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Case No. OSH 2014-6

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and MARYL GROUP CONSTRUCTION, INC., Respondent.	CASE NO. 2014-6 ORDER NO. 610 ORDER GRANTING COMPLAINANT DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS' MOTION TO DISMISS RESPONDENT MARYL GROUP CONSTRUCTION, INC.'S CONTEST

ORDER GRANTING COMPLAINANT DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS' MOTION TO DISMISS RESPONDENT MARYL GROUP CONSTRUCTION, INC.'S CONTEST

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. Notice of Contest and Citation

This case arises from a written notice of contest from the Amended Citation and Notification of Penalty (Amended Citation), issued on December 20, 2013[1] to Respondent Maryl Group Construction, Inc. (Maryl or Respondent) by the State of Hawaii Department of Labor and Industrial Relations (DLIR), Hawaii Occupational Safety and Health Division (HIOSH), based on Inspection No. 316271162 conducted on July 11, 2013. A booklet entitled "Employer Rights and Responsibilities following a HIOSH Inspection" (Booklet) was included with the Amended Citation. The Booklet, Section 10 entitled **How to Contest** states in relevant part:

How to Contest

If you wish to contest any portion of your citation, a Notice of Contest must be submitted in writing within 20 calendar days after receipt of the

Citation and Notification of Penalty even if you have orally stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an Informal Conference.

The Notice of Contest must be a written and signed original. The notice must be postmarked (if mailed) within twenty calendar days of receipt of the citation. If it is not mailed, the date of receipt stamped by the Director's office must be within twenty calendar days of receipt of the citation.

(Emphasis added)

During a January 10, 2014 Informal Conference, Tin Shing Chao (Chao), Supervisor for the Occupational and Safety & Health Branches of the HIOSH Division of the DLIR, informed Maryl Safety Manager Dan Cunningham (Cunningham) that Maryl would need to submit an "original" contest to contest the Amended Citation.

Subsequently, in a January 13, 2014 discussion with Cunningham, Chao reiterated that Maryl would need to submit an "original" contest by close of business on that date to contest the Amended Citation.

On January 13, 2014, Cunningham personally delivered to the HIOSH office a copy of a January 13, 2013 letter signed by him to HIOSH Administrator Diantha Goo. Cunningham requested that the HIOSH employee receiving this letter give it to Chao. In the copy of the letter, Cunningham notified HIOSH that Maryl was contesting "the citation and proposed penalty for item 1 of citation 1 issued on December 20, 2013," and "the citation for items 1, 2, and 3 of citation No. 2 issued on December 20, 2013." HIOSH file stamped the copy as received on January 13, 2014 at 3:24 p.m. (First Contest).

On January 17, 2014, Chao called Cunningham. Chao acknowledged that the First Contest was timely filed based on Maryl's delivery of the First Contest on the 20th day after issuance of the Amended Citation. However, Chao further informed Cunningham that because the First Contest was not an "original" signed document, Maryl would have to accept the Amended Citation. Chao acknowledged that the First Contest had been timely delivered but not the "original" document. Cunningham asked if he could submit an "original" later that day. Chao responded that it was too late because the 20-days had passed.

Nevertheless, Cunningham immediately delivered the original signed document to the HIOSH office (Second Contest) and left it with the same HIOSH employee who had received the First Contest. The Second Contest was file stamped January 17, 2014 at 2:49 p.m.

After leaving the HIOSH office, Cunningham ran into Chao and requested that Chao accept the Second Contest.

On February 14, 2014, HIOSH notified the Hawaii Labor Relations Board (Board or HLRB) by a "Notice of Contest" (HIOSH Notice) that Respondent was contesting that

Amended Citation. A copy of the Second Contest was attached to the HIOSH Notice. The Amended Citation also attached to the HIOSH Notice listed one Citation 1 violation deemed "Serious" for a violation of 29 CFR 1926.102(a) (2) subject to a proposed penalty of $1,100 and three Citation 2 violations of 29 CFR 1910.134(d) (1) (iii), 29 CFR 1910.1200(h) (l), and 29 CFR 1926.150(c) (1) (viii) noted as "Other" for the type of violation and subject to $0 proposed penalties.

On February 18, 2014, the HLRB issued a "Notice of Initial Conference/Settlement Conference" informing the parties that a settlement conference was scheduled for March 13, 2014.

Following that conference, on March 13, 2014, the Board issued a "Notice of Deadlines and Motion Hearing" confirming the following deadlines: March 28, 2014 for motions; April 11, 2014 for responses; April 18, 2014 for replies; and a motion hearing for April 29, 2014.

B. Motion to Dismiss

On March 28, 2014, the Director of DLIR (Director or Complainant) filed "Complainant Director of Labor and Industrial Relations' Motion to Dismiss Respondent Maryl Group Construction, Inc.'s Contest" (Motion) for lack of jurisdiction based on Maryl's untimely filing of the contest.

On that same date, based on a March 20, 2014 letter from Maryl's attorney requesting rescheduling, the Board issued a "Notice of Rescheduled Motion Hearing" rescheduling the April 29, 2014 motion hearing to April 22, 2014.

On April 8, 2014, Maryl filed a "Declaration of Dan Cunningham."

On April 11, 2014, Maryl filed "Respondent's Memorandum in Opposition to Complainant Director of Labor and Industrial Relations' Motion to Dismiss Respondent Maryl Group Construction, Inc.'s Contest Filed March 28, 2014" (Memorandum in Opposition). In its Memorandum in Opposition, Maryl took the position that the Board should deny the Motion because: 1) Maryl timely delivered for filing a Notice of Contest with HIOSH and a supplemental Notice of Contest; and 2) the alleged pretext of an "original" Notice of Contest did not prejudice the Director.

On April 21, 2014, the Director filed "Complainant's Reply to Respondent's Memorandum in Opposition to Complainant Director of Labor and Industrial Relations [sic] Motion to Dismiss Respondent Maryl Group Construction, Inc.'s Contest Filed March 28, 2014" (Reply). In his Reply, the Director contended that the Board lacks jurisdiction over this case based on Maryl's failure to timely contest the Amended Citation because: 1) the First Contest submitted on January 13, 2014 was not an "original" but a copy and therefore defective; 2) the "alleged pretext" makes no sense; and 2) the Second Contest submitted on January 17, 2014 was late; and therefore, defective.

On April 22, 2014, the Board held a hearing on the Motion. Both parties reiterated, further supported, and clarified the arguments made in their respective Motion and Memorandum in Support of Motion to Dismiss, Memorandum in Opposition, and Reply. At the conclusion of these arguments, the Board took the matter under advisement and stated that a written decision would be issued.

II. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Applicable Standards for A Motion to Dismiss

The Board adheres to the legal standards established by the Hawaii appellate courts for motions to dismiss brought under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).[2]

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b) (1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000) (Casumpang); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007); Director, Dep't. of Labor and Indus. Rels. v. 1st Green Solutions, LLC, OSH 2011-19, Order No. 530, at p. 6 (2013).

B. The Board Lacks Jurisdiction Based on Untimely Filing of The Contest.

In its Motion to Dismiss, the Director takes the position that the Board lacked subject matter jurisdiction because Maryl did not properly and timely contest its citation. In support, the Director asserts that the applicable rule is that the court [Board] has no jurisdiction unless the mandatory, statutory requirement of a timely perfecting of an appeal is met. The Director maintains that in this case Hawaii Revised Statutes (HRS) §396-11(a) requires that a citation and proposed penalty shall be final and conclusive unless a contest is filed within 20-days after receipt of the citation; and further, that Hawaii Administrative Rules (HAR) §12-51-19 requires that the Director be served with an "original" contest within 20 days of receipt of the citation. The Director then argues that Maryl failed to submit an "original" contest on or before this required 20-day deadline for two reasons: 1) the First Contest submitted by Maryl on January 13, 2014 did not meet the HAR §12-51-19 requirement of an "original;" and 2) the Second Contest was untimely because the filing occurred after the 20-day deadline for contesting the citation. In support, the Director relies on HAR §12-51-19 and the Hawaii Intermediate Court of Appeals' (ICA) ruling in Si-Nor v. Director, Dep't. of Labor and Indus.

Rels., 120 Haw. 135, 202 P.3d 596 (2009) (Si-Nor), holding that because transmission of facsimile copies was not specifically allowed by any applicable statute or rule, a facsimile notice of contest to HIOSH did not satisfy the HRS §396-11(a) filing requirements.

In its Memorandum in Opposition, Maryl presents the counterarguments that: 1) Maryl timely delivered a notice of contest and a supplemental notice of contest to HIOSH; 2) neither HRS §396-3 nor HAR §12-51-19 defines "original document" or defines this language to mean an original signed document; 3) the January 13, 2013 Notice of Contest did not lack sufficiency in contrast to the Labor and Industrial Appeals Board's (LIRAB) decision in Cole v. AOAO Alii Cove, AB 2010-089 (WH) (2013) (LIRAB Cole),[3] and there was no question of Maryl's intention to challenge the Amended Citation; 4) this case is distinguishable from Si-Nor because in this case there was actual delivery of the copy of the notice of contest, rather than an attempt to file by facsimile notice; 5) an overly rigid compliance with requirements as jurisdictional is improper and inconsistent with HRS §396-11(a); 6) the Director lacked authority to promulgate HAR 12-51-19; and 7) the Board, not HIOSH, determines whether jurisdiction exists. In support of these arguments, Maryl relies on the LIRAB decision in Higuchi v. Otaka, AB 2012-019 (2013) (Higuchi) and the ICA decision in Jou v. Hamada, 120 Hawai'i 101, 201 P.3d 614 (App. 2009) (Jou)[4].

In his Reply to the Memorandum in Opposition, the Director reiterates his position and many of the same arguments that the Board lacks jurisdiction over this case. The Director frames the key issue as whether Maryl timely submitted an "original" contest; reiterates his position that the First Contest was not an "original" as required by HAR §12-51-19 and the Second Contest was untimely; and asserts that no applicable statute or rule permitted Maryl to contest the Amended Citation with a copy of its contest. More specifically, the Director asserts that: 1) Maryl "inaccurately claims" that "the filing of an original document is not jurisdictional[.];" 2) Maryl's use of the phrase "original document" inaccurately quotes the rule which simply states "original;" 3) HRS §1-14 provides that "[w]ords of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to the general or popular use or meaning." and Merriam-Webster defines "original" as "that from which a copy, reproduction, or translation is made;" 4) there is no merit to or authority provided for Maryl's claims of excuse or cure by conveying an intent to contest, actual delivery of a defective contest, lack of prejudice, and actual notice; 5) the LIRAB Cole decision highlights the principle that appeal filing requirements must be strictly met and that lack of prejudice does not excuse compliance; 6) Maryl's attempt to distinguish Si-Nor lacks legal substance; and 7) that Higuchi and Jou are distinguishable. Finally, the Director disputes Maryl's other contentions as unwarranted and unsupported, such as that HIOSH has no authority to determine if jurisdiction exists or to fail to time-stamp and file a timely submitted notice of contest, and that HIOSH was disingenuous and "sandbagged" Maryl.

At the hearing on the Motion, the Director, not only clarified his arguments but made the following additional arguments in support of the Motion. The Director argued that the sole issue is whether Maryl had to submit an "original" contest to perfect its appeal; and further, that the key is not only to file but to timely file an "original." Regarding the filing in this case,

Director submitted that: 1) there is no factual dispute that the January 13, 2014 filing was a copy in all respects without an original signature; 2) the requirement is for an "original," as the term is ordinarily used, not an original signature; 3) full compliance is required, and the mere act of filing was only partial compliance; and 4) noncompliance cannot be waived, disregarded, cured, or excused. Regarding this case, the Director argued that Cunningham "messed up." Further, there is no dispute that Maryl's January 13, 2014 submission to HIOSH was timely filed and not an "original," but rather a copy in all respects; and the January 17, 2014 submission of the original was untimely. Accordingly, there is no perfected appeal without the" original" contest, requiring the Board to dismiss the appeal. The Director maintained that while there is an issue of what "original" means, the dictionary definition applies. Hence, the only issue for the Board is whether to apply the requirement of an "original." The Director asserted that to accept Maryl's argument that the January 13, 2014 copy of the contest met the statutory requirements, the Board must inappropriately ignore the administrative rule with the word "original." While acknowledging that there may be a difference between the statute which does not specify the requirement of an "original," and the rule requiring an "original," the Director maintained that he was authorized under HRS §396-8 to promulgate the rule. Further, that any challenge to the rule rests in a declaratory ruling action in the courts not with the Board. In addition, the Director argued that the ICA Si-Nor, is relevant, determinative, and not distinguishable because it held that a facsimile is not an "original" but a copy, which is the precise issue in this case. Regarding Maryl's position that hand delivery and/or file stamping of the First Contest met the appeal filing requirements establishing jurisdiction, the Director reiterated that: 1) file stamping a copy is only partial compliance with the filing requirements, which require filing of an "original" insufficient to establish jurisdiction; 2) in Si-Nor, the appeal was perfected because the original was mailed within the 20-day deadline and hand delivery does not perfect "original" filing requirements; and 3) unlike Si-Nor, the original in this case came in after such deadline.

At the hearing on the Motion, Maryl framed the issues as what is an "original;" and whether a notice of contest with a copy not an original signature, is sufficient to invoke Board jurisdiction. Maryl did not dispute that the January 13, 2014 file stamped copy was not an "original," but rather took issue with HIOSH's position that a copy of the signature is not an "original." Maryl pointed out that Cunningham also dropped off a document with an original signature filed stamped January 17, 2014. Maryl further supported its position that the appeal was perfected with the following contentions. First, that under HRS §396-11, a review of a citation only requires a written notice of contest filed within 20-days of the receipt of the citation. An "original" is not required. Accordingly, the January 13, 2014 notice of contest complied with the statutory requirements to effectuate a review of the citation. Second, the Board has inherent powers to take jurisdiction over an appeal if there is a question regarding ambiguity. HRS §396-3 contains no definition of "original." Hence, HIOSH's position that a copy of the signature was not an "original" relies on an undefined, ambiguous, restrictive definition of "original" under HAR §12-51-9 [sic] not contained in HRS §396-11. Moreover, HIOSH's dictionary definition of "original" is not incorporated into the HAR or the statute. Third, the administrative agency's interpretation cannot be inconsistent with the statute or legislative intent. The HAR requirement of an "original" raises another procedural barrier that conflicts with the statute and is ambiguous because of the lack of a definition for an "original."

Consequently, the statute takes precedence, and the Board should revert back to the clear language of the statute and find that jurisdiction exists based on the January 13, 2014 timely filed written notice of contest. Fourth, the January 13, 2014 filed copy is basically the same as the January 17, 2014 filed "original," which has a darker signature. Fifth, that by file stamping, HIOSH accepted the copy, which is sufficient to invoke jurisdiction based on a waiver. Sixth, this case is distinguishable from Si-Nor which: 1) did not define "original;" 2) held that a facsimile notice does not effectuate a timely notice of the contest because neither the statute nor the rule provide for faxing; and 3) held that submission by mail is timely as opposed to this case in which Maryl hand delivered a copy of the notice of contest on the last day of filing. Since the copy filed in this case was not facsimile transmitted, it is consistent with Si-Nor and the statutory requirements. Relying on the Si-Nor dissent's finding that the HRS §396-11 requirement of "shall file" means to deliver to the court clerk or record custodian for submission into the record and not through mail, Maryl further maintained by hand delivering the January 13, 2014 notice, which HIOSH acknowledged and received by file stamping, that it completed the filing requirement and perfected its appeal. Finally, Maryl argued that a copy is a written "original" document, and that HIOSH is requiring an original signed document, not specifically required by the HAR.

1. Deference to Administrative Agency Determinations

The Board recognizes that in reviewing administrative agency determinations, the Hawaii appellate courts have applied certain well-established standards for review of such determinations and accorded deference to the administrative agency's determination.

In Director, Dep't. of Labor and Indus. Rels. v. Permasteelisa Cladding Technologies, 125 Hawai'i 223, 257 P.3d 236 (App. 2011) (Permasteelisa), the ICA set forth the applicable standards regarding the circumstances in which deference should be given to the administrative agency determination in a HIOSH case. First, an agency's legal conclusions are freely reviewable. Accordingly, an agency's statutory interpretation is reviewed *de novo*. Dir., Dept. of Labor and Indus. Rel. v. Kiewit Pacific Co., 104 Haw. 22, 26, 84 P.3d 530, 534 (App. 2004) (Kiewit).

Regarding the proper analysis, the ICA stated:

> [W]hen reviewing a determination of an administrative agency, we first decide whether the legislature granted the agency discretion to make the determination being reviewed. If the legislature has granted the agency discretion over a particular matter, then we review the agency's action pursuant to the deferential abuse of discretion standard (bearing in mind that the legislature determines the boundaries of that discretion discretion). If the legislature has not granted the agency discretion over a particular matter, then the agency's conclusions are subject to de novo review.

Permasteelissa, 125 Hawai'i at 226, 257 P.3d at 239. The question of deference remains despite the standard of a fresh review of an agency's conclusions of law in statutory

interpretation. Kiewit, 104 Haw. at 28, 84 P.3d at 536. Regarding when deference should be given, the ICA further stated:

> [I]n deference to the administrative agency's expertise and experience in its particular field, the courts should not substitute their own judgment for that of the administrative agency where mixed questions of fact and law are presented. This is particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.

Permasteelisa, 125 Hawai'i at 226, 257 P.3d at 239. (citing Camara v. Agsalud, 67 Haw. 212, 216, 682 P.2d 794, 797 (1984)). (Citations omitted). The court's [Board's] review is further qualified by the principle that the agency's decision carries a presumption of validity and the party seeking to reverse the agency's decision has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequence. Kiewit, 104 Haw. at 27, 84 P.3d 535 (App. 2004).

Following federal precedent, the ICA further determined that in the HIOSH context involving a "split enforcement" structure between the Director and the HLRB, the Director, as the agency generally charged with promulgation and enforcement, is given the deference over the Board, the adjudicative authority, where the Director and the Board offer conflicting interpretations of an ambiguous regulation. Regarding application of that deference, the ICA further stated:

> However, "[i]f an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning."
>
> Therefore, to determine if judicial deference to [sic] Director applies in the instant case, we must determine (a) if the regulatory language in question is ambiguous and (b) if the language is ambiguous, is Director's interpretation reasonable. An interpretation is reasonable if it "sensibly conforms to the purpose and wording of the regulations." Furthermore, "the agency's decision must be consistent with the legislative purpose."

Permasteelisa, 125 Hawai'i at 228-229, 257 P.3d at 241-242. (Citations omitted)

In addition, the Hawaii appellate courts have concluded that the general principles applying to statutory interpretation are equally applicable to interpretation of administrative rules. Director, Dep't of Labor & Indus. Rels. v. Kiewit Pacific Co., 104 Hawai'i 22, 29-30 n. 6., 84 P.3d 530, 537-538 n. 6 (App. 2004) (Kiewit Pacific); Si-Nor, 120 Hawai'i at 141, 202 P.3d at 602 (App. 2009) (citing Kiewit Pacific, 104 Hawai'i at 29-30 n.6, 84 P.3d at 537-538 n. 6). Moreover, an administrative agency's interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose. In re Wai'ola O Moloka'i, Inc.,

103 Hawai'i 401, 422-423, 83 P.3d 664, 685-686 (2004) (Wai'ola).

In Si-Nor, the Court specifically stated regarding the interpretation of administrative rules:

> In construing statutes, we have recognized that our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
>
> In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. This court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.
>
> If we determine, based on the foregoing rules of statutory construction, that the legislature has unambiguously spoken on the matter in question, then our inquiry ends. When the legislative intent is less than clear, however, this court will observe the well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous. Such deference reflects a sensitivity to the proper roles of the political and judicial branches, insofar as the resolution of ambiguity in a statutory text is often more a question of policy than law.
>
> The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation.

Si-Nor, 120 Hawai'i at 141-142, 292 P.3d at 602-603 (citing Director, Dep't. of Labor & Indus. Rels. v. Kiewiet Pacific Co., 104 Hawai'i 22, 29-30 n. 6, 84 P.3d 530, 537-538 n. 6 (App.2004)).

"Accordingly, review for an administrative agencies consists of two parts: first, an analysis of whether the legislature empowered the agency with discretion to make a particular determination; and second, if the agency's determination was within its realm of discretion, an analysis of whether the agency abused that discretion (or whether the agency's action was otherwise 'arbitrary, or capricious, or characterized by...[a] clearly unwarranted exercise of discretion,' HRS §912-14(g)(6). If an agency determination is not within its realm of discretion (as defined by the legislature), then the agency's determination is not entitled to the deferential 'abuse of discretion' standard of review." Paul's Electrical v. Befitel, 104 Hawai'i 412, 417, 91 P.3d at 494, 499 (2004).

2. Application to the Statutory and Administrative Rule

Regarding the first part of the Paul's Electrical analysis, there is no question that the DLIR has been entrusted with the authority to promulgate and enforce rules and regulations necessary to carry out HRS §396-11(a) and HAR §12-51-19. In interpreting and applying HRS §396-11(a) and HAR §12-51-19, among others, the ICA in Si-Nor found that, "The DLIR has been entrusted with the authority to promulgate and enforce rules and regulations necessary to carry out the purposes of the Hawai'i Occupational Safety and Health Law, HRS Chapter 396, HRS §396-4(a)(1) (1993)."[5] 120 Hawai'i at 142, 202 P.3d at 603. Therefore, in this split enforcement situation, the Director's interpretation is required to be given deference. Permasteelissa, 125 Hawai'i at 228-229, 257 P.3d at 241-242.

HRS §396-11(a) setting forth the review procedure for citations and penalties issued under HRS Chapter 396 states that any citation or proposed penalty shall be final and conclusive against the employer unless "the employer files with the director a written notice of contest of the citation,...the proposed penalty...within twenty days after receipt of the citation, proposed penalty...."

(Emphasis added) As Si-Nor noted, DLIR promulgated HAR §§12-51-15 and 12-51-19 to clarify this review process in more detail. HAR §12-51-15 states in relevant part:

> §12-51-15 Proposed penalties. (a)...Any notice of proposed penalty shall state that the proposed penalty shall be the final order and not subject to review by any court of agency unless, within twenty calendar days from the date of receipt of notice, the employer files a notice of contest in accordance with section 12-51-19 for review of the order in accordance with the law.

120 Hawai'i at 142-143, 202 P.3d at 604. (Emphasis added) HAR §12-51-19 states:

> Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to

> the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director....

(Emphasis added)

In this case, the parties do not dispute that on January 13, 2014, Maryl submitted a copy of its notice of contest that was timely filed within the 20-days of receipt of the Amended Citation. Based on the ICA Cole decision,[6] Maryl submits that the timely filing of this copy met the requirements for a timely filing of a notice of contest under HRS §396-11(a). The Director, on the other hand, argues that Si-Nor is relevant, determinative, not distinguishable, and compels a conclusion that a submission of a copy of a notice of contest does not satisfy the filing requirement of HRS §396-11(a) based on HAR §12-51-19's requirement that the notice be an "original." The Board will review these cases to determine the relevance and persuasiveness of and guidance for the issues in this case.

Si-Nor involved two distinct issues regarding the HRS §396-11(a) filing requirement. First, whether a facsimile transmission of a notice of contest to HIOSH constituted timely filing under HRS §396-11(a); and second, whether a mailing of an "original" notice of contest within the 20-day period satisfied the HRS §396-11(a) filing requirement. In considering these issues, the ICA initially recognized the rule that, "The right of appeal is purely statutory and therefore, the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is obligatory." 120 Hawai'i at 145, 202 P.3d at 606 (citing In re Tax Appeal of Lower Mapunapuna Tenants Ass'n., 73 Haw. 63, 68, 828 P.2d 263, 266 (1992)). In determining that the facsimile submission failed to comply with the method and procedure for a valid notice of contest under HAR §12-51-19, the ICA stated:

> There is no applicable statute or administrative rule that specifically allows filing of a notice of contest by facsimile. The Director, charged with the authority to promulgate rules for the DLIR, has consistently taken the position in this case that a facsimile submission is not sufficient for a valid notice of contest. *HAR §12-51-19*, the administrative rule governing the filing of the notice of contest, specifically directs that the notice of contest "shall be an original." A facsimile is not an original.

Id., 202 P.3d at 606. (Emphasis added) The ICA further relied on the rule that, "A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way." *Id.*, 202 P.3d at 606. Finally, the ICA noted the Tennessee Supreme Court's decision in Love v. College Level Assessment Service, Inc., 928 S.W.2d 36, 38 (Tenn. 1996), referencing the problematic issues which could arise if filing via

facsimile was permitted without a detailed rule governing such filing and further finding that facsimile filing would not be permitted until court procedures and rules have been adopted to govern and control the use of facsimile transmissions,. The ICA finally concluded that:

> We agree with the views expressed in *Love*. As the DLIR has not promulgated rules that authorize the filing of a notice of contest by facsimile transmission, the circuit court did not err in ruling that Si-Nor's facsimile transmission did not constitute a valid filing under HAR §12-51-19.

Id., 202 P.3d at 606. Regarding the second issue of whether the timely mailing of an "original" notice of contest satisfied the filing requirement, the ICA reasoned that in reviewing HRS §396-11(a) that "the term 'file' is sufficiently indistinct that the Director pursuant to the DLIR's rulemaking power under HRS §396-4(a)(1), was authorized to promulgate rules clarifying the term's meaning." The ICA then found that the Director's promulgation of HAR §12-51-15 and 12-51-19 clarified the meaning of the term "file" and the established procedures for complying with the filing requirement set forth in HRS §396-11(a). *Id.* at 145-147, 202 P.3d at 606-608.

In Cole, a notice of appeal was filed with the LIRAB on October 26, 2011 from an October 7, 2011 decision (October Decision) of the Director of the DLIR Disability Compensation Division in a workers' compensation case. The four-page notice of appeal document contained an unsigned Appeal and Notice of Appeal. The omission of the signature apparently was unnoticed until November 9, 2012 when the LIRAB issued an Order to Show Cause (OSC) as to why the case should not be dismissed for lack of a proper appeal based on the unsigned October 26, 2011 document. Cole contended that the dismissal was warranted because the lack of the required signature invalidated the notice of appeal and the 20-day time period to appeal the October Decision had passed. Appellants responded that: their signed letter constituted a "written notice of appeal" under HRS §386-87(a); they were willing to sign the unsigned Appeal and Notice of Appeal; and no prejudice occurred consequent to the missing signature. Alternatively, Appellants asserted that neither HAR §12-47-13(c) nor HAR §12-10-61 (c) require appeals to be signed. In a March 19, 2013 Decision and Order (D &O), the LIRAB agreed with Cole, concluding that it had no subject matter jurisdiction over the appeal of the October Decision based on the lack of a signature on the Appeal and Notice of Appeal. Accordingly, LIRAB dismissed all of the issues on appeal, except for the sole issue regarding a previous February Decision. *Id.* at *2-13.

On the appeal, which included the D&O, among other things, the Cole ICA noted that despite LIRAB's findings that 20 days after the omission was raised by the OSC and just over two months after the OSC that appellants offered to correct the omission, and that appellants submitted a signed copy of the unsigned appeal document, LIRAB concluded the omission was not cured promptly because appellants had neither corrected the omission nor sought leave to do so by motion under LIRAB rules. The ICA noted and provided comments on the relevant LIRAB Rules as follows. HAR §12-47-13(c) (Format for pleadings and other documents)[7] requires appeals and notices to be signed. HAR §12-47-17 (Defective documents)[8] appears to address the effect of a filed, unsigned document, but does not provide

a procedure for curing the omission. HAR §12-47-15 (Retention of documents by the [Board])[9] appears to be the LIRAB rule most resembling a procedure for curing an unsigned document but does not provide a specific motion or process to initiate the correction. HAR §12-47-32 presumably permits a motion for relief to be filed for correcting the deficiency but does not appear to be a LIRAB rule requiring a motion to be filed as indicated in the D&O. HAR §12-47-1 provides that LIRAB rules must be "construed to secure the just, speedy, inexpensive determination of every proceeding." *Id.* at *15-18.

Analogizing the omitted signature to "insufficiency in the form of a notice of appeal, which does not raise jurisdictional questions," the ICA further articulated the factors in Cole relevant to its determination that the missing signature should not result in the loss of the appeal:

> The parties proceeded for over a year before the omitted signature was noticed. A pre-trial statement was issued by the Board which unequivocally provided the parties involved and the issues to be determined, including eight issues from the October Decision. The parties stipulated to forgo a trial and submit memoranda to resolve the issues. Appellants submitted a signed copy of the unsigned appeal document just over two months after the omission was brought to their attention. Cole has not alleged he was misled or that any prejudice resulted from the omitted signature. The record thus shows (1) Appellants' intent to appeal from the October Decision could be fairly inferred and was in fact acted upon by all parties and the Board, and (2) Cole was not misled by the deficiency in the form of Appellants' notice of appeal. Consequently, the missing signature should not have resulted in loss of the appeal.

2014 Haw. App. LEXIS 358, at *18-19. (Footnotes omitted) The ICA further noted that while this matter did not involve discovery violations, the decision was nevertheless guided by precedent regarding dismissal of claims as discovery sanctions and cited the five factors considered[10]. The ICA relied on the last two factors as most relevant. Finally, the ICA concluded that the LIRAB abused its discretion by dismissing the appeal reasoning that, "the Board [LIRAB] had less drastic sanctions at its disposal if it determined such was needed to enforce its rules." The ICA then referenced the appellants' offer to sign the defective notice of appeal 20 days after it was brought to their attention and then submitting a signed copy. *Id.* at 19-21.

While acknowledging that there are some factual similarities between the ICA Cole and this case, this Board nevertheless finds that decision distinguishable from this case on both factual and legal grounds. First, unlike this HIOSH case, the ICA Cole decision was an appeal from a workers' compensation case brought under a totally different statute HRS Chapter 386 and HAR §12-10-1 *et. seq.*, 12-14-1 *et. seq.* and 12-15-1 *et. seq.*. Under HRS §386-87, appeals from workers' compensation cases are taken to LIRAB governed by HRS Chapter 371 and HAR §12-47-1 *et. seq.*. This case is a HIOSH case brought under HRS Chapter 396 and HAR §12-51-1 *et. seq.*. Under HRS §§396-11 and 396-3 (2013) definition of "Appeals board," review of a citation, proposed penalty, or order of the director are reviewed by the

HLRB. Accordingly, the ICA Cole decision and the present case are subject to two separate and distinct statutory and regulatory schemes. Second, in ICA Cole, the LIRAB determination that the notice of appeal was insufficient was rendered based on its interpretation of its own procedure for filing under its own administrative rules. In this case, the Board is not rendering a determination based on its own rules. Rather, the Board is reviewing a HIOSH determination that a notice of contest that HIOSH accepted for filing was invalid and untimely under its interpretation of its administrative rules, which it promulgated and is entitled to deference unless plainly erroneous or inconsistent with the underlying purpose under the standards set forth above. Third, in ICA Cole, the omitted signature was not noticed for over a year after the Notice of Appeal was filed. During that year, the appeal had progressed through pretrial statements and a stipulation to forego a trial and submit memoranda to resolve the issues. In this case, the lack of an "original" was discovered within a few days of filing, and the contested case had not progressed past the filing of the notice of contest. Fourth, the issues in ICA Cole and the present case are distinguishable. In ICA Cole, the "original" of the Notice of Appeal was timely filed but was incomplete based on the omission of the signature. The Notice of Appeal failed to comply with HAR §12-47-13(c), requiring that "The original of each document, including appeals…shall be signed and dated in black ink…." In this case, a copy of the notice of contest was timely filed as opposed to the "original" notice of contest. The filing of the copy failed to comply with the HAR §12-51-19[11] requirement that the petition be "original." Unlike ICA Cole's finding that the omission of the signature constituted an "insufficiency in the form of a notice of appeal," the submission of a copy rather than the "original" is not just an insufficient form. Submission of a copy raises, among other things, questions regarding the authenticity, accuracy, veracity, completeness, and quality of reproduction of the document not present with the filing of an "original." Moreover, a copy of a notice of contest does not comply with the Hawaii Rules of Evidence Rule (HRE) 1002,[12] requirement of an "original." As courts have stated, "The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing." U.S. v. Ross, 33 F.3d 1507, 1513 (11th Cir. 1994); U.S. v. Yamin, 868 F.2d 130, 134 (5th Cir. 1989).

Based on the foregoing, the Board agrees with the Director and finds that the circumstances and issues presented in this case are more closely akin to those in Si-Nor than ICA Cole for several reasons. First, both are HIOSH cases subject to HRS Chapter 396 and the implementing administrative rules set forth in HAR §12-51-1 *et. seq.* and the statutory and regulatory scheme established by these laws. Moreover, the issue in Si-Nor and in Maryl implicate and require interpretation and application of the exact same statutory provision HRS §396-11(a) and HAR §§12-51-15 and 12-51-19. Finally, although arising from different facts and technology, both Si-Nor and this case involve the issue of a timely filing of a copy. While the copy in Si-Nor was sent by facsimile transmission and the copy in this case was hand delivered, both of the filings were nonetheless copies of the notice of contest. Consequently, the Board will look to Si-Nor for guidance in interpreting and applying HRS §396-11(a) and HAR §§12-51-15 and 12-51-19 to the issues in this case.

The Board acknowledges that Maryl is correct that there are differences between HAR §12-51-19 and HRS §396-396-11(a). HRS §396-11(a) sets forth a broad requirement that a "written notice of contest" be filed within 20-days of receipt of the citation to invoke the

review procedures of this provision and provides no specific requirements regarding the form of that written notice. HAR §12-51-19, on the other hand, specifically requires that the petition be an "original" and specifies the method of effectuating appropriate service by delivery or by mail. Maryl contends that the Director lacked the authority to promulgate HAR §12-51-19 because the requirement of an "original" contained in the rule adds another procedural barrier to a review, conflicts with the more general requirements of HRS §396-11(a); and is ambiguous because neither HRS §396-3 or HAR §12-51-19 defines "original." However, Maryl cites no authority for these contentions. Further, based on the ICA's reasoning in Si-Nor, the Board finds that there is no merit to this argument for several reasons.

First, the Board finds that the relationship between HRS §396-11(a) and its implementing administrative rule HAR §12-51-19 falls within the situation "where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts [the Board] accord persuasive weight to administrative construction and follow the same, unless the construction is patently erroneous." Si-Nor, 120 Hawai'i at 142, 202 P.3d at 603. As the ICA found in Si-Nor regarding the term "file" in HRS §396-11(a), the term "written notice of contest" is likewise sufficiently indistinct that the Director, pursuant to the DLIR's rulemaking power under HRS § 396-4(a) (1), was authorized to promulgate rules clarifying the term's meaning." *Id.* at 146-147, 202 P.3d at 607-608. Following the Si-Nor reasoning, the clarifications occurred by promulgation of HAR §12-51-15 and 12-51-19. HAR §12-51-15 defines the term "notice of contest" to mean compliance with HAR §12-51-19. HAR §12-51-19 states, in part, that, "Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original..."

Regarding Maryl's argument that "original" is ambiguous, the Hawaii Supreme Court has found that its "primary obligation in construing a statute 'is to ascertain and give effect to the intention of the legislature,' which is to be obtained primarily from the language contained in the statute itself." Leslie v. Bd. Of Appeals of the County of Hawai'i, 109 Haw. 384, 393, 126 P.3d 1071, 1080 (2006) (citing Franks v. City & County of Honolulu, 74 Haw. 328, 334, 843 P.2d 668, 671 (1993) (quoting In re Hawaiian Tel. Co., 61 Haw. 572, 577, 608 P.2d 383, 387 (1980)). The parties have provided no legislative history as an interpretive tool, and there is no dispute that no definition of "original" exists in either the statute or the administrative rule. The Board is of the opinion that the term "original" is unambiguous and "its literal application is neither inconsistent with the policies of the statue the rule implements nor produces an absurd or unjust result." Permasteelisa, 125 Haw. at 229, 257 P.3d at 242. However, even if "original" is ambiguous, the Director maintains that HRS §1-14 applies, "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." The Director then urges resort to the Merriam-Webster dictionary definition of "original" as "that from which a copy, reproduction, or translation is made" to determine the ordinary meaning of the term. The Hawaii Supreme Court has sanctioned such an approach. "We may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." Leslie. *id.*, 126 P.3d at 1080. Complying with the standards set forth above, the

Board is unable to find that this interpretation is palpably erroneous. According, the Board accords persuasive weight to the Director's construction of its administrative rules and follows the same.

Second, construing the word "original" according to its plain or ordinary meaning, the parties do not dispute and the Board agrees that the document delivered and filed on January 13, 2014 was not an "original." The rule applied by the ICA in Si-Nor that, "A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way" equally applies to the requirement of an "original." Hence, as with facsimiles, there is not only no provision for a "copy" in the statute or rule; and moreover, the administrative rule specifically precludes a "copy" by requiring the "original." The plain language of HAR §12-51-19 requires an "original" to be filed within the 20-day period set forth in HRS §396-11(a). It is undisputed and the record confirms that while a copy of the notice of contest was timely filed on January 13, 2014, no "original" was filed within that period. Accordingly, the Board is unable to find that Maryl perfected a timely contest in accordance with the statute. The Board recognizes that the technology of copiers has improved since HAR §12-51-19 was promulgated, and as Maryl has argued, there may be very little difference between the copy and the original of the contest in this particular case. However, taking a broader view, there are potential technical problems, such as the quality of the copies, and legal issues, as discussed more fully above, presented by the acceptance of copies, rather than by an "original." As the ICA in Si-Nor noted, in the absence of court procedures and rules to govern and control the use of copies, filing of copies should not be permitted. The Board finds that the "bottom line" is that the plain language of HAR §12-51-19 unambiguously requires that the notice of contest be an "original." The Board concurs with the Director that to accept Maryl's position that a copy of the contest would meet the HAR §12-51-19 filing requirements is to ignore the word in the administrative rule requiring an "original." (Emphasis added) The Board is unable to find that this literal application is inconsistent with the policies of HRS §396-11(a) nor produces an absurd or unjust result. Further, even if as Maryl maintains, the word "original is ambiguous," the Board determines that the Director's interpretation of "original" as defined in the dictionary as "that from which a copy, reproduction, or translation is made" is reasonable because it "sensibly conforms to the purpose and wording of the regulations." Permasteelisa, 125 Haw. at 229, 257 P.3d at 242. Accordingly, the Board defers to the Director's determination that Maryl's notice of contest filed on January 13, 2014 was not an "original" satisfying the requirements of HAR §12-51-19 for a timely valid notice of contest; and that the subsequent January 17, 2014 filing of the "original" notice of contest was untimely because the 20-day period had expired.

Based on the foregoing, the Board concludes that the Director's position that the First Contest filed on January 13, 2014 was a copy and not an "original" in accordance with HAR §12-51-19, and the January 17, 2014 filing of the "original" notice of contest occurring after the 20-day period set forth in HRS §396-11(a) did not constitute a timely written notice of contest under HRS §396-11(a) and HAR §12-51-19 was not plainly erroneous or inconsistent with the underlying legislative purpose. Therefore, in this case, the Director's interpretation of its own rules is entitled to deference. Wai'ola, 103 Hawai'i at 422-423, 83 P.3d at 685-686. Further, "The right of appeal is purely statutory and therefore, the right of appeal is limited as

provided by the legislature and compliance with the method and procedure prescribed by it is obligatory." Si-Nor, 120 Hawai'i at 145, 202 P.3d at 606. Accordingly, the Board lacks jurisdiction to consider Maryl's notice of contest.

The Board hereby grants the Director's Motion to Dismiss.

DATED: Honolulu, Hawaii, October 3, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to

J. Gerard Lam, Deputy Attorney General
Brian G.S. Choy, Esq.

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[1] The December 20, 2013 Amended Citation was an "Amended Citation and Notification of Penalty." The original Citation and Notification of Penalty to Maryl issued on November 15, 2013 had seven items, including subparts. After an Informal Conference, HIOSH reduced the items from seven to four as shown in the Amended Citation. *See* Declaration of Ting Shing Chao, paragraphs 2-3, dated March 24, 2014, and Exhibit A attached to the Motion and Memorandum in Support of Motion. Although in "Respondent's Initial Conference Statement," Maryl appears to reference the original November 15, 2013 Citation in the "Issues Presented on Appeal," the Director's Motion is obviously requesting dismissal of the contest of the December 20, 2014 Amended Citation.

[2] The Board looks to the HRCP for guidance in resolving ambiguities in its rules or procedures. Poe v. Hawaii Gov't. Emp. Ass'n., Local 152, 6 HLRB 361, 362 (2004) (The Board looked to HRCP Rule 6(b) providing for enlargement of time for guidance in interpreting HAR §12-42-8(g) (17)(D) providing for requests of extension of time to file a brief or proposed findings.). *See also:* Hawaii Fed'n. of Coll. Teachers, Local 2003 v. Bd. of Regents, Univ. of Hawaii, 1 HPERB 428, 429-431 (1974) (The Board applied HRCP Rule 30(a) to deny an application to take depositions during the 30-day waiting period.); United Pub. Workers, AFSCME, Local 656 v.

Cayetano, 6 HLRB 81, 84-85 (2000) (The Board applied the HRCP Rule 26(b) relevancy requirement to the information requested by the union in that case.).

[3] Subsequent to the hearing on the Motion to Dismiss, the ICA rendered a decision on appeal from the LIRAB Cole decision, Cole v. AOAO Alii Cove, 2014 Haw. App. LEXIS 358 (2014) (ICA Cole). Maryl brought the ICA Cole decision to the attention of the Board through an August 26, 2014 letter from its attorney Brian G.S. Choy (Choy) to Board Chair James Nicholson with a copy to Deputy Attorney General J. Gerard Lam (Lam), who is representing HIOSH in this proceeding. Lam responded to Choy's letter by an August 28, 2014 letter to the Board. The Board does not consider these letters as part of the record. However, because Maryl raised the LIRAB Cole in its Memorandum in Opposition and nothing precludes consideration of decisions relevant to the issues before us, whether cited by the parties or not, the Board will address whether the ICA's Cole decision is relevant to the Motion to Dismiss.

[4] The Board determines that Higuchi and Jou are factually distinguishable from the present case for several reasons. First, both of these cases, like the ICA and LIRAB Cole decisions were workers' compensation cases under HRS Chapter 386 rather than under HRS Chapter 396, the HIOSH law, and involve interpretation of different administrative rules than HAR §§12-51-15 and 12-51-19. Accordingly, as with ICA and LIRAB Cole, the statutory and regulatory scheme involved in those cases are not the same as the HIOSH statute and administrative rules at issue in this case. Further, Maryl cites Higuchi for the proposition that the overly rigid enforcement of the 30-day deadline to notice the Special Compensation Fund (SCF) under HAR §12-10-33 was improper for lack of prejudice. The Board finds that Higuchi has little relevance to the present case because it did not involve a deadline to file a contest or an appeal. While the Board understands Maryl's attempt to analogize the relationship between HRS §396-11(a) and HAR §12-51-19 to the relationship between HRS §386-33 and HAR §§12-10-33 and 12-10-74, the relationships are not the same. More specifically, in Higuchi, the LIRAB found that: 1) HAR §12-10-74 permitting joinder of parties, except the SCF, accorded special treatment or preference to the SCF over other parties; 2) HAR §12-10-33 provided a labyrinth of requirements to determine when to provide notice to the Director that a party wishes to join the SCF; and 3) the unduly narrow window provided by HAR §12-10-33 decreased the likelihood of SCF apportionment and appeared to run contrary to HRS §386-33 enacted with the legislative intent to encourage the hiring or ameliorate the employer's qualms regarding the hiring of persons with prior disabilities or handicaps. The Board recognizes that the employer's right to contest a citation and penalty under HRS Chapter 396 is a matter of due process significant to the employer. In this case, however, there is no similar special treatment or legislative intent addressing a significant public policy similar to that in Higuchi. In Jou, the ICA held that HAR §12-15-94(a), authorizing the Director to resolve billing disputes between employers and medical service providers in workers' compensation cases without a hearing and providing for that decision to be final and not appealable was inconsistent with the statutory right granted to parties to appeal the Director's decisions under HRS §§386-73 and 386-87. In this case, HAR §12-51-19 does not preclude the appeal of a citation and penalty provided for in HRS §396-11(a). The only issue is whether HIOSH may impose the requirement of the timely filing of an "original" notice of contest to perfect that appeal. Again, this case is distinguishable from Jou for these reasons.

[5] HRS §396-4(a)(1) states:

> §396-4 Powers and duties of department. (a) Administration. The department shall be responsible for administering occupational safety and health standards through the State.
> (1) The department shall prescribe and enforce rules and regulations under chapter 91 as may be necessary for carrying out the purposes and provisions of this chapter....

[6] *See* note 3 *supra*.

[7] The ICA Cole quoted HAR §12-47-13(c) as stating, "The original of each document, including appeals, complaints, answers, motions, notices, briefs, and amendments shall be signed and dated in black ink by each

party or its authorized representative." 2014 Haw. App. WL 358, at *16.

[8] The ICA Cole quoted HAR §12-47-17 as stating, "Any document filed with the [Board] which is not in compliance with applicable rules, orders, or statutes may be accepted by the chief clerk or designee and filed. The mere fact of filing, however, shall not waive any failure to comply with this chapter or any other legal requirement." 2014 Haw. App. WL 358, at *16-17.

[9] The ICA Cole quoted HAR §12-47-15 as stating, "During the pendency of the appeal, all documents filed with or presented to the [board] shall be retained in the files of the [Board]. The [Board] may however, permit the withdrawal of original documents upon submission of properly authenticated copies to replace the documents." 2014 Haw. App. WL 358, at *17.

[10] The ICA Cole decision quoted the following:

> In reviewing whether a trial court's dismissal of a claim as a discovery sanction constitutes an abuse of discretion, appellate courts consider the following five factors: "(1) the public's interest in the expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [party moving for sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *W.H. Shipman, Ltd. v. Hawaiian Holiday Macadamia Nut Co., 8 Haw. App. 354, 362, 802 P.2d 1203, 1207 (1990)* (quoting *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 603 (9th Cir.1988)* (other citations and internal quotation marks omitted)).

2014 Haw. App. WL 358, at *19.

[11] The Board must clarify that the issue in this case arises from HRS Chapter 396 and HIOSH administrative rules promulgated under this Chapter, not HLRB administrative rules promulgated under HRS Chapter 89. Under HRS Chapter 89, the Board has promulgated HAR §12-42-8 (a), which sets forth, among other things, the requirements for filing of documents. This section states in relevant part:

> §12-42-8 **Proceedings before the board.** (a) Filing of documents:
>
> ***
>
> (4) All papers filed with the board shall be written in ink, typewritten, mimeographed, or printed, shall be plainly legible,...
> (5) All papers must be signed in ink by the party or the party's duly authorized representative of attorney. The signature of the person signing the document constitutes a certification that such person has read the document; that to the best of such person's knowledge, information, and belief every statement contained in the instrument is true and correct and no such statements are misleading; and that the document is not interposed for delay.

[12] HRE Rule 1002 Requirement of an original. states in relevant part, "To prove the content of a writing...the original writing...is required, except as otherwise provided in these rules or by statute."