

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DEWAYNE GONSALVES,)	CASE NO.: AB 2022-052(M)
)	DCD No.: 7-10-00890(O)
Claimant-Appellant,)	
)	
vs.)	D/A: May 5, 2010
)	
SOUTH PACIFIC STEEL CORP.,)	
)	
Employer-Appellee,)	May 18 2023, 10:08 am
)	FILED SM
and)	Labor and Industrial Relations
)	Appeals Board
SEDGWICK CMS - HAWAII,)	
)	
Insurance Carrier-)	
Appellee.)	
)	

ORDER HOLDING CASE IN ABEYANCE
and
NOTICE OF INTENTION TO DISMISS

On April 27, 2022, Claimant DEWAYNE GONSALVES appealed the Director's April 13, 2022 Decision Supplemental to Award Dated 5/20/2013 to the Labor and Industrial Relations Appeals Board ("Board").

On July 18, 2022, the Board issued a Pretrial Order and set trial in this appeal for February 21, 2023 at 1:30 p.m., Hawaiian Standard Time.

Trial proceeded on February 21, 2023 at 1:30 p.m. On February 24, 2023, the Board issued a Post-Trial Order which confirmed that the parties may file post-trial briefs on or before May 22, 2023.

Following the trial, Claimant’s attorney, Charles Brower, Esq., and Employer SOUTH PACIFIC STEEL CORP.’s attorney, Jesse J. Maeda, Esq., submitted a Stipulation to Suspend or, Alternatively, Continue Post-Trial Brief Deadline (“stipulation”), dated May 12, 2023, for the Board’s consideration. The stipulation stated that Claimant “died after the LIRAB trial but before the parties submitted their respective post-trial briefs[.]”

The Board is not in receipt of a Death Certificate, obituary, or other reliable indicia of death confirming Claimant’s death or the date of death.

To date, no court-appointed legal representative of Claimant’s estate and no court approved personal representative for Claimant 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 HRCPP Rule 25(a)(1)).

§ 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.¹

The dissent questions the Board's order for Employer to inform the Board as to whether or not a special administrator or personal representative of Claimant's estate was appointed. In referencing the Board's obligation to make a "reasonable and diligent inquiry," the dissent's reliance upon HRS § 371-4(d) is misplaced. Pursuant to HRS § 371-4(d), the Board has an obligation

¹The order which follows is also consistent with the tenet of fairness. In this instant, Claimant apparently died before the deadline by which the parties may file their post-trial briefs. Not having filed a post-trial brief prior to his death, it would be patently unfair to Claimant for the Board to issue a Decision and Order in this appeal, as the dissent suggests, without placing this matter in abeyance and offering the opportunity for a proper, legal representative of the deceased to substitute in as a party in this proceeding to file such a brief, if desired. Similarly, if the Board were to issue a Decision and Order in this matter, at this juncture, query as to whom would protect Claimant's right to request reconsideration or appeal.

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. (Emphasis added.) 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. The dissent’s attempts to apply HRS § 371-4(d) to the current situation presented before the Board, by stating that we do not know the address of a court-appointed personal representative, are strained, at best, because such a personal representative has not been substituted in as a party, much less been identified. Plainly stated, the provisions of HRS § 371-4(d) and the Board’s obligations arising therefrom do not apply.

Rather, 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 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. 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.

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

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

will quickly reveal if a special administrator or personal representative has been appointed.

Finally, the dissent's preference is to have the notice of intent to dismiss published in a newspaper of general circulation; such practice is unproven and unsupported. There is no statute or rule that mandates that a notice of dismissal must be published in a newspaper of general circulation when one of the parties dies during the proceedings. To the contrary, 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, Rule 25(a)(1) of the Hawai'i Rules of Civil Procedure 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." No notice of intention to dismiss by publication is required.

The dissent is correct with respect to the observation that the Board is quasi-judicial and does not "hold[] the same powers as a judge or panel of judges[/justices] of the Judiciary." Although the Board is quasi-judicial in nature, 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.

Being fully advised in the premises,

IT IS HEREBY ORDERED that the above-captioned appeal be held in abeyance until **September 13, 2023**, pending the Board's receipt of a Death Certificate, obituary, or other reliable indicia of death that confirms Claimant's death and Claimant's date of death and the following:

1. The Board's receipt of a written appearance by a court-appointed personal representative or special administrator of Claimant's estate; or
2. The Board's receipt of a written appearance by a party with legal standing to participate in this case on Claimant's behalf, in the absence of a court-appointed legal representative.

Submissions of Claimant's death certificate or obituary and such written appearance are to be made on or before **September 13, 2023**. Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

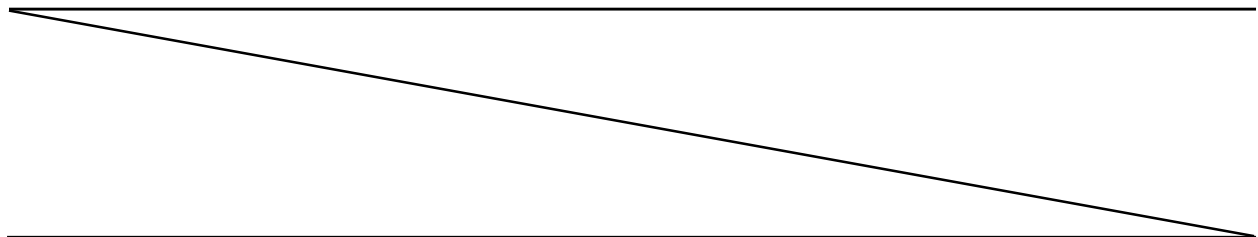
If the Board does not receive any of the above-referenced documents on or before **September 13, 2023** and no extension of this deadline is granted by the Board, IT IS HEREBY ORDERED that Employer SOUTH PACIFIC STEEL CORP. will have until **October 3, 2023** to submit a copy of Claimant's Death Certificate, obituary, or other reliable indicia of death to the Board and to confirm, in writing, whether or not a special administrator or personal representative of Claimant's estate was appointed on or before September 13, 2023, and:

1. If a special administrator or personal representative of Claimant's estate was not appointed on or before September

13, 2023, Employer shall file a declaration with the Board that confirms this, on or before **October 3, 2023**.

2. If a special administrator or personal representative of Claimant's estate has been appointed, Employer shall, on or before **October 3, 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 13, 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 13, 2023, unless an appearance is made by either a court-appointed personal representative of Claimant's estate, a special administrator of Claimant's estate, or a party with legal standing to participate in this case in the absence of a court-appointed legal representative. Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.



Dated: Honolulu, Hawaii,

May 18 2023



DAMIEN A. ELEFANTE, Chair



MARIE C.L. LADERTA, Member

Dewayne Gonsalves v. South Pacific Steel Corp., et al.; AB 2022-052(M);
Order Holding Case in Further Abeyance and Notice of Intention to Dismiss

DISSENT:

I agree that the identification and appearance of a court-appointed personal representative of Claimant's estate may be necessary for further litigation. I agree that holding the case in abeyance to allow for such appearance would be appropriate. I agree that requesting information that might assist in determining the identification of the personal representative of Claimant's estate from Employer's attorney would be appropriate.

However, I would also make inquiry with Claimant's last attorney of record because he is an officer of the court. Further, I don't believe that the obligations to make reasonable and diligent inquiry (*see* Section 371-4(d), HRS) and provide proper notice to the appropriate party, particularly of the intent to dismiss Claimant's appeal, may be shifted to a party who is neither the Board nor an agent of the Board. To me, if the identification of a court-appointed personal representative is unknown, their address is also unknown. Also, I believe that when the Board has not received confirmation of a personal representative of a deceased party's estate, the proper vehicle for a notice of an intent to dismiss would be by way of publication in a newspaper of general circulation. This would be the best means available to the Board to provide any potential personal representative the appropriate notice.

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

Dewayne Gonsalves v. South Pacific Steel Corp., et al.; AB 2022-052(M);
Order Holding Case in Further Abeyance and Notice of Intention to Dismiss
(Dissent)

Charles H. Brower, Esq.

Blaine W. Fujimoto, Esq.
For Employer/Insurance
Carrier-Appellee

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



/s/ *S. 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

Dewayne Gonsalves v. South Pacific Steel Corp., et al.; AB 2022-052(M);
Order Holding Case in Further Abeyance and Notice of Intention to Dismiss