

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

SURVIVORS OF JAMES P.)	CASE NO.: AB 2013-115
TEMBLOR,)	DCD No.: 2-10-10913
)	
Claimant-Appellant,)	
)	D/A: June 10, 2010
vs.)	
)	
MIKE MITCHELL CONSULTING,)	Jun 29 2023, 2:46 pm
)	FILED ^{SK}
Employer-Appellee,)	Labor and Industrial Relations
Delinquent,)	Appeals Board
)	
and)	
)	
SPECIAL COMPENSATION FUND,)	
)	
Appellee.)	

ORDER HOLDING CASE IN ABEYANCE
and
NOTICE OF INTENTION TO DISMISS

On June 10, 2010, Decedent JAMES P. TEMBLOR sustained a fatal injury to the head.

On August 27, 2012, Claimant SURVIVORS OF JAMES P. TEMBLOR, by and through THERESA TEMBLOR, the surviving spouse of Decedent, appealed the Director's August 23, 2012 Decision to the Labor and Industrial Relations Appeals Board ("Board").

On June 19, 2013, Lowell K.Y. Chun-Hoon, Esq. entered an appearance as counsel for Claimant.

On August 26, 2014, THERESA TEMBLOR, by and through her

attorney, Lowell K.Y. Chun-Hoon, Esq., filed an Offer of Proof, confirming that THERESA TEMBLOR was the only dependent survivor of Decedent JAMES P. TEMBLOR.

On November 9, 2015, the Board entered a Decision and Order in the above-entitled appeal.

On December 9, 2015, Claimant filed a Motion to Reconsider and/or Reopen the Board's November 9, 2015 Decision and Order.

On May 24, 2016, the Board entered an order denying Claimant's request for reconsideration and granted, in part, Claimant's request to reopen the record. Discovery deadlines were reset and trial was scheduled for December 7, 2016 at 9:00 a.m.

This matter proceeded to trial on December 7, 2016. Pursuant to a Sixteenth Stipulation Continuing Filing of Post Trial Briefs, filed on January 3, 2023, the deadline for the filing of post-trial briefs was continued to June 29, 2023.

On January 10, 2023, Lowell K.Y. Chun-Hoon, Esq., attorney for Claimant, provided the Board with a copy of the obituary of THERESA TEMBLOR, confirming that THERESA TEMBLOR died on January 26, 2019.

To date, the Board has not received written notice from Lowell K.Y. Chun-Hoon, Esq. that he is no longer representing Claimant. The Board, however, recognizes that, 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).

To date, no court-appointed personal representative or special administrator of the Estate of THERESA TEMBLOR (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 HRCF 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 MIKE MITCHELL CONSULTING and the SPECIAL COMPENSATION FUND (“SCF”) to do the same.¹ The reasonableness of the ICA in effecting such a procedure is apparent. The Employer and the SCF, as the remaining parties to this appeal, are the only parties that have a vested interest in resolving the appeal, whether by dismissal or decision.

Further, the Board’s order for the Employer and the SCF 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

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.iframe;jsessionid=0F58DB78EAA3F8907C968D76149C0FAF>

been appointed.

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 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.³

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, 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."

³ 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 successive weeks, on random dates and, perhaps, on a Sunday, and may only be available to subscribers of that particular newspaper publication.

Being fully advised in the premises,

IT IS HEREBY ORDERED that the above-captioned appeal, including but not limited to the filing of post-trial briefs, be held in abeyance until **October 27, 2023**, pending the Board's receipt of a written appearance by a court-appointed personal representative or special administrator of Claimant's estate (the Estate of THERESA TEMBLOR). Such appearance is to be made on or before **October 27, 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 **October 27, 2023** and no extension of this deadline is granted by the Board, IT IS HEREBY ORDERED that Employer MIKE MITCHELL CONSULTING and the SPECIAL COMPENSATION FUND will have until **November 16, 2023** to confirm, in writing, whether or not a special administrator or personal representative of Claimant's estate (the Estate of THERESA TEMBLOR) was appointed on or before **October 27, 2023**, and:

1. If a special administrator or personal representative of Claimant's estate was not appointed on or before October 27, 2023 Employer and the SCF shall file a declaration with the Board that confirms this, on or before **November 16, 2023**.
2. If a special administrator or personal representative of Claimant's estate has been appointed, Employer and the SCF shall, on or before **November 16, 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 **December 26, 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 **October 27, 2023**, unless an appearance is made by either a court-appointed personal representative of Claimant's estate (the Estate of THERESA TEMBLOR) or a special administrator of Claimant's estate (the Estate of THERESA TEMBLOR). Extensions by the Board may be granted upon good cause shown or at the discretion of the Board.

Dated: Honolulu, Hawaii,

Jun 29 2023



DAMIEN A. ELEFANTE, Chair



MARIE C.L. LADERTA, Member

Survivors of James P. Temblor v. Mike Mitchell Consulting, et al.; AB 2013-115; Order Holding Case in Abeyance and Notice of Intention to Dismiss

CONCURRENCE/DISSENT:

I don't necessarily disagree that this appeal may be held in abeyance for a period of time, pending the appearance of a court-appointed personal representative and to provide the parties the time to secure the appointment.

However, I acknowledge the following regarding the status of this appeal:

- (1) This appeal deals with the death of an injured worker as well as the post-trial death of his wife.
- (2) The further trial has been held and this appeal is pending post-trial briefs and a 17th stipulation to extend the deadline to submit trial briefs is pending review at the Board.
- (3) The parties have been actively engaged in settlement discussions, which have been fruitful.
- (4) Mr. Chun-Hoon has kept the Board apprised of the efforts by himself with the family members of Theresa and James Temblor toward the appointment of a personal representative through the multiple and regular status conferences held with me.
- (5) Mr. Mitchell is a self-represented litigant.

I disagree with the method of notification, the justification discussed, and the orders to Employer and the SCF'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

Survivors of James P. Temblor v. Mike Mitchell Consulting, et al.; AB 2013-115; Order Holding Case in Abeyance and Notice of Intention to Dismiss (Concurrence/Dissent)

Lowell K. Y. Chun-Hoon, Esq.
(Courtesy copy)

Mike Mitchell
For Delinquent Employer-Appellee

Nelson T. Higa, Esq.
For Special Compensation
Fund-Appellee

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


/s/ J. Kaaihue 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

*Survivors of James P. Temblor v. Mike Mitchell Consulting, et al.; AB 2013-
115; Order Holding Case in Abeyance and Notice of Intention to Dismiss*