

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

LEILA N. MONIZ,)	CASE NO. AB 2009-603
)	(2-92-25327)
Claimant-Appellant,)	
)	D/A: September 18, 1992
vs.)	
)	
GEORGE C. CROMACK,)	
)	May 25 2023, 8:57 am
Employer-Cross)	FILED SM
Appellant,)	Labor and Industrial Relations
)	Appeals Board
and)	
)	
FIRST INSURANCE COMPANY OF)	
HAWAII, LTD.,)	
)	
Insurance Carrier-)	
Cross Appellant.)	
)	
)	

ORDER HOLDING CASE IN ABEYANCE
and
NOTICE OF INTENTION TO DISMISS

This workers' compensation case is before the Labor and Industrial Relations Appeals Board on appeal by Employer GEORGE C. CROMACK and Claimant LEILA N. MONIZ, both of whom appealed the Director's November 16, 2009 Decision.

On January 6, 2011, the Board temporarily remanded the appeal to the Director to address issues concerning medical and indemnity benefits, as well as compensable consequences of the work injury.

On March 23, 2017, the Director held a hearing during which the Employer appeared and neither Claimant nor Wayne H. Mukaida, Esq., Claimant's attorney, appeared.

By letter dated April 12, 2017 and filed on April 17, 2017, Mr. Mukaida informed the Director that he "recently learned" of Claimant's death and that "the hearing on [March 23, 2017] is void as [Claimant's] estate was not a party to the proceedings, and no decision should be issued by the Director." Mr. Mukaida provided the Director a copy of Claimant's Certificate of Death, confirming that Claimant died on November 27, 2016.

On May 3, 2017, the Director issued a Supplemental Decision. Neither party appealed this decision. Subsequently, the case was returned to the Board.

On January 17, 2018, Employer's attorney requested that the Board suspend the January 30, 2018 trial, pending substitution of a legal representative for Claimant. Employer relied on the following statute and case law:

Section 663-7, *Hawaii Revised Statutes* provides that in the event of the death of the injured person, the cause of action survives in favor of the legal representative of the person and any damages recovered forms part of the deceased's estate.

The Hawaii Supreme Court held that a deceased person cannot be party to a legal proceeding and the effect of death is to suspend the action as to the decedent until his legal representative is substituted as a party. *Bangalay [sic] v. Lahaina Restoration Foundation*, 60 Haw. 125, 588 P.2d 416 (1978).

On January 19, 2018, Employer filed a Non-Hearing Motion to Continue Trial arguing that, pursuant to Section 663-7, HRS and *Bagalay*, the trial scheduled for January 30, 2018 should be continued until such time that a legal representative for Claimant is substituted in the case. Employer requested that Mr. Mukaida confirm, in writing, within 30 days of an order, whether there is any survivor of Claimant who wishes to pursue the appeal. If there was no one, Employer stated that it would take the appropriate action and move to dismiss the appeal for failure to prosecute the claim.

On February 8, 2018, the Board issued the Order Granting Motion to Continue Trial.

On May 24, 2018, Mr. Mukaida filed a Motion to Withdraw as Counsel for Claimant stating that because Claimant is deceased, he no longer has a client and that he spoke with Claimant's daughter (Kaleimaeole Latronic) and son (Mark Rodrigues), both of whom decided not to retain his services to be their attorney.

On June 21, 2018, the Board held a hearing on Mr. Mukaida's Motion to Withdraw as Counsel, with Mr. Mukaida and Employer being present.

On September 14, 2018, the Board issued an Order Granting Motion to Withdraw as Counsel.

By letter dated March 27, 2019 and filed on March 28, 2019, Mr. Mukaida provided the Board the contact information for Claimant's son and daughter.

On February 10, 2020, the Board issued a Notice of Hearing stating that a trial would be held on May 6, 2020 and that the Board intended to dismiss the appeal if either Claimant or Employer failed to timely appear for the trial. The notice was provided to Mr. Rodrigues and published in the Honolulu Star-Advertiser on the 10th and 17th of February 2020. On March 23, 2020, the USPS returned Mr. Rodrigues's copy of the notice to the Board as "Return to Sender;" "Attempted Not Known;" and "Unable to Forward."

On March 18, 2020, the Board issued a memorandum stating that all hearings, conferences, trials, and deadlines were suspended due to the Emergency Proclamations of the Governor, specifically, the COVID Pandemic.

On June 23, 2021, the Board issued a Notice of Status Conference that scheduled a status conference for August 12, 2021 at 1:30 p.m. This notice was provided to Mr. Rodrigues and Ms. Latronic via email and published in the Honolulu Star-Advertiser on the 20th and 27th of July 2021.

On August 12, 2021, the Board held a status conference. Employer appeared, but no personal representative or special administrator for Claimant's estate appeared.

To date and despite the two publications in newspapers of general circulation to the "Estate of Leila N. Moniz," no court-appointed personal representative or special administrator of Claimant's estate has appeared in this appeal.

The following legal authorities are relevant:

"A deceased person cannot be a party to a legal proceeding, and the effect of death is to suspend the

action as to the decedent until his legal representative is substituted as a party.” *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125 (1978) (citations omitted.)

“As a general rule, the authority of counsel to proceed with a case is terminated upon the death of the party being represented . . . but the courts can pass upon questions raised and listen to suggestions as to their disposal from an attorney who is an officer of the court” *Id.*

“ . . . an heir of an undistributed estate, who has not been judicially appointed as the personal representative of a decedent’s estate, is not a ‘proper party’ for substitution” *Roxas v. Marcos*, 89 Haw. 91 (1998), (analyzing the application of HRCP Rule 25(a)(1) and citations omitted).

“The majority rule in other jurisdictions is that only judicially appointed representatives may be substituted for a decedent party.” *Id.* (Citations omitted.)

§ 12-47-25, LAB Rules: “Upon motion and for good cause shown, the board may order substitution of parties, except that in the case of a party’s death, substitution may be ordered without filing a motion.”

§ 371-4(k), HRS: “The board may make or issue any order or take other appropriate steps as may be necessary to enforce its rules and orders and to carry into full effect the powers and duties given to it by law.”

§ 560:1-302(a), HRS: “To the full extent permitted by the Constitution and except as otherwise provided by law, the court has jurisdiction over all subject matter relating to: (1) Estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons”

§ 560:3-103, HRS: “Except as otherwise provided in article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the

court or registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.”

§ 560:3-105: “Persons interested in decedents’ estates may apply to the registrar for determination in the informal proceedings provided in this article, and may petition the court for orders in formal proceedings within the court’s jurisdiction including but not limited to those described in this article. The court has exclusive jurisdiction of formal proceedings to determine how decedents’ estates, subject to the laws of this State, are to be administered, expended, and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.”

§ 560:3-703(c): “Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at the decedent’s death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as the decedent had immediately prior to death.”

The Board’s order herein is consistent with the common law principle that “if a party dies before a verdict or decision is rendered, the action abates as to him and must be dismissed unless it is revived by substitution of a personal representative.” *Bagalay*, 60 Haw. 135 (emphasis added). Our Hawai‘i Supreme Court has made it clear that it is improper to continue legal proceedings because a “deceased person cannot be a party to a legal proceeding, and the effect of death is to suspend the action as to the decedent until his legal representative is substituted as a party.” *Id.* (Emphasis added.)

In this respect, the order that follows is consistent with and mindful of practice and precepts of common law.

This order concerns ascertaining the identity of a possible person who may be substituted for a party who is now deceased. The Board's order, herein, is consistent with the procedure undertaken by the Intermediate Court of Appeals of the State of Hawai'i ("ICA") in *City and County of Honolulu v. Sharon Black*, CAAP-11-0000748, (Haw. App. 2013), wherein a self-represented appellant died after filing an opening brief at the ICA. Although *Black* is not a published decision and is of limited precedential value, it is noteworthy that in its effort to ascertain the identity of a proper person to substitute for the deceased appellant, the ICA placed the onus on the appellee to confirm with the court whether a special administrator or personal representative had been appointed to represent the appellant's estate and to give the personal representative or special administrator, if any, notice: (1) of the pending appeal, copies of the opening brief, and copies of the answering brief; (2) that s/he must enter an appearance to indicate the estate's plan to continue with the appeal within the time frame specified by the ICA; and (3) that failure to do so in a timely manner may result in the dismissal of the appeal. The ICA also ordered the appellee to file a declaration indicating compliance with the foregoing.

Just as the ICA placed the onus on the appellee to confirm whether a personal representative had been appointed and to provide relevant notice of and documents pertaining to the pending appeal to the court, the Board, by

way of this order, orders Employer to do the same.¹ The reasonableness of the ICA in effecting such a procedure is apparent. The Employer, as the remaining party to this appeal, is the only party that has a vested interest in resolving the appeal, whether by dismissal or decision. While the dissent takes issue with respect to the orders to Employer's counsel, the dissent does not proffer any legal support or argument to support the notion that the order to Employer is improper.

Further, the Board's order for the Employer to assist in ascertaining the identity of a person who may be lawfully substituted for a party who is now deceased requires only a quick, electronic search because that person must be appointed by the circuit court. *See generally*, HRS Chapter 560, Uniform Probate Code. Because the person who may be lawfully substituted for Claimant can be approved only by Hawai'i's Circuit Court, a search (electronic² or otherwise) of the Hawai'i State Judiciary court records will quickly reveal if a special administrator or personal representative has been appointed.

¹ The Board is quasi-judicial in nature; thus, where there exists no statutory authority or specific guidance regarding the exact manner by which an appeal to the Board should be handled upon the death of a party, as here, a reasonable course of action is to seek guidance from higher courts and established rules.

² E.g., eCourt* Kokua:
<http://jimspss1.courts.state.hi.us:8080/eCourt/ECC/ECCDisclaimer.iface;jsessionid=0F58DB78EAA3F8907C968D76149C0FAF>

The Board's order and notice of intention to dismiss herein will be published on the Board's website for at least 180 days. The dissent complains that proper notice of the Board's intention to dismiss this appeal was not afforded. However, a careful reading of this order, herein, makes clear that the Board is not merely relying upon Employer's notice to a court-appointed personal representative or special administrator, as the dissent presumes. Rather, in the event that a personal representative or special administrator is identified, duplicative notices regarding the Board's intention to dismiss will have been given by way of the Board's posting of the notice on its website and Employer's provision of the notice to the personal representative or special administrator, if any. Thus, contrary to the dissent's characterizations, the Board is providing, to the general public, its own notice of intention to dismiss this appeal by publishing this order on its website.

The inherent capabilities of the internet allow this order and notice to reach a world-wide public audience because the order and notice will be available for viewing 24 hours a day, 7 days a week, for as long as it is posted. Further, an internet search of Claimant's name will yield instant retrieval of this order and notice, available for review without incurring any subscription costs or membership. In this respect, the dissent's concern that a "potential party may be unaware of the existence of the subject appeal" is misplaced; the potential party does not need to be cognizant of the existing appeal to avail itself of the posted order but only needs to conduct an internet search of the decedent's name.

The dissent expresses a preference for publication by a newspaper of general circulation. Publication via the Board’s website is far superior to placement of a legal notice publication in a newspaper of general circulation, where the notice may only appear once in each of 2 consecutive weeks, on random dates and, perhaps, on a Sunday, and may only be available to subscribers of that particular newspaper publication.

It is rather curious that the dissent would criticize the majority for publishing a notice of intention to dismiss via its website as opposed to a newspaper, when the dissent, citing HRS Section 371-4(d), HRS³, also concedes that the legislature has afforded the Board the option to publish a notice of hearing on its website. Notably, Section 371-4(d), HRS allows the Board the option to publish online on its webpage or via a newspaper.

Publication of the Board’s order herein and its notice of intention to dismiss this appeal provides additional notice beyond what the ICA or the court rules provide. In *Black*, the ICA did not publish a notice of intent to dismiss before dismissing the appellant/decedent’s appeal. Rather, the ICA noted that no one representing appellant/decedent’s estate moved to substitute as a party for appellant/decedent and ordered the appeal dismissed. Similarly,

³ The dissent’s reliance upon HRS § 371-4(d) is misplaced. Pursuant to HRS § 371-4(d), the Board has an obligation to make a “reasonable and diligent inquiry” to “ascertain the address of [a] party” in a situation where the Board (or its agents) “have been unable to ascertain the address of [a] party” and where a written “notice of hearing” needs to be served. Neither situation exists here: (1) The address of the party in question (Claimant) is not an issue because Claimant is deceased; and (2) the Board is not issuing a notice of hearing. Therefore, the provisions of HRS § 371-4(d) do not apply.

there is no publication requirement in Rule 25(a)(1) of the Hawai‘i Rules of Civil Procedure, which states that “[i]f a party dies and the claim is not thereby extinguished,” “[u]nless the motion for substitution is made not later than 120 days after the death is suggested. . . the action shall be dismissed as to the deceased party.”

Being fully advised in the premises,

IT IS HEREBY ORDERED that the above-captioned appeal be held in abeyance until September 21, 2023, pending the Board’s receipt of a written appearance by a court-appointed personal representative or special administrator of Claimant’s estate. Such appearance is to be made on or before September 21, 2023. Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

If the Board does not receive any of the above-referenced, written appearances on or before September 21, 2023 and no extension of this deadline is granted by the Board, IT IS HEREBY ORDERED that Employer will have until October 11, 2023 to confirm, in writing, whether or not a special administrator or personal representative of Claimant’s estate was appointed on or before September 21, 2023, and:

1. If a special administrator or personal representative of Claimant’s estate was not appointed on or before September 21, 2023 Employer shall file a declaration with the Board that confirms this, on or before October 11, 2023.
2. If a special administrator or personal representative of Claimant’s estate has been appointed, Employer shall, on or before October 11, 2023:

- a. Provide the special administrator or personal representative with written notice of the appeal herein, any and all Pretrial Orders pertaining to this appeal, and this Order Holding Case in Abeyance;
- b. Give notice to the special administrator or personal representative that, on or before November 20, 2023, the special administrator or personal representative must enter an appearance in this appeal and indicate whether the estate plans to continue the appeal with a substitute party or the appeal will be dismissed; and
- c. File a declaration with this Board that confirms compliance with this order and includes the identity and contact information of the special administrator or personal representative of Claimant's estate.

YOU ARE HEREBY NOTIFIED that this appeal may be dismissed after September 21, 2023, unless an appearance is made by either a court-appointed personal representative of Claimant's estate or a special administrator of Claimant's estate. Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

Dated: Honolulu, Hawaii,

May 25 2023



DAMIEN A. ELEFANTE, Chair



MARIE C.L. LADERTA, Member

Leila N. Moniz v. George C. Cromack, et al.; AB 2009-603; Order Holding Case in Abeyance and Notice of Intention to Dismiss

CONCURRENCE/DISSENT:

I agree that this appeal should be held in abeyance for a period of time, pending the appearance of a court-appointed personal representative. I agree with the notice of a potential dismissal if no appearance is made within the specified time.

I disagree with the method of notification, the justification discussed, and the orders to Employer's counsel. To me, proper notice to the proper party of the Board's intent to dismiss the appeal is the responsibility of the Board or an agent of the Board.

As to whether a notice of dismissal should be published on the Board's website or in a newspaper of general circulation, I believe that the Board's authority to utilize these alternate methods of notice is granted in Section 371-4(d), HRS. To me, publication in a newspaper of general circulation may reach a different audience than publication on the Board's website, especially when a potential party may be unaware of the existence of the subject appeal. Although the Board is quasi-judicial, it is not part of the Judiciary and I don't believe it holds the same powers as a judge or panel of judges of the Judiciary.



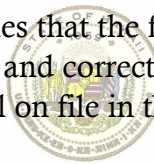
MELANIE S. MATSUI, Member

Leila N. Moniz v. George C. Cromack, et al.; AB 2009-603; Order Holding Case in Abeyance and Notice of Intention to Dismiss (Concurrence/Dissent)

Mark Rodrigues (courtesy copy)
Kaleimaeole Latronic (courtesy copy)

Carlton W. T. Chun, Esq.
For Employer/Insurance
Carrier-Cross Appellant

This certifies that the foregoing is a
full, true, and correct copy of the
original on file in this office.



/s/ *J. Macarayan* for LIRAB

A certified copy of the foregoing was served upon the above-captioned parties or their legal representatives on the date of filing noted above.

LABOR APPEALS BOARD - 830 PUNCHBOWL ST, RM 404, HONOLULU, HI 96813 - (808)586-8600

If you need a language interpreter or if you need an auxiliary aid/service or other accommodation due to a disability, please contact the Board at (808) 586-8600 and/or dlir.appealsboard@hawaii.gov as soon as possible, preferably at least ten (10) business days prior to your hearing or conference date. Requests made as early as possible have a greater likelihood of being fulfilled. If a request is received after the reply date, the Board will try to obtain the interpreter, auxiliary aid/service, or accommodation, but the Board cannot guarantee that the request will be fulfilled.

Upon request, this notice is available in alternate/accessible formats such as large print, Braille, or electronic copy.

Equal Opportunity Employer/Program
Auxiliary aids and services are available
upon request to individuals with disabilities.
TDD/TTY Dial 711 then ask for (808) 586-8600

Leila N. Moniz v. George C. Cromack, et al.; AB 2009-603; Order Holding Case in Abeyance and Notice of Intention to Dismiss