

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO.: AB 2020-170
Attorney's Fees Pertaining to)	DCD No.: 2-18-09754
DENNIS W.S. CHANG, ESQ.,)	
Appellee.)	D/A: December 28, 2018
In the Case of)	
BRYAN AMERINO,)	
Claimant-Appellant,)	
vs.)	May 22 2023, 8:14 am
PHOTONWORKS ENGINEERING,)	FILED SM
LLP,)	Labor and Industrial Relations
Employer-Appellee,)	Appeals Board
and)	
ISLAND INSURANCE COMPANY,)	
LTD.,)	
Insurance Carrier-)	
Appellee.)	

ORDER OF DISMISSAL

This workers' compensation case is before the Board on appeal by Claimant BRYAN AMERINO, from the Approval of Attorney's Fees entered by the Director of Labor and Industrial Relations on October 2, 2020, approving DENNIS W.S. CHANG, ESQ.'s ("Attorney Chang") attorney's fees request of \$14,665.65.

On August 19, 2021 and October 21, 2021, the Board held hearings in this appeal. Claimant appeared for the August 19, 2021 hearing.

Claimant did not appear for the October 21, 2021 hearing. At the hearing, counsel for Employer PHOTONWORKS ENGINEERING, LLP stated, upon information and belief, that Claimant had died.

On August 15, 2022, David K. Ahuna, Esq. (“Attorney Ahuna”), Claimant’s former attorney, filed a Notice of Claimant’s death, stating that Claimant died on August 29, 2021. Attached to Attorney Ahuna’s notice was a Certificate of Death confirming the same.

On August 22, 2022, the Labor and Industrial Relations Appeals Board issued an Order Amending Caption and Holding Case in Abeyance. The Board ordered, in relevant part, that the above-captioned case be held in abeyance for up to 120 days, until December 20, 2022, pending the Board’s receipt of a written appearance by a court-appointed personal representative, special administrator of Claimant’s estate, or a party with legal standing to participate in this case on Claimant’s behalf, in the absence of a court-appointed legal representative.

On December 20, 2022, Attorney Ahuna, filed a motion to extend the deadline by which written appearance was to be made by a court-appointed personal representative (“motion”). Although, Attorney Ahuna represented that he was the attorney for Claimant and filed said motion as “Claimant’s” motion, the Board does not recognize Attorney Ahuna as Claimant’s attorney because Claimant died on August 29, 2021, and as a general rule, the authority of

counsel to proceed with a case is terminated upon the death of the party being represented. *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125 (1978).

On January 23, 2023, the Board issued a First Supplemental Order Holding Case in Abeyance, extending the deadline to April 19, 2023 for the Board's receipt of a written appearance by a court-appointed personal representative, special administrator of Claimant's estate, or a party with legal standing to participate in this case on Claimant's behalf, in the absence of a court-appointed legal representative.

On May 5, 2023, in accordance with the Board's January 23, 2023 First Supplemental Order Holding Case in Abeyance, Attorney Chang submitted a declaration confirming that a legal representative for Claimant was not appointed on or before April 19, 2023. Attorney Chang also confirmed that as of May 4, 2023, no probate action was opened with respect to Claimant's estate. Attorney Chang requested that Claimant's appeal herein be dismissed.

As of the date of this order, no one with legal standing to participate in this case on Claimant's behalf, no court-appointed personal representative, and/or no special administrator of Claimant's estate has entered an appearance in this case.

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). In this

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

The dissent, however, questions the validity of the Board's order herein to dismiss this appeal. The dissent's conclusions are based upon the erroneous presumption that the Board has a statutory obligation to make a "reasonable and diligent inquiry" as to the existence of a court appointed personal representative where one of the parties to an appeal has passed away. The dissent's reliance upon HRS § 371-4(d) is completely 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. (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 and therefore, do not present a viable concern regarding the efficacy of the Board's order herein.

In challenging the Board's authority to issue an order dismissing this appeal, the dissent is also remiss in appreciating that the Board utilized a procedure used by the Intermediate Court of Appeals of the State of Hawai'i ("ICA") in a similar situation, in the matter of *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 a previous order, ordered Attorney Chang to do the same. The reasonableness of the ICA in effecting such a procedure is apparent. Just as the appellee in *Black* was the only remaining party of interest in the appeal,

Attorney Chang is the only party that has a vested interest in resolving this appeal, whether by dismissal or decision.

While the dissent believes that the “appropriate vehicle” for a notice of intent to dismiss is by way of publication in a newspaper of general circulation, such a suggestion is merely a personal preference of the dissent, without any legal support. 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. By contrast, the procedures as effected by the majority Board Members in this case are consistent with the *Black* court: 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 simply 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. 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 court rules, emulating their procedures and benefitting from their wisdom.

In this instance, even without publication of its notice of intent to dismiss in a newspaper of general circulation, the Board has provided more than ample notice and opportunity for a special administrator or personal representative of Claimant's estate to enter an appearance in this case. This appeal has been held in abeyance for over a year and 7 months. That is, the Board has allowed over a year and half for a special administrator or personal representative of Claimant's estate to enter an appearance. By comparison, our circuit courts will dismiss a case after only 120 days after a death is suggested if no substitution is made for the deceased party, and the *Black* court allowed only 60 days from the date of its order for an appearance to be made.

Not only has the Board allowed substantially more time for an appearance to be made, but also the Board's orders regarding abeyance of this matter and notices that this case may be dismissed if a proper substitution for the deceased is not made were posted on the Board's website. Because of the inherent capabilities of the internet, the Board's posting of such orders and notices of dismissal reaches a greater audience than that of a newspaper. Whereas publication in a newspaper of general circulation, as suggested by the dissent, is limited to publication on only 3 occasions on random dates and perhaps, on a Sunday, publication via the Board's website allows for access to the orders and notices 24 hours a day, 7 days a week. An internet search of the Claimant's name would have instantly retrieved the Board's orders and notices, available for review without incurring any subscription costs.

Furthermore, the majority is satisfied that both Attorney Ahuna, Claimant's former counsel, and Attorney Chang exercised due diligence in their efforts to identify a person who could lawfully substitute in as a party upon Claimant's death. Notably, on December 20, 2022, Attorney Ahuna requested an additional 120 days to locate an individual to serve as a personal representative of Claimant, noting that Claimant does not have any surviving parents and indicating that none of Claimant's surviving siblings agreed to act as personal representative. The Board allowed the additional time, and on January 23, 2023, ordered that the case be held in abeyance until April 19, 2023. Attorney Ahuna has not informed the Board of the existence of a personal representative. Attorney Chang conducted a recent search of applicable court records for the existence of a legal representative for Claimant and did not find any such person or even a probate action pertaining to Claimant.

Given that the Board has allowed substantial time for a person to make an appearance and substitute as a party on Claimant's behalf, considering that the orders and notices of dismissal have been made accessible via the internet, in light of the efforts of two attorneys in ascertaining the identity of a personal representative or special administrator for Claimant's estate, and bearing in mind that Claimant's known surviving relatives have declined to act as a personal representative, the Board has afforded fair and reasonable notices of dismissal of this appeal and is satisfied that there does

not exist a person who may lawfully act as Claimant's legal representative for purposes of this appeal.

IT IS ORDERED that all proceedings before this Board in the above-entitled cause be and hereby are dismissed.

Dated: Honolulu, Hawaii,

May 22 2023

A handwritten signature in black ink, reading "Damien A. Elefante".

DAMIEN A. ELEFANTE, Chair

A handwritten signature in black ink, reading "Marie C.L. Laderta".

MARIE C.L. LADERTA, Member

In the Matter of Attorney's Fees Pertaining to Dennis W.S. Chang, Esq. in the Case of Bryan Amerino v. Photonworks Engineering, LLP, et al.; AB 2020-170; Order of Dismissal

DISSENT

By filing his declaration, Attorney Chang complied with the Board's orders. However, I don't believe that the obligations to make reasonable and diligent inquiry (*see* Section 371-4(d), HRS) and provide appropriate notice to the appropriate party, particularly of an 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. I believe that the appropriate vehicle for the notice of the intent to dismiss would be by way of publication in a newspaper of general circulation. Therefore, I don't agree with the dismissal of Claimant's appeal, at this time.



MELANIE S. MATSUI, Member

In the Matter of Attorney's Fees Pertaining to Dennis W.S. Chang, Esq. in the Case of Bryan Amerino v. Photonworks Engineering, LLP, et al.; AB 2020-170; Order of Dismissal (Dissent)

Family of Brian Amerino (courtesy copy)

David K. Ahuna, Esq., (courtesy copy)
Former attorney for Claimant

Dennis W.S. Chang, Esq.

Darlene Y.F. Itomura, Esq./
Law Office of Cary T. Tanaka
For Employer/Insurance
Carrier

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.

Order mailed: May 22 2023

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

*In the Matter of Attorney's Fees Pertaining to Dennis W.S. Chang, Esq. in the
Case of Bryan Amerino v. Photonworks Engineering, LLP, et al.; AB 2020-
170; Order of Dismissal*