NO. 23847

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

JACEK NOWICKI, Claimant-Appellant, v.
GMP ASSOCIATES, INC., Employer-Appellee, and
PACIFIC INSURANCE COMPANY, LTD., Insurance Carrier-Appellee.

and

JACEK NOWICKI, Claimant-Appellant, v.
GMP ASSOCIATES, INC., Employer-Appellee, and
TRAVELERS INSURANCE COMPANY, Insurance Carrier-Appellee.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 96-262(a)(2-94-07191)
(CASE NO. AB-96-262(b)(2-95-11964)
(CASE NO. AB-96-262(c)(2-95-13026)(2-95-13025)(2-95-13027))

ORDER DISMISSING APPEAL
(By: Burns, C.J., Lim and Foley, JJ.)

In this workers' compensation case, Claimant Jacek Nowicki (Nowicki) appeals, *pro se*, the September 27, 2000 order of the Labor and Industrial Relations Appeals Board (the Board) that granted a February 14, 2000 motion filed by Employer-Appellee GMP Associates, Inc. (GMP) and Insurance Carrier-Appellee Travelers Insurance Company, in which motion GMP and Insurance Carrier-Appellee Pacific Insurance Company, Ltd. had joined. The February 14, 2000 motion asked the Board to strike Nowicki's January 27, 2000 request for reconsideration of the Board's December 28, 1999 decision and order that had affirmed the April 24, 1996 decision of the Director of Labor and

Industrial Relations (the Director) on Nowicki's workers' compensation claims.

The Director rendered his April 24, 1996 decision upon the various workers' compensation claims Nowicki had filed, pursuant to Hawaii Revised Statutes (HRS) § 386-3 (1993 & Supp. 2001),[1] for personal injuries he allegedly sustained while working as a construction inspector for GMP on various projects, including a Kailua Wastewater Treatment Plant project and a Honolulu International Airport project. The Director determined that Nowicki had suffered temporary aggravation of his bronchitis and asthma conditions, arising out of and in the course of his employment, on August 26, 1992 and on April 15, 1993, and awarded him medical and rehabilitative benefits for those injuries. The Director awarded Nowicki benefits for temporary total disability resulting from the April 15, 1993 injury, for various periods during the period July 11, 1993 through May 27, 1994. No permanent disability benefits were awarded for the April 15, 1993 injury. The Director denied disability benefits for the August 26, 1992 injury. The Director denied Nowicki's claims that he had sustained work-related injuries on February 15, 1994, July 20, 1994, and June 8, 1995.

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[1] Hawaii Revised Statutes § 386-3 (1993 & Supp. 2001) provides, in relevant part, that "[i]f an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter."

Nowicki appealed the Director's decision to the Board on May 2, 1996. After a hearing held over the course of three days,[2] the Board affirmed the Director's decision.

In its December 28, 1999 decision and order, the Board found, in part, as follows:

> 3. [Nowicki] filed claims for work injuries occurring on August 26, 1992 and April 15, 1993. [Nowicki] alleged in his WC-5 claim forms that he developed respiratory symptoms and illnesses such as bronchitis and asthma as a result of exposures to chemicals at [the Kailua Wastewater Treatment Plant] for the past three years. The symptoms that [Nowicki] had alleged were related to his work exposures included coughing, breathing difficulties, weakness, diarrhea, lung or chest pain, nausea, and hypersensitivity to odors such as cigarette smoke.
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> 4. [Nowicki] appeared pro se for most of the appeal. [Nowicki] was initially represented by counsel at the initial conference held on July 11, 1996. At that conference, [Nowicki's] counsel indicated that the nature of the claimed injury for which [Nowicki] is seeking compensation is the condition of multiple chemical sensitivity ("MCS"). By February of 1997, [Nowicki's] counsel withdrew and [Nowicki] proceeded pro se.
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> 6. Since the filing of his injury claims, [Nowicki] has complained to numerous physicians of many additional symptoms or medical conditions that were not previously identified in the WC-5 claim forms. These symptoms included throat pain, peripheral neuropathy in the legs, shoulder pain, buckling of the knees, diarrhea, stomach pain, rash,

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[2] Claimant-Appellant Jacek Nowicki (Nowicki) testified at the hearing before the Labor and Industrial Relations Appeals Board (the Board) that he suffered and suffers from a plethora of medical impairments, which he termed "Multiple Chemical Sensitivity," resulting from on-the-job exposure to chemicals: loss of voice, severe pain in his throat, wheezing, "strange body jerks[,]" numbness in his arms and legs, a tic in his eye, severe shoulder pain, buckling knees, severe pain in his knees, pain in his ankles, pain in his wrist, "pain in the crouch[(sic),]" snapping joints, severe pain in various internal organs, severe diarrhea, severe stomach pain, swelling of his elbow, severe pain in his legs, problems sleeping, rash over much of his body, acne, severe pain in his chest, extensive sweating, corrosively acidic sweat, ulcers, pain in his eyes, "spraying" tears, blurry vision, photosensitivity, "electromagnetic hypersensitivity," "scabs of pus forming in [the] eyes[,]" dizziness, unexplained shaking in his hands, blackouts, inability to eat certain foods, spitting "a teaspoon of yellowish mucus with red stains" every morning, memory loss, coughing irritated by certain odors, disorientation, cracking teeth, drowsiness, recurrent cysts over his body, severe sense of smell causing "neurological vomiting," severe bruising, swelling, numbness in his mouth, oily forehead, bleeding gums, mouth ulcers, sexual impairment caused by "neurological spasms" during intercourse, back and kidney pains, "leaking gut syndrome[,]" bone pains, ammonia emissions from his body, cramps and fainting.

acne, liver disease, profuse sweating, photosensitivity, teary eyes, eye pain, blurred vision, food intolerance, bleeding gums, and mouth ulcers.

We discern from our review of [Nowicki's] post-hearing position statement, [Nowicki's] testimony at trial, and the medical records, that the medical conditions that [Nowicki] is seeking compensation for are: lung disease, skin disorders, neuropathy, joint disease, gastrointestinal disorders, liver disease, eye/vision disorders, fibromyalgia, and chronic fatigue syndrome.

7. [Nowicki's] position is consistent with that of his former counsel in that he is contending that his respiratory symptoms, as well as all of his current symptoms are attributable to the condition of MCS, a condition that he has been diagnosed with by Dr. George Ewing and that he says was triggered by work-related exposures to hydrogen sulfide at [the Kailua Wastewater Treatment Plant] and jet exhaust and fumes at the airport. Alternatively, Claimant argues that even if his symptoms cannot be explained by a single diagnosis of MCS, the Board should still find his multiple symptoms and medical conditions to be caused by chemical exposures at work.

In affirming the Director's April 24, 1996 decision, the Board concluded, in part, as follows:

AB 96-262(a)

1. We conclude that [Nowicki] sustained a personal injury, on or about August 26, 1992, arising out of and in the course of employment. The injury was a temporary irritation of the lungs that caused [Nowicki] to experience respiratory symptoms such as wheezing, coughing, and shortness of breath.

2. [Nowicki] seeks TTD [(temporary total disability)] benefits in addition to what the Director had awarded. We have found that [Nowicki] sustained a temporary aggravation of a pulmonary condition on August 26, 1992, and that his pulmonary status returned to normal by July 7, 1994, when Dr. McDonnell examined him. We have also found that [Nowicki's] other symptoms and medical conditions are not related to his August 26, 1992 or April 15, 1993 work injuries. Accordingly, we conclude that [Nowicki] is not entitled to further TTD benefits.

3. We conclude that no permanent disability resulted from the August 26, 1992 work injury.

AB 96-262(b)

1. We conclude that [Nowicki] sustained a personal injury, on or about April 15, 1993, arising out of and in the course of employment. The injury is a temporary irritation of the lungs that caused [Nowicki] to experience respiratory symptoms such as wheezing, coughing, and shortness of breath.

2. [Nowicki] seeks TTD benefits in addition to what the Director had awarded. We have found that [Nowicki] sustained a temporary aggravation of a pulmonary condition on April 15, 1993, and that his [pulmonary] status returned to normal by July 7, 1994, when Dr. McDonnell examined him. We have also found that [Nowicki's] other symptoms and medical conditions are not related to the April 15, 1993 work injury. Accordingly, we conclude that [Nowicki] is not entitled to further TTD benefits.

3. We conclude that no permanent disability resulted from the April 15, 1993 work injury.

On January 27, 2000, Nowicki filed his request that the Board reconsider its December 28, 1999 decision and order. On September 27, 2000, the Board granted the Appellees' February 14, 2000 motion to strike the request for reconsideration, because Nowicki had failed, and at the hearing on the motion to strike had refused, to provide copies of his request for reconsideration to Appellees, despite his several previous failures to serve his pleadings upon Appellees, his being admonished that such service is required by administrative rule, and his being ordered to comply. Nowicki filed this appeal on October 25, 2000.

In his opening brief,[3] Nowicki presents us with a solipsistic litany of vague, diffuse and ever-changing accusations, assertions and arguments. Nowicki first animadverts upon "wrong doing, corruption, racketeering, and fraud" in the workers' compensation system in general and in his case in particular. Nowicki limns an all-encompassing web of corrupt collusion by just about every person and entity ensnared in this case and the workers' compensation system. Examples of references utilized, such as "con attorneys," "paid off insiders" and "highly unethical legal whores," may serve to illustrate the tenor of this writing. Nowicki follows with a rambling narrative presenting his side of the case, in its essence a damning indictment of the numerous treating physicians and independent

[3] Nowicki has not filed a reply brief.

medical examiners involved in his case, who were, apparently, too incompetent and corrupt to recognize the true nature of his symptoms. Nowicki poses a rhetorical question which may serve to epitomize this passage: "Where this doctor has brains?" Nowicki ends his opening brief with a flourish, an extended dissertation purporting to present the cutting-edge state of knowledge about industrial chemical poisoning and the *soi disant* syndrome sometimes known as "Multiple Chemical Sensitivity."

All in all, the opening brief is quite a piece of work. For our purposes, however, Nowicki's opening brief is virtually incomprehensible. It fails to provide any legal argument, and in no way adheres to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (2001). HRAP Rule 28.[4] Its formal noncompliance is ecumenical and complete: (1) the failure to serve two copies of the opening brief on each party to the appeal, in violation of HRAP Rule 28(a); (2) the failure to provide a subject index and a table of authorities, with page references, in violation of HRAP Rule 28(b)(1); (3) the failure to provide a concise statement of

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[4] The Hawai'i Supreme Court denied two motions filed by Nowicki, in which he sought, respectively, "[t]o wave [(sic)] any and all rules of appeal, due to claimant [(sic)] severe disability"; and "[t]o wave [(sic)] any and all rules of appeal, due to my severe disability as a [(sic)] accommodation under American [(sic)] With Disability Act." Further, in placing the case on the supreme court calendar, the clerk of the supreme court warned ("CAVEAT") all parties to the appeal, including Nowicki, that "[t]he Supreme Court of Hawai'i expects counsel and parties to fully comply with the requirements of the Hawai'i Rules of Appellate Procedure (HRAP). All filings, including briefs, must comply with the requirements of HRAP 32 and briefs must comply with the requirements of HRAP 28. Non-compliance may result in sanctions. Sanctions include, but are not limited to, striking documents, imposition of monetary assessments, removal of counsel from the case, and dismissal of the case."

the case, with record references, or to append a copy of the relevant order, decision and order, in violation of HRAP Rule 28(b)(3); (4) the failure to provide "[a] concise statement of the points of error set forth in separately numbered paragraphs," with relevant references to the record, and including "a quotation of the finding[s] or conclusion[s] urged as error[,]" in violation of HRAP Rule 28(b)(4); (5) the failure to delineate standards of review and the points of error to which each applies, in violation of HRAP Rule 28(b)(5); (6) the failure to provide any discernable legal argument or cite to any authority in support of argument, in violation of HRAP Rule 28(b)(7); (7) the failure to provide relevant portions of applicable constitutions, statutes, ordinances, treaties, rules or regulations, in violation of HRAP Rule 28(b)(8); and (8) the failure to provide a conclusion "specifying with particularity the relief sought[,]" in violation of HRAP Rule 28(b)(9).

Appellees argue in their answering briefs that Nowicki's opening brief should be struck and his appeal dismissed for, *inter alia,* lack of compliance with HRAP Rule 28.[5]

HRAP Rule 30 (2001) provides, in pertinent part, that "[w]hen the brief of an appellant is . . . not in conformity with these rules, the appeal may be dismissed or the brief stricken

[5] Appellees also argue, in the alternative, that the Board's findings of fact are not clearly erroneous, that the Board did not err in its conclusions of law, and that the Board did not abuse its discretion in striking Nowicki's motion for reconsideration.

and monetary or other sanctions may be levied by the appellate court." See also HRAP Rule 28(b)(4) ("Points [of error] not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."); HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

The Hawai'i Supreme Court has long held, and stated numerous times, that an appeal may be dismissed for the appellant's failure to conform his or her opening brief to HRAP Rule 28. "[Appellant's] failure to conform his brief to the requirements of HRAP Rule 28(b) burdens both the parties compelled to respond to the brief and the appellate court attempting to render an informed judgment. As we have previously stated, such noncompliance offers sufficient grounds for the dismissal of the appeal." Housing Fin. and Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999) (citation omitted). See also Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001); Bettencourt v. Bettencourt, 80 Hawai'i 225, 228, 909 P.2d 553, 556 (1995) ("appellant's brief in almost no respect conforms to the requirements of [HRAP] Rule 28(b), which we have held is, alone, sufficient basis to affirm the judgment of the circuit court" (citation omitted)); Weinberg v. Mauch, 78 Hawai'i 40, 49, 890 P.2d 277, 286 (1995); O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994); In re Miller and Lieb Water

Co., Inc., 65 Haw. 310, 310-11, 651 P.2d 486, 487-88 (1982) (per curiam) (dismissal of appeal warranted for appellant's failure to conform opening brief to the requirements of the predecessor to HRAP Rule 28(b)(4), Supreme Court Rule 3(b)(5)); Alamida v. Wilson, 53 Haw. 398, 405, 495 P.2d 585, 590 (1972) (failure to conform appellate brief to Supreme Court Rule 3(b)(5) on a point of error warrants dismissal of point of error on appeal); Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 157-59, 434 P.2d 516, 517-18 (1967).

We recognize that our appellate courts have "consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible," Shefke, 96 Hawai'i at 420, 32 P.3d at 64 (internal quotation marks and citation omitted; emphasis supplied), and have in several instances addressed the merits of an appeal, the nonconformance of the appellate briefs notwithstanding. See, e.g., Housing Fin. and Dev. Corp., 91 Hawai'i at 85-86, 979 P.2d at 1111-12; O'Connor, 77 Hawai'i at 386, 885 P.2d at 364. We surmise that the foregoing policy is most acute where, as here, the litigant is *pro se*.

The problem in this case is that it is not possible to address the merits of Nowicki's appeal. Even if we put to one side the formal defects of Nowicki's opening brief, we still face the resulting substantive defects. First, the Board's September

27, 2000 order granting the Appellees' motion to strike Nowicki's request for reconsideration, which is what Nowicki directly appealed, is not directly addressed anywhere in the opening brief. With respect to the underlying December 28, 1999 decision and order of the Board, the most we can deduce from Nowicki's opening brief is that he believes the decision and order was wrong. Nowicki does not tell us in what specific respects the Board was wrong, how the Board was wrong, why the Board was wrong or what authorities mandate such a conclusion. And as mentioned, there are no citations to the record in the opening brief which might anchor these questions. Indeed, Nowicki raises many matters on appeal not raised below,[6] and makes numerous references in his opening brief to materials that were not before the Board and are not in the record on appeal.[7] Nowicki does not even give us his bottom line. Nowicki nowhere specifies what workers' compensation benefits should be awarded to him and, if applicable, for what periods of time, beyond what was awarded him in the Director's April 24, 1996 decision that the Board's decision and order affirmed.

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[6] Cf. Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 475-76, 540 P.2d 978, 985 (1975) ("A judgment ordinarily will not be reversed upon a legal theory not raised by the appellant in the court below. This is the general rule to which an appellate court will adhere, unless and until justice otherwise requires." (Citations omitted.)).

[7] Cf. Orso v. City & County, 55 Haw. 37, 38, 514 P.2d 859, 860 (1973) ("Matters outside the trial record . . . may neither be appended nor referred to in appellate brief.").

It might be in the outer realm of possibility for us to construct a working opening brief for Nowicki, perhaps by dint of repeated close readings of his opening brief and the record on appeal and the drawing of plausible cross-links between the two. But such an endeavor would be a quixotic waste of judicial resources, especially in light of the particularly voluminous record in this case. Worse, such an undertaking would be mere speculation and surmise, and thus unfair to all parties to this appeal, including Nowicki. Accordingly, we do not engage in such endeavors, because

> the appellant, not having properly briefed the motley array of questions stated and advanced, cannot with reason expect the appellate court to make a painstaking survey of them in order to cull unimportant questions and determine the crucial ones, nor has he the right to cast upon it his burden of studying the record and authorities to essay the essential to the maintenance of the appeal and its efficient prosecution.

Ala Moana Boat Owners' Ass'n, 50 Haw. at 159, 434 P.2d at 518 (internal quotation marks, block quote format and citation omitted). Moreover, the rules of appellate procedure

> require[] specific arguments which demonstrate to this court, why a particular viewpoint should be adopted. Anything less can only be an imposition upon the court. Throughout its entire argument, the appellant has cast the burden on this court to ascertain the grounds of its objection to the trial court's findings of facts and conclusions of law. Counsel have no right to cast the burden on the court of searching through a voluminous record to find the ground of his objection and where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them.
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> Close scrutiny of the appellant's opening brief reveals only generalities and assertions amounting to mere conclusions of law. Where arguments in a brief are unsupported by citations of authorities, this court will not ordinarily search out authorities, and will assume that counsel, after diligent search, had been unable to find any supporting authority.
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> Appellant has the burden of sustaining his allegations of error against the presumption of correctness and regularity that attend the decision of the lower court. [T]he burden of showing error is on the

> plaintiffs in error. We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance.
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> Appellant has not answered appellee's contentions as to the deficiencies of its opening brief, and has failed to file a reply brief.
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> We are of the opinion that appellant's failure to observe the requirements of the rules of this court in its opening brief merits dismissal of the appeal.

Id. at 158-59, 434 P.2d at 518 (ellipsis, internal quotation marks and citations omitted).

Hence, we dismiss Nowicki's appeal.[8] See Bettencourt, 80 Hawai'i at 230, 909 P.2d at 558 ("Notwithstanding such policy [of affording litigants the opportunity to have their cases heard on the merits, where possible], we are . . . unable to consider the merits of appellant's contention . . . because appellant failed to include the transcript of the applicable hearing in the record on appeal."); Weinberg, 78 Hawai'i at 49, 890 P.2d at 286 (appellants having failed to present argument on an issue on appeal, that issue was not subject to review); Alamida, 53 Haw.

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[8] We observe that the Board credited the medical experts whose opinions formed the basis for the Board's December 28, 1999 decision and order, and did not credit Nowicki's treating physician, upon whose opinions Nowicki relied. See Tamashiro v. Control Specialist, Inc. 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) (in a workers' compensation case, "the credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal" (citations omitted)). The medical opinions the Board relied on were reliable, probative and substantial evidence before the Board, and we cannot say that the Board's findings of fact were clearly erroneous. See Korsak v. Hawaii Permanente Medical Group, Inc., 94 Hawai'i 297, 302-3, 12 P.3d 1238, 1243-44 (2000). Accordingly, the Board's conclusions of law were not wrong, as they were supported by the Board's findings of fact and we can detect no error of law in them. Tamashiro, 97 Hawai'i at 93, 34 P.3d at 23. See also Bumanglag v. Oahu Sugar Co., Ltd., 78 Hawai'i 275, 279, 892 P.2d 468, 472 (1995)(we review the Board's findings of fact under the clearly erroneous standard, and its conclusions of law under the right/wrong standard). It would appear, then, that the Board's December 28, 1999 decision and order is eminently defensible, no matter what it is that Nowicki is contending on appeal.

at 405, 495 P.2d at 590 (where appellant failed to "set forth the manner in which the alleged errors were raised in the trial court," its appeal was dismissed as to those alleged errors).

Therefore,

IT IS HEREBY ORDERED that Nowicki's appeal is dismissed.

DATED: Honolulu, Hawaii, January 29, 2003.

On the briefs:

Jacek Nowicki,
claimant-appellant, *pro se.*

Chief Judge

Robert A. Chong,
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Associate Judge

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