
 NOT FOR PUBLICATION

NO. 26509

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

RAMONA M.U. SMITH, Claimant-Appellant,
v.
STRAUB CLINIC AND HOSPITAL and
HAWAII INSURANCE GUARANTY ASSOCIATION,
Employer/Insurance Carrier-Appellee.

APPEAL FROM THE LABOR AND
INDUSTRIAL RELATIONS APPEALS BOARD

(CASE NO. AB 2000-287 (2-96-06907))

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

(By: Foley, Acting C.J., Nakamura, and Fujise, JJ.)

In this workers' compensation case, Claimant-Appellant Ramona M.U. Smith (Smith), pro se, appeals from the "Order Compelling Examination" that was filed on April 1, 2004, by the Labor and Industrial Relations Appeals Board (the Board). The order granted the motion of Employer/Insurance Carrier-Appellee Straub Clinic and Hospital and Hawaii Insurance Guaranty Association (collectively referred to as "the Employer") to compel Smith to attend a second Independent Medical Examination (IME). After a careful review of the record and the briefs and other papers submitted by the parties, we resolve the issues raised by the parties as follows:

I.

As a threshold matter, the Employer argues that because Smith is appealing from a non-final decision, this court lacks jurisdiction over Smith's appeal. We disagree. The Board's order compelling Smith to submit to a second IME was a "preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief" Hawaii Revised Statutes (HRS) § 91-14(a) (1993). Accordingly, we have jurisdiction over the present appeal. See Tam v. Kaiser Permanente, 94 Hawai'i 487, 494-95, 17 P.3d 219, 226-27 (2001) (holding that appellate jurisdiction existed over an employee's appeal of an order suspending her workers' compensation benefits until she complied with an order to submit to a second medical examination).

II.

On appeal, Smith argues that the Board lacked the authority to order a second IME because HRS § 386-79 (Supp. 2005)¹ only authorizes the Director of the Department of Labor

¹ Hawaii Revised Statutes (HRS) § 386-79 (Supp. 2005) provides, in relevant part, as follows:

After an injury and during the period of disability, the employee, whenever ordered by the director of labor and industrial relations, shall submit to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer. . . .

If an employee refuses to submit to, or in any way obstructs such examination, 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.

and Industrial Relations (the Director), and not the Board, to order medical examinations. We reject Smith's claim that the Board lacked authority to order a second IME.

Among the Board's Rules of Practice and Procedure is Hawaii Administrative Rules (HAR) Section 12-47-31, which provides in relevant part:

The board may upon written application and for good cause shown, compel discovery, order that discovery be made by any other means prescribed by the Hawaii Rules of Civil Procedure, and impose sanctions as provided by the Hawaii Rules of Civil Procedure or section 12-47-48, or both, as it deems appropriate, for the failure of any party or person to allow discovery.

(Emphasis added.) Under Rule 35 of the Hawai'i Rules of Civil Procedure, a party may be ordered, upon good cause shown, to submit to a mental or physical examination when the party's mental or physical condition is in controversy. We conclude that the Board, pursuant to HAR § 12-47-31, had the authority to order Smith to submit to a second IME.

We also reject Smith's contention that the Board erred in ordering a second IME because there was "no good and valid reasons" for a second IME. One of the issues pending in the appeal before the Board was whether the Director had erred in determining that Smith's injury was resolved by September 1, 1996. As of July 2002, Smith's attending physician, psychiatrist

. . . .
Employer 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.

Shepard B. Ginandes, M.D., maintained that Smith's injury had not been resolved and that she was in need of continuing treatment. Smith's first IME was conducted in September 1996. The Board had good cause to order a second IME because the questions of whether and when Smith's injury had been resolved were in dispute. A second IME would assist the Board in evaluating Dr. Ginandes's opinions and Smith's claims on these questions.

Assuming, arguendo, that the Board was subject to the HRS § 386-79 standard for ordering a second IME, we conclude that this standard was met. The Board had "good and valid reasons . . . with regard to the medical progress of the employee's treatment" for compelling Smith to submit to a second IME. HRS § 386-79. We conclude that the Board did not abuse its discretion in ordering Smith to submit to a second IME. HRS § 91-14(g)(6) (1993).

III.

Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38, the Employer moved for sanctions in the form of attorney's fees and costs, claiming that Smith's appeal was frivolous. We deny the Employer's motion.

IV.

IT IS HEREBY ORDERED that: 1) the "Order Compelling Examination" filed on April 1, 2004, by the Labor and Industrial

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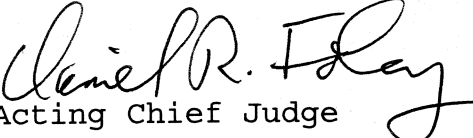
Relations Appeals Board is affirmed; and 2) the Employer's motion for sanctions pursuant to HRAP Rule 38 is denied.

DATED: Honolulu, Hawai'i, February 28, 2006.

On the briefs:

Ramona M.U. Smith, Pro Se,
for Claimant-Appellant.

Brian G.S. Choy,
Keith M. Yonamine,
for Respondent-Appellee and
Insurance Carrier-Appellee.


Acting Chief Judge


Associate Judge


Associate Judge