letter states that all the files are already part of the record regardless that [C]laimant did not stipulate them into evidence. (doc 385) [The Board] stated that it only takes on [(sic)] side to stipulate any document into evidence.

As a preliminary matter, we know of no rule of law or practice that conditions the admissibility of evidence upon a stipulation of the parties to admit the evidence. In its December 16, 1998 initial conference statement, Employer informed Claimant and the Board that it was "wiling [(sic)] to stipulate the [Department's] entire workers' compensation file into evidence, subject to appropriate evidentiary objection." Obviously, Claimant did not take Employer up on this offer, but the Board nevertheless considered the file in rendering its decision and order. There is nothing in the record that indicates the Board refused to hear

objections to the admissibility of specific documents in the file.[7] The Board did not err in considering the file. Hawaii Revised Statutes (HRS) § 386-87(c);[8] HRS § 91-10;[9] Hawai'i Administrative Rules § 12-47-41.[10] Nor was the Board required, as urged by Claimant, to consider only live testimony or documents proffered pursuant thereto in order to afford Claimant the opportunity for cross-examination. See, e.g., Bocalbos v. Kapiolani Medical Center, 93 Hawai'i 116, 128-29, 997 P.2d 42, 54-55 (App. 2000) (it was an abuse of discretion for the Board

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[7] Claimant chose not to order the transcript of the hearing for this appeal.

[8] HRS § 386-87(c) (1993) provides that "[t]he [Labor and Industrial Relations Appeals Board (the Board)] shall have power to review the findings of fact, conclusions of law and exercise of discretion by the [D]irector in hearing, determining or otherwise handling of any compensation case and may affirm, reverse or modify any compensation case upon review, or remand to the [D]irector for further proceedings and action."

[9] HRS § 91-10(1) (1993) provides: "In contested cases: Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law." (Enumeration omitted.) HRS § 91-1(1) (1993) defines "agency" as "each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." See also Cazimero v. Kohala Sugar Co., 54 Haw. 479, 481, 510 P.2d 89, 91 (1973) ("[The Board] is an agency within the definition of [HRS §§ 91-1 et seq.] A contested case heard by it is therefore bound by the proscriptions of HRS § 91-10[.]" (Footnote omitted.)).

[10] HAR § 12-47-41 (1994) provides that the Board "shall not be bound by statutory and common law rules relating to the admission or rejection of evidence. [The Board] may exercise its own discretion in these matters, limited only by considerations of relevancy, materiality, and repetition, by the rules of privilege recognized by law, and with a view to securing a just, speedy, and inexpensive determination of the proceedings."

not to consider a letter from the claimant's treating dentist). This point of error on appeal lacks merit.

Third:

> Did [the Board] error [(sic)] by refusing to issue any subpoenas requested by [Claimant]? [Board] Rule 12-47-30 & 31 LIRAB Request for subpoenas: Claimant made many requests for subpoenas of witnesses, documents and order of Depositions. [The Board] refused to issue any subpoenas that [C]laimant requested. [The Board] stated that even if they did issue these Subpoenas the Witnesses were not required to appear. (doc 398, 399, 411, 418, 409, 419,)

Claimant does not argue on appeal why the Board was wrong in denying his requests for subpoenas and depositions. Thus, this point of error on appeal is not subject to our review. HRAP Rule 28(b)(7); Weinberg, 78 Hawai'i at 49, 890 P.2d at 286. At any rate, Claimant never specifically explained below, and does not enlighten us in any way on appeal, how the subpoenaed documents and the testimony of the target witnesses would have been material in this case. See, e.g., Bank of Hawaii v. Shaw, 83 Hawai'i 50, 59-60, 924 P.2d 544, 553-54 (App. 1996) (trial court did not err in quashing the defendant's subpoenas duces tecum directed at three high officials of the plaintiff corporation, where the defendant "made no offer to show how [the] testimony was specifically material to the case"). See also Tam v. Kaiser Permanente, 94 Hawai'i 487, 490-91, 17 P.3d 219, 222-23 (2001) (the Board's denial of the claimant's requested subpoena was "not arbitrary and was supported by the record," where the claimant's "assertion of possible undisclosed *ex parte* communications

between [the employer] and [the Department] is speculative"). Cf. Hawai'i Rules of Civil Procedure Rule 26(b)(1).[11]

Fourth:

> Did [the Board] error [(sic)] by refusing to grant a hearing on evidence until the day before the trail [(sic)].
> LAB Rule 12-47-32 LIRAB Claimant requested may [(sic)] hearings about removal of evidence or facts from the record. (doc 397, 402, 420) Hearing was granted the afternoon before the trail [(sic)] date. Order By [the Board] Denying claimant's request to remove evidence (doc 424)

Here, Claimant does not aver that he was prejudiced by the scheduling of the hearing on his requests, much less explain how he might have been prejudiced. This point of error on appeal has no merit. See Tam, 94 Hawai'i at 496-97, 17 P.3d at 228-29 (the Board's failure to apply the amended version of a statute was harmless error).

Fifth:

> Did [the Department] error [(sic)] for refusing to have hearings that [C]laimant request [(sic)]? Claimant made many requests to [the Department] of [(sic)] hearings that were totally disregarded. Claimant has every legal right to a hearing.

Claimant does not identify or locate in the record the hearing requests he refers to in this point of error on appeal, or argue why the Department's alleged refusals were error or prejudicial, so it is impossible for us to review this point of error on

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[11] Hawai'i Rules of Civil Procedure Rule 26(b)(1) (2000) provides, in relevant part, that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.] . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

appeal. HRAP Rule 28(b)(1); Wright, 2 Haw. App. at 76, 625 P.2d at 1062; HRAP Rule 28(b)(7); Weinberg, 78 Hawai‘i at 49, 890 P.2d at 286; HRAP Rule 28(B)(4); Kawamata Farms, 86 Hawai‘i at 234-35, 948 P.2d at 1075-76. We can only note that the November 27, 2000 decision and order of the Board that Claimant here appeals issued out of a February 1, 2000 hearing before the Board, and that the Board's decision and order affirmed the October 2, 1998 decision of the Director, which in turn arose out of an August 18, 1998 hearing. We also observe that, in addition to the two hearings underlying this particular appeal, Claimant was afforded no less than five other hearings in his workers' compensation case, either before the Department or before the Board on appeal from a decision of the Director.

> *Sixth:*
>
> Did [the Department] error on [(sic)] issuing a decision based upon an issue that had been appealed by Claimant?
> Claimant file [(sic)] an Appeal of the Order of the Director dated 3/2/1998 (doc 329) on 3/11/1998 within the 20 day period. (Doc 330). Appeal was accepted by [the Department's Kona office] and forwarded. (Doc 331) Claimant should not be responsible for any No-show fees or lost [(sic)] of benefits due [(sic)] the fact [C]laimant had been requesting hearings about this and other issues and [the Department] refused to respond. (Doc 325, 326, 482, 295) [The Department] refused to give any hearings to [C]laimant for years but will give a Hearing or Order to [the Employer] within days, regardless of facts.

Here, Claimant is apparently repeating his contention before the Board, that he did not attend the IME requested by Employer and ordered by the Director because he had appealed the Director's IME order to the Board, and believed that he did not have to

attend the IME pending that appeal. Hence, Claimant appears to argue that the Board should not have affirmed the Director's decisions to suspend his right to workers' compensation benefits, relieve the Employer of benefits liability and levy a $250.00 no-show fee against him, by reason of his failure to attend the IME. We disagree. In its November 27, 2000 decision and order, the Board recounted the pertinent evidence adduced at the hearing:

> 12. Claimant indicated in writing and at the Board trial that he had not attended the IME, because he disagreed with the Director's Order, because Employer's IME doctors are biased, and because it was not a "good time" for him. Claimant also indicated that he had thought that by appealing the Director's Order, he did not have to attend the IME.

Even assuming, *arguendo*, that Claimant's belief -- that he need not attend the IME pending appeal[12] -- was well founded, the Board apparently credited the former reasons over this latter reason in finding that "Claimant has not presented good cause as to why he did not attend the ordered IME[.]" Consequently, we will not disturb this finding on appeal. Nakamura v. State, 98 Hawai'i 263, 270, 47 P.3d 730, 737 (2002) (reiterating "the well established rule that the Board's determinations of credibility and weight are entitled to deference" (citation omitted)). This penultimate point of error on appeal is without merit.

Seventh:

> Did [the Department] error is [(sic)] issuing an Order (Doc. 329) and refuse [(sic)] to grant a hearing by

[12] HAR § 12-10-75(c) provides, in pertinent part, that "[t]he order [for an IME] shall not be appealable[.]"

> [(sic)] Claimant regarding this Order. [The Department's] order was based upon a doctors [(sic)] report that [C]laimant did not need further treatments. Claimant requested this document from Pacific Ins [(sic)] but did not receive document until six months later. Doctor told [C]laimant he could go back for treatments anytime. Claimant questions the authenticity of this document due to the fact that the same doctor told him that he was welcome to return for future treatments. This documents [(sic)] states that more should be done and that the problem is still there. No where [(sic)] in this statement does this doctor say there is no need for further medical.

From our independent review of the record, we surmise that this point of error on appeal involves the October 24, 1997 WC-2 Physician's Report from Claimant's treating physician, reporting that Claimant was "Maximally Medically Improved." This was the impetus for the Employer's request and the Director's March 2, 1998 order thereon for the IME. Claimant opposed the IME because he alleged that his treating physician had told him that "it was ok for me to come back anytime[,]" notwithstanding the fact that the subject WC-2 recommended consideration of "private insurance[.]" In any event, we observe that Claimant previously appealed the Director's March 2, 1998 order for the IME to the Board, but withdrew his appeal after the Employer moved for a dismissal of the appeal and for attorney's fees and costs. If Claimant is, in this appeal, again challenging the propriety of the Director's March 2, 1998 order for the IME (which was not the first IME requested by the Employer and ordered and performed in Claimant's workers' compensation case), we conclude that it was

properly issued. HRS § 398-79;[13] Tam, 94 Hawai'i at 496-97, 17 P.3d at 228-29 (to determine whether the claimant's medical condition had stabilized, thus enabling a determination of permanent disability and a closing of the case, was sufficient reason under HRS § 386-79 for the Director to order a second employer-requested IME). This final point of error on appeal is devoid of merit.

III. Conclusion.

The November 27, 2000 decision and order of the Board is affirmed.

DATED: Honolulu, Hawaii, September 23, 2002.

On the briefs:

William H. Barker, III,
claimant-appellant, pro se.

Chief Judge

Edie Feldman,
for employer/insurance
carrier-appellee.

Associate Judge

Associate Judge

[13] HRS § 386-79 (Supp. 2001) provides, in pertinent part, that "[e]mployer requested examinations under this section shall not exceed more than one per case unless good and valid reasons exist with regard to the medical progress of the employee's treatment."