NOT FOR PUBLICATION

NO. 26207

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STEVEN F. DABNEY, Claimant-Appellant, v.
MAUI'S MEAT FISH AND LIQUOR CO., INC.,
dba: CARY AND EDDIE'S HIDEAWAY, and
FIREMAN'S FUND INSURANCE CO.,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2002-104(M) (7-00-03242))

SUMMARY DISPOSITION ORDER
(By: Lim, Acting C.J., Nakamura and Fujise, JJ.)

In this workers' compensation case, Claimant-Appellant Steven F. Dabney (Dabney), pro se, appeals from the September 26, 2003, Decision and Order of the Labor and Industrial Relations Appeals Board (the Board) in favor of Employer-Appellee Maui's Meat Fish and Liquor Company, dba Cary & Eddie's Hideaway, and Insurance Carrier-Appellee Fireman's Fund Insurance Company (collectively referred to as "the Employer"). The Board affirmed the February 25, 2002, supplemental decision of the Director of Labor and Industrial Relations (the Director), which determined that Dabney did not sustain any permanent disability as a result of his October 4, 2000, work injury.

On appeal, Dabney, who was represented by counsel in the proceedings before the Board, argues that the Board erred in excluding Exhibit H, a March 30, 2002, letter written by Dabney's

treating physician, Dr. Michael McDonald, that was submitted after the pretrial discovery deadline. Dr. McDonald's letter stated that Dabney's pre-existing back and neck conditions were "definitely worse" after the October 4, 2000, work accident.

In particular, Dabney claims that he was not informed by "either lawyer," which presumably includes Dabney's own lawyer, that the Exhibit H the Board was excluding was Dr. McDonald's letter, and, therefore, Dabney did not have the chance to object. Dabney contends that Dr. McDonald's letter was needed to fully state Dabney's case because it is the only document that gives a complete opinion of Dabney's condition before and after the accident. Dabney also implicitly attacks the Board's determination that he did not sustain a permanent disability as a result of the October 4, 2000, accident. Dabney argues that the medical evaluation of Dr. James A. Ferrier, on which the Board relied, was flawed; that Dabney was working five to six nights per week before the accident but can no longer work; and that he has been certified as disabled by a social security doctor. Dabney asks that Exhibit H be "admitted for consideration" and that he "be given a rating of range of motion according to the already submitted findings and the AMA guides to determine impairment."

At the outset, we note that Dabney did not include the transcripts of the trial before the Board or the hearings before

the Director. Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(b)(1)(A) places on the appellant the affirmative burden of providing the transcript of the proceedings:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

Thus, it is well settled that "'[t]he burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). See also Lepere v. United Public Workers, Local 646, AFL-CIO, 77 Hawai'i 471, 474, 887 P.2d 1029, 1032 (1995) ("Lepere, as appellant, had a duty to include the relevant transcripts of proceedings as a part of the record on appeal." (Footnote omitted.)); State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964) ("It is elementary that an appellant must furnish to the appellate court a sufficient record to positively show the alleged error." (Citation omitted.)); Yee Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961) (transcript of proceedings must be provided to the appellate court unless "evidence is not necessary for the disposition of an appeal on its merits" (citation omitted)).

In addition, HRAP Rule 10(b)(3) provides:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

In Union Bldg. Materials Corp., supra, we held that

> if the appellant wishes to urge that a finding or conclusion is unsupported by the evidence, he must include a transcript of all the evidence relevant to such finding or conclusion. . . . An appellant . . . has the burden to designate all the evidence, good and bad, material to the point he wishes to raise.
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> The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error. An appellant must include in the record all of the evidence on which the lower court might have based its findings and if this is not done, the lower court must be affirmed.

Union Bldg. Materials Corp., 5 Haw. App. at 151-52, 682 P.2d at 87 (citations omitted).

Because Dabney did not include the transcript of the trial before the Board, we do not know what was said at trial regarding the Employer's objection to Dabney's submission of Exhibit H to the Board for its consideration. In a Pretrial Order filed on April 26, 2002, the Board established discovery deadlines, including a deadline of June 19, 2003, for the submission of medical reports. The available record on appeal, which consists of the original documents entered on record before the Board, indicates that Exhibit H was submitted after the pretrial deadline for medical reports.[1] Dabney does not dispute,

[1] The record indicates that Exhibit H was first submitted on August 13, 2003, along with the other exhibits for Claimant-Appellant Steven F. Dabney, which was after the June 19, 2003, pretrial deadline for submission of medical reports.

on appeal, that Exhibit H was submitted after the pretrial deadline. Nor did Dabney's counsel, in pleadings filed with the Board, dispute that Exhibit H was submitted late. Instead, in a post-trial brief, Dabney's counsel simply argued that even if Exhibit H was excluded, Dabney's trial testimony provided the same information. The record does not contain any explanation or justification for the late submission of Exhibit H.

The Hawai'i Administrative Rules (HAR) set forth the Rules of Practice and Procedure for the Board in Title 12, Chapter 47. HAR § 12-47-22(a) authorizes the Board to enter a pretrial order which recites the actions, including discovery deadlines, taken at the initial conference. HAR § 12-47-22(b)(3) provides that when a pretrial order establishes discovery deadlines, the "[m]edical report deadline means the date that all medical reports or records shall be filed at the board." HAR §§ 12-47-22(c) and (d) further provide that the pretrial order "shall control the subsequent course of the appeal, unless modified by the board . . . to prevent manifest injustice" and that "[t]he board may impose administrative sanctions as described in section 12-47-48 for noncompliance with the board's order." HAR § 12-47-48, in turn, states in relevant part:

> Any person whose conduct at any proceeding before the board or before a member is deemed contemptuous by the presiding member, or who has refused to comply with an order of the board . . . may be excluded from the proceeding. The board may impose other sanctions, including dismissal of the appeal.

(Emphasis added.)

The available record shows that Dabney violated the Board's pretrial order by submitting Exhibit H after the medical reports deadline. We conclude that the Board's decision to exclude Exhibit H was made upon a lawful procedure and did not constitute an abuse of discretion. Hawaii Revised Statutes (HRS) §§ 91-14(g)(3) and (6) (1993); Igawa v. Koa House Restaurant, 97 Hawai'i 402, 405-06, 38 P.3d 570, 573-74 (2001). The Board apparently heard and considered Dabney's testimony that his condition had considerably worsened after the accident which was comparable to the information contained in Exhibit H. In addition, Dabney's claim that he did not have the opportunity to personally object to the exclusion of Exhibit H provides him with no basis for relief. Dabney's counsel had the opportunity to object on Dabney's behalf before the Board.

We also reject Dabney's implicit challenge to the Board's determination that he suffered no permanent disability as a result of the October 4, 2000, accident. The Board credited Dr. Ferrier's evaluation of Dabney, including Dr. Ferrier's rating of 0% impairment resulting from the work injury. Based on the available record, we conclude that there was sufficient evidence to support the Board's ruling. Igawa, 97 Hawai'i at 407-10, 38 P.3d at 575-78. Dabney did not meet his burden of showing that the Board committed error. Bettencourt, 80 Hawai'i at 230, 909 P.2d at 558.

In accordance with HRAP Rule 35, and after carefully reviewing the record and the briefs submitted by the parties and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the September 26, 2003, Decision and Order of the Board is affirmed.

DATED: Honolulu, Hawai'i, December 2, 2005.

Acting Chief Judge

Associate Judge

Associate Judge

Steven F. Dabney,
on the briefs, for
Claimant-Appellant, Pro Se.

Brian G.S. Choy,
(Robert E. McKee, Jr.
on the briefs) for
Employer/Insurance Carrier-
Appellee.