NO. 25080

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

TAMMY L. SANTANA, Claimant-Appellant, v.
McDONALD'S OF WAIMEA, and TIG INSURANCE COMPANY,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2001-284(WH) (9-97-00410 HILO))

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

In this workers' compensation case, Tammy L. Santana (Santana) appeals, *pro se*, the March 27, 2002 decision and order of the Labor and Industrial Relations Appeals Board (LIRAB) that dismissed her LIRAB appeal of the May 3, 2001 decision of the Director of Labor and Industrial Relations (Director). The Director had denied Santana's request to reopen her 1997 claim for compensation. The LIRAB, citing Hawaii Administrative Rules (HAR) § 12-47-23, dismissed Santana's appeal "for lack of prosecution and for failure to appear at trial." (Citations omitted.) We affirm.

I. Background.

On March 23, 1997, Santana was injured when she slipped and fell as she was leaving work at McDonald's of Waimea (Employer). Employer did not deny liability for workers' compensation benefits. On August 25, 1998, after investigation, the Director awarded Santana medical benefits, and temporary

total disability benefits for the period March 27, 1997 through April 7, 1997. Santana was not awarded benefits for permanent disability or disfigurement.

On March 9, 2000, Santana filed a request to reopen her claim, complaining of continuing pain. Employer's insurance carrier denied Santana's request, and filed for a hearing on reopening before the Director. After an April 5, 2001 hearing, the Director issued a May 3, 2001 decision that denied Santana's request. On May 22, 2001, Santana appealed the Director's decision to the LIRAB.

On August 16, 2001, the LIRAB filed a notice that set forth the dates and times for an initial conference, a settlement conference and a March 25, 2002, 1:30 p.m., trial on Santana's appeal.[1] The notice also required each party to file an initial conference statement. Employer and its insurance carrier filed an initial conference statement. Santana did not file one. A September 17, 2001 pretrial order issued out of the September 13, 2001 initial conference. The pretrial order noted that Santana[2] and the attorney for Employer and its insurance carrier "were

[1] In its March 27, 2002 decision and order, the Labor and Industrial Relations Appeals Board (LIRAB) stated that "notice of the March 25, 2002 trial was sent to the parties on August 16, 2001[.]"

[2] The last attorney to represent Tammy L. Santana (Santana) in this case withdrew on May 10, 1999.

present"[3] at the initial conference. The pretrial order reiterated the dates and times for the settlement conference and the trial. The pretrial order provided that "this Pretrial Order shall control the course of the proceedings and may not be amended except by consent of the parties and the [LIRAB], or by order of the [LIRAB] in accordance with the [LIRAB's] Rules of Practice and Procedure." The pretrial order included, at its end, the following: "A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on SEP 17 2001 [sic]." The pretrial order also set schedules for discovery cut-off, witness identifications and exhibit lists. Employer and its insurance carrier filed witness identifications and exhibit lists. Santana filed none of the same.

On March 25, 2002, at 1:38 p.m., the LIRAB convened the trial on Santana's appeal. Santana did not appear. Nor did she contact the LIRAB concerning her absence or a continuance of the trial. Employer and its insurance carrier orally moved to dismiss Santana's appeal, "for lack of prosecution and for non-appearance at the trial." On March 27, 2002, the LIRAB filed its decision and order, which dismissed Santana's appeal "for lack of prosecution and for failure to appear at trial." (Citations

[3] Although the September 17, 2001 pretrial order of the LIRAB stated that Santana and the attorney for McDonald's of Waimea (Employer) and its insurance carrier "were present" at the September 13, 2001 initial conference, the LIRAB's August 16, 2001 notice of the initial conference provided that Santana appear at the conference by telephone, while counsel for Employer and its insurance carrier "will appear at the [LIRAB]."

omitted.)

On April 16, 2002, Santana requested reconsideration of the LIRAB's decision and order. In her request, Santana alleged:

> The days before the hearing I had tried to contact [the attorney for Employer and its insurance carrier] to let him know that I was not going to make it to the hearing, but no contact was made, so I left a message with his answering service. Their [sic] was poor communecation [sic] in regards to my being present at the hearing.
>
> He did call the day of the hearing and I was not there (at home) to receive the call to find out the outcome of the hearing.

This is the only mention in the record of Santana's alleged telephone calls to the attorney for Employer and its insurance carrier. After brief comments concerning the merits of her claim for reopening, Santana's request for reconsideration concluded:

> So in all fairness to me I feel I should be allowed to ask for a reconsideration of appeal on my behalf. I [sic] first hearing that was made I did not attend, but given the opportunity, at my own expense, I would beable [sic] to attend so that I can express my side of the case. all [sic] I'am [sic] asking for is a fair hearing before any final decision is made.
>
> Please reconsider having a fair hearing before any dicision [sic] is made.

On April 18, 2002, the LIRAB issued its order denying Santana's request for reconsideration:

> [Santana] seeks to reopen the matter before the [LIRAB] in order to present her case at a hearing to be scheduled. Having reviewed [Santana's] request and the record before us, we find no basis to reopen this matter. IT IS HEREBY ORDERED that the request for reconsideration or reopening be and is denied.

On May 3, 2002, Santana appealed the LIRAB's decision "to close my workmen comp [sic] case" to us.

II. Standards of Review.

The standard of review of an administrative agency's decision is governed by Hawaii Revised Statutes (HRS) § 91-14(g)

(1993), which provides:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The supreme court has parsed HRS § 91-14(g), thus:

> "Under HRS § 91-14(g), [conclusions of law] are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); [findings of fact] are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." Potter v. Hawaii Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62 (1999) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998) (quoting Konno v. County of Hawai'i, 85 Hawai'i 61, 77, 937 P.2d 397, 413 (1997) (quoting Bragg v. State Farm Mutual Auto. Ins., 81 Hawai'i 302, 305, 916 P.2d 1203, 1206 (1996)))).

Korsak v. Hawaii Permanente Med. Group, Inc., 94 Hawai'i 297, 302, 12 P.3d 1238, 1243 (2000) (original bracketed material replaced).

In reviewing an administrative agency's exercise of its discretion,

> appellate courts must consider that
>
> > [d]iscretion denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard

> > to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.
> >
> > Booker v. Midpac Lumber Co., 65 Haw. 166, 172, 649 P.2d 376, 380 (1982) (citations and internal brackets omitted). A hearings officer abuses his or her discretion when he or she "clearly exceeds bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Craft v. Peebles, 78 Hawai'i 287, 301, 893 P.2d 138, 152 (1995) (citation and internal quotation marks omitted).
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> Arakaki[v. State, Dep't of Accounting and General Serv.], 87 Hawai'i [147,] 149-50, 952 P.2d [1210,] 1212-13[(1998)]. Indeed, in order to reverse or modify an agency decision, the appellate court must conclude that an appellant's substantial rights were prejudiced by the agency. See In re Application of Hawaiian Elec. Co., 81 Hawai'i 459, 465, 918 P.2d 561, 567 (1996) (citing Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 638, 675 P.2d 784, 789 (1983), cert. denied, 67 Haw. 1, 677 P.2d 965 (1984)).
>
> Finally, expressing further caution with regard to reviewing administrative determinations, this court has verbalized the following caveat:
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> > In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.
>
> Id. (citing In re Application of Hawaii Elec. Light Co., Inc., 60 Haw. 625, 629, 594 P.2d 612, 617 (1979)) (internal citations and quotation marks omitted) (emphasis added).

S. Foods Group, L.P. v. State, Dep't of Educ., 89 Hawai'i 443, 452-53, 974 P.2d 1033, 1042-43 (1999) (some brackets in the original).

In contrast, "an agency's statutory interpretation is reviewed *de novo*." Keanini v. Akiba, 93 Hawai'i 75, 79, 996 P.2d 280, 284 (App. 2000). Similarly, an agency's interpretation of its own administrative rules is reviewed *de novo*. Int'l. Bhd. of Elec. Workers v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d

943, 950-51 (1986) (citations omitted).

III. Discussion.

In the main, Santana's opening brief[4] focuses on what she alleges are the continuing sequelae of her March 23, 1997 accident and their disabling effects; in other words, the substance of her request to reopen her claim. Her brief does not address the dismissal of her LIRAB appeal for failure to prosecute and attend trial, except at the end, as follows:

> On March 21, 22, 23, 24 2002 [sic] I tryed [sic] to get in contact with Attorney Scott G Leong [sic] to let him know that I wasn't going to make the hearing with no response from him. No one told me that if I couldn't make my hearing, I could have called the Labor & Industrial Relations board of [sic] any change. I'm not highly intelligent, this is new to me to do my own case with little or no help at all. . . .
>
> . . . . I know that because I miss [sic] my court hearing, that I might not even be given another chance to be heard, but that's all I want is a chance to be heard and a chance to be understood.

Opening Brief at 39.[5]

With respect to the procedural aspect of the dismissal, HRS § 91-14(g)(3), we observe that HAR § 12-47-23, part of the LIRAB's Rules of Practice and Procedure, provides as follows:

> Where it appears that the appellant or complainant was served with a notice of hearing or initial or settlement conference but fails to appear at such hearing or conference, either in person, by attorney, or duly appointed representative, the [LIRAB] may, after service of notice of intention to dismiss, dismiss the appeal or may proceed and make a decision as is just and proper.

It thus appears the dismissal of Santana's appeal was "[m]ade

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[4] Santana did not file a reply brief in this appeal.

[5] Santana's seven-page opening brief begins at page 34, with the caption, and is numbered consecutively, ending at page 40, with the certificate of service.

upon unlawful procedure[,]" HRS § 91-14(g)(3), because the LIRAB failed to serve Santana with a "notice of intention to dismiss," before it actually dismissed her appeal. HAR § 12-47-23.

However, we "may reverse or modify the decision and order [of the LIRAB]" only "if the substantial rights of [Santana] may have been prejudiced" by the procedural defect. HRS § 91-14(g). See also Nakamine v. Bd. of Trustees, Employees' Ret. Sys., 65 Haw. 251, 254, 649 P.2d 1162, 1164 (1982) (vacating the circuit court's reversal of an agency decision and remanding, because "what is lacking is any finding that [claimant's] substantial rights had been prejudiced by the unlawful procedure"). Cf. Hawai‘i Rules of Civil Procedure Rule 61 (2002) ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

Here, the LIRAB gave Santana's objections to dismissal of her LIRAB appeal full consideration, on the whole record, when it heard and denied her request for reconsideration. The lack of notice to Santana of the LIRAB's intention to dismiss was thereby rendered harmless. Indeed, in concluding on reconsideration that "we find no basis to reopen this matter[,]" and in ordering that "the request for reconsideration or reopening be and is denied[,]" the LIRAB appears to have also addressed the merits of Santana's underlying request for reopening. We conclude, in sum, that Santana's substantial rights were not prejudiced by the

LIRAB's failure to follow its own rules of practice and procedure.

What remains for us on appeal is the discrete question of abuse of discretion. HRS § 91-14(g)(6); Korsak, 94 Hawai‘i at 302, 12 P.3d at 1243. This question need not detain us long. Santana was twice notified in writing of the date and time of the trial. Santana conceded below and concedes on appeal that she knew when the trial was to take place. She did not attempt to contact the LIRAB regarding her absence or request a continuance of trial. She simply did not show up. We acknowledge Santana's allegation on appeal, albeit supported only by a similar bare allegation below, that she attempted to contact the attorney for Employer and its insurance carrier about her inability to attend. The truth or falsity of this allegation notwithstanding, it is still apparent from the record that Santana did absolutely nothing to prosecute her LIRAB appeal. Her failure to show up for trial was merely the most salient indicator of her thoroughgoing lack of prosecution. Although, as we have discussed, there was a procedural defect in the LIRAB's dismissal of Santana's appeal, we conclude this was not a case in which the LIRAB "clearly exceed[ed] bounds of reason or disregard[ed] rules or principles of law or practice to the substantial detriment of a party[,]" S. Foods Group, L.P., 89 Hawai‘i at 452, 974 P.2d at 1042 (citations, internal quotation marks and block quote format omitted; emphasis supplied), and hence, the LIRAB did not abuse

its discretion in dismissing Santana's appeal for her lack of prosecution and failure to attend at trial. We also observe that "a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." Id. at 453, 974 P.2d at 1043 (emphasis, citation and block quote format omitted).

IV. Conclusion.

Accordingly, the March 27, 2002 decision and order of the LIRAB is affirmed.

DATED: Honolulu, Hawai‘i, February 5, 2004.

On the briefs:

Chief Judge

Tammy L. Santana, *pro se*,
claimant-appellant.

Scott G. Leong
(Leong Kunihiro Leong & Lezy), for
employer/insurance carrier-appellees.

Associate Judge

Associate Judge