NOS. 27604 AND 27605

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EDA M. SIMINSKI, Claimant-Appellant, v.
KIHEI YOUTH CENTER, and HAWAII EMPLOYERS' MUTUAL INSURANCE COMPANY, Employer/Insurance Carrier-Appellee
(Case No. AB 2004-039(M))
(7-03-01264)

and

EDA M. SIMINSKI, Claimant-Appellant, v.
KIHEI YOUTH CENTER, and HAWAII EMPLOYERS' MUTUAL INSURANCE COMPANY, Employer/Insurance Carrier-Appellee
(Case No. AB 2004-181(M))
(7-02-01106)

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(Case Nos. AB 2004-039(M) and AB 2004-181(M)
(7-03-01264 and 7-02-01106)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Foley and Leonard, JJ.)

Claimant-Appellant Eda M. Siminski (**Siminski** or **Claimant**) appeals from several Findings of Fact and Conclusions of Law in two Decision and Orders entered by the Labor and Industrial Relations Appeals Board (**LIRAB**) on October 18, 2005, in favor of Employer-Appellee Kihei Youth Center, Inc. (**KYC**) and Insurance Carrier-Appellee Hawaii Employers Mutual Insurance Company, Inc. (**HEMIC**).[1] Siminski also appeals from an order entered by the LIRAB on March 29, 2005, denying certain discovery requests in her motion to compel discovery, filed on February 18, 2005.

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[1] Claimant filed two Notices of Appeal from the LIRAB's Decision and Orders in appeals No. 27604 (Case No. AB 2004-039(M)) (7-03-01264) and No. 27605 (Case No. AB 2004-181(M)) (7-02-01106). These appeals have been consolidated under No. 27605.

Siminski worked for KYC on Maui. She suffered a stroke on March 22, 2002, and a seizure on August 23, 2002. Siminski claimed that work-related stress caused both health incidents. The Department of Labor and Industrial Relations, Disability Compensation Division (**DCD**) determined that Claimant's employment did not cause the stroke or the seizure, and therefore, the injuries were not compensable. The LIRAB affirmed the DCD's Decision. On appeal, Siminski argues, *inter alia*, that her claims are compensable and that the LIRAB failed to apply the statutory presumption of compensability under Hawaii Revised Statutes (**HRS**) § 386-85 (1993) to her stroke and seizure claims.

Siminski raises the following points of error:

(1) The LIRAB erred in failing to correctly apply Hawai'i law and the statutory presumption of compensability to Siminski's stroke of March 22, 2002.

(2) The LIRAB erred in failing to find and/or conclude that Siminski was entitled to medical benefits after March 21, 2002.

(3) The LIRAB clearly erred in entering Finding of Fact (**FOF**) 18: "We further find that Claimant's March 22, 2002 stroke was a non-industrial injury."

(4) The following Conclusions of Law (**COLs**) are erroneous because the LIRAB based such conclusions upon clearly erroneous FOFs and the conclusions are manifestly against the credible, probative evidence in the record:

> 2. We conclude that Employer is not liable for medical benefits after March 21, 2002, because Claimant's March 22, 2002 stroke was an independent, non-industrial intervening injury that terminated Employer's liability for medical benefits for the February 5, 2002 work injury.
>
> 3. We conclude that Claimant did not sustain any permanent disability as a result of her February 5, 2002 work injury, based on the lack of any rating report in the record and the medical evidence that shows that she was improving until her stroke on March 22, 2002.

(5) The LIRAB erred in failing to correctly apply Hawai'i law and the statutory presumption of compensability to Siminski's industrial injury of August 23, 2002.

(6) The LIRAB clearly erred in entering the following FOFs because each is incomplete and ignores reliable, probative evidence on the whole record as well as Hawai'i law:

> Nothing unusual or stressful occurred at work before Claimant suffered her seizure-like symptoms
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> 4. According to the Director's December 26, 2003 decision, Claimant stated at the Disability Compensation Division hearing on November 5, 2003, that she had met with the person from the State on August 23, 2002, and it was during this meeting that she experienced her seizure-like symptoms.
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> At trial, Claimant noted that the only stressful event that she could recall prior to the onset of her seizure-like symptoms on August 23, 2002, was seeing the person from the State. Claimant, however, acknowledged that she had seen that same person at KYC on other occasions in the past and had had no problems or concerns on those occasions. She did not testify that she had spoken with the person from the State.
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> 5. Based on the foregoing, we find that Claimant did not experience any event or incident at work on August 23, 2002, that was beyond what she was normally accustomed to as a senior youth specialist at KYC. She had a meeting without any unusual stress or tension. Even if, however, Claimant were stressed as a result of her meeting, we find that there is no medical evidence in the record that the stress from such meeting caused her seizure-like symptoms.
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> The credible and persuasive medical evidence in the record establishes that emotional stress does not cause seizures and that Claimant's alleged stress at work on August 23, 2002, did not cause her seizure-like symptoms. In his October 23, 2003 report, Mark Stitham, M.D., opined that the medical literature does not support stress as an etiological factor in seizure disorders. At trial, Dr. Stitham stated that within reasonable medical probability, mental stress does not cause, aggravate, or contribute to seizure. We credit Dr. Stitham's opinions.
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> . . . .
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> 21. We find that there is no evidence in the record that Claimant had experienced any unusual stresses at work on August 23, 2002, prior to the onset of her seizure-like symptoms.
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> . . . .
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> 23. None of the physicians in this case have opined that Claimant's seizure-like symptoms were causally related

> to any specific event or incident at work on August 23, 2002.
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> 24. Based on the foregoing, we find that Claimant's seizure-like symptoms on August 23, 2002, were causally related to her uncontrolled seizure disorder.

(7) The following LIRAB COLs are erroneous because they are based on clearly erroneous FOFs and the conclusions are manifestly against the credible, probative evidence in the record, and are incorrect:

> We conclude that Claimant did not sustain a personal injury on August 23, 2002, arising out of and in the course of employment.
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> . . . .
>
> [W]e conclude that there is no causal connection between Claimant's seizure-like symptoms on August 23, 2002, and her employment, because her seizure-like symptoms on August 23, 2002, were caused by her uncontrolled seizure disorder, which is unrelated to her employment.
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> We conclude that the mere fact that Claimant was at her place of employment in a meeting on August 23, 2002, when she suffered her seizure-like symptoms, is insufficient to establish a causal connection between her injury and her employment, given the lack of any unusual work stressor prior to the onset of her seizure-like symptoms; her history of seizures and seizure disorder; her noncompliance with her anti-seizure medications, which would predispose her to seizures; the fact that she had a seizure on August 18, 2002; and the absence of any medical opinion in the record that Claimant's seizure-like symptoms on August 23, 2002, were work-related.
>
> We conclude that the presumption of compensability has been overcome in this case. Accordingly, Claimant's claim for seizure-like symptoms on August 23, 2002, is denied.

(8) The LIRAB erred in failing to grant Siminski's motion to compel discovery with respect to Employer's refusal to produce documents reasonably calculated to lead to the discovery of admissible evidence.

Appellate review of the LIRAB's decisions is governed by HRS § 91-14(g) (1993). Capua v. Weyerhaeuser Co., 117 Hawai'i 439, 444, 184 P.3d 191, 196 (2008). Section 91-14(g) provides:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Appeals taken from FOFs set forth in decisions of the Board are reviewed under the clearly erroneous standard. Thus, the court considers whether such a finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The clearly erroneous standard requires the court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made." Nakamura v. State, 98 Hawai'i 263, 267, 47 P.3d 730, 734 (2002) (citation and brackets omitted).

A COL is not binding on an appellate court and is freely reviewable for its correctness. The court reviews COLs de novo, under the right/wrong standard. Capua, 117 Hawai'i at 444, 184 P.3d at 196.

Appellate courts review LIRAB decisions involving mixed questions of fact and law under the clearly erroneous standard "because the conclusion is dependent upon the facts and circumstances of the particular case." Id. (citation and internal quotation marks omitted). However, an appellate court must give deference to an agency's expertise and experience in the particular field with regard to mixed questions of fact and law, and "should not substitute its own judgment for that of the agency." Peroutka v. Cronin, 117 Hawai'i 323, 326, 179 P.3d 1050, 1053 (2008) (citation, internal quotation marks, and boldface omitted).

Appellate courts give deference to the LIRAB's assessment of the credibility of the witnesses and the weight of

the evidence. Moi v. State, No. 27557, 2008 WL 2122838, at *2 (Haw. Ct. App. May 21, 2008). "It is well established that courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field." Id. (internal quotation marks and citaion omitted).

The standard of review for a ruling on a motion to compel discovery is abuse of discretion. See Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 100-01, 73 P.3d 46, 54-55 (2003). "An abuse of discretion occurs when the trial court [or agency] has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. (citation omitted).

Upon careful review of the record, the applicable statutes and case law, and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Siminski's points of error as follows:[2]

(1)(2)(3)(4) An employee's claim for workers' compensation is presumed to be for a covered work injury under HRS § 386-85 (1993), which provides:

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[2] We have also considered Appellees' objections to Siminski's failure, in some instances, to comply with the requirements of Hawai'i Rules of Appellate Procedure (**HRAP**) Rules 28(b)(3) and 28(b)(4) and her alleged overstatement of the factual record on appeal. Counsel for Siminski is cautioned that future non-compliance with HRAP Rule 28 may result in sanctions against him. We do not, however, find Siminski's briefs to be misleading. Any slight tendency toward hyperbole in this case, as perceived from the appellees' vantage point, is within the bounds of zealous advocacy and is inconsequential in light of this court's independent review of the record on appeal. In addition, we recognize the strong policy in favor of review on the merits. See Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995).

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:
> (1) That the claim is for a covered work injury;
> (2) That sufficient notice of such injury has been given;
> (3) That the injury was not caused by the intoxication of the injured employee; and
> (4) That the injury was not caused by the wilful intention of the injured employee to injure oneself or another.

The LIRAB "should generally state whether or not it has in fact applied the presumption" under HRS § 386-85, but "its failure to do so does not, in and of itself, prejudice a claimant." Tate v. GTE Hawaiian Telephone Co., 77 Hawai'i 100, 107, 881 P.2d 1246, 1253 (1994) (internal quotation marks and citations omitted). The issue is not whether the LIRAB "has explicitly referred to the presumption, but whether the presumption has been rebutted by substantial evidence." Id. "The term substantial evidence signifies a high quantum of evidence which, at the minimum, must be relevant and credible evidence of a quality and quantity sufficient to justify a conclusion by a reasonable man that an injury or death is not work connected." Igawa v. Koa House Rest., 97 Hawai'i 402, 407, 38 P.3d 570, 575 (2001) (internal quotation marks and citation omitted).

In order to overcome this statutory presumption, the employer has the burden of persuasion and burden of production:

> [T]he employer has the initial burden of producing substantial evidence that, if believed, could rebut the presumption that the injury is work-related. If the initial burden of production is satisfied, the LIRAB must weigh the employer's evidence against the evidence presented by the claimant. The employer bears the ultimate burden of persuasion, and the claimant is given the benefit of the doubt, on the work-relatedness issue.

Moi, No. 27557, 2008 WL 2122838, at *2 (internal citations omitted).

Although the LIRAB did not state explicitly that it applied the presumption under HRS § 386-85 in determining that Siminski's stroke was not a compensable injury, the dispositive

issue in this case is whether the presumption was rebutted by substantial evidence. Tate, 77 Hawai'i at 107, 881 P.2d at 1253.

The record on appeal and the LIRAB's Decision and Order support the conclusion that the LIRAB considered the evidence presented by the Appellees to overcome the presumption that Siminski's stroke was work-related, including, among other things, that: (1) Siminski had been at home on temporary disability as a result of a prior incident of stress and anxiety due to her employment for approximately six weeks prior to the stroke; (2) Siminski had been cleared to return to work prior to having the stroke (she was "doing beautifully . . . less anxious, more optimistic"), which took place while she was gardening at home;[3] (3) Siminski had not yet returned to work at the time of the stroke; (4) medical reports and medical testimony from multiple sources, which the LIRAB clearly found to be more credible and persuasive than the contrary evidence, either (a) affirmatively opined that Siminski's stroke was not caused, aggravated, or contributed to by work-related stress (stroke was probably caused by her preexisting hypertension of many years, which was poorly controlled)[4] or (b) failed to affirmatively attribute the stroke to a work-related cause, even upon a request by Siminski's husband to attribute the stroke to Siminski's employment. Without more, Siminski's testimony that, based in part on discussions with KYC staff about her return, she was worried about returning to work is insufficient to cause us to

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[3] The fact that Claimant was at home, in isolation, is insufficient evidence to rebut the statutory presumption. See Akamine v. Hawaiian Packing & Crating Co., 53 Haw. 406, 413, 495 P.2d 1164, 1169 (1972). However, under the facts and circumstances of this case, we consider it along with the other evidence presented by the parties. See Ostrowski v. Wasa Elec. Serv., Inc., 87 Hawai'i 492, 497 n.8, 960 P.2d 162, 167 n.8 (App. 1998).

[4] It appears from the record on appeal that Siminski had a prior history of stroke, as well as seizures, pre-dating long before her employment with KYC.

reject the LIRAB's finding that the stroke was an independent non-work related injury.

We give deference to the LIRAB's assessment of the credibility of the witnesses and the weight it gives to the evidence. Moi, No. 27557, 2008 WL 2122838, at *2. We decline to consider the weight of the evidence to review an agency's findings of fact by passing upon the credibility of the witnesses or conflicts in testimony, "'especially the findings of an expert agency dealing with a specialized field.'" Id. (citation omitted). The record on appeal shows that the Appellees presented substantial medical, spatial, and temporal evidence to rebut the compensability of Siminski's stroke. Siminski proffered evidence that was, in some instances, damaging to her claim. One psychiatric examination report presented by Siminski stated, "I find it impossible to say whether or not these stressors specifically and directly brought about her stroke or aggravated her seizure condition." Another doctor opined that the incident in February 2002 "would have & did contribute to the subsequent stroke," but then conceded, "this is not my area of expertise." For these reasons, we cannot say that LIRAB's FOFs concerning Siminski's stroke are clearly erroneous or that LIRAB's COLs are based on clearly erroneous facts.

As to the second part of point of error (4), regarding COL 3, Siminski did not present any argument in her opening brief on whether she sustained a permanent disability as a result of her February 5, 2002 work injury. Therefore, this part of

Claimant's point of error (4) is deemed waived.[5] See HRAP Rule 28(b)(7).[6]

(5)(6)(7) We consider many of the same issues as discussed above in conjunction with our review of the LIRAB's FOFs and COLs related to Siminski's August 23, 2002 seizure. In particular, we must carefully consider the LIRAB's assessment of the conflicting expert opinions presented.

Unlike the stroke on March 22, 2002, Siminski experienced the seizure at work. Siminski's injury on August 23, 2002 is compensable if there is a nexus between the employment and her seizure, *i.e.*, the injury arose "out of and in the course of the employment[.]" HRS § 386-3. Under the "unitary test" that is used to interpret the nexus required under HRS § 386-3, a causal connection between Claimant's seizure and any incidents or conditions of employment satisfies the nexus requirement. Moi, No. 27557, 2008 WL 2122838, at *2. Appellees needed to adduce substantial medical evidence to rebut the presumption that work-related stress caused Siminski's seizure.

It is undisputed that the symptoms presented by Siminski followed her seeing, but not speaking with, a particular State of Hawai'i employee, whom Siminski identified as responsible for the grant funding for KYC's programs. When Siminski saw her, shortly after she started work at 9:00 a.m. on August 23, 2003, she felt concerned that funding might not be

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[5] "The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived." HRAP Rule 28(b)(7).

[6] Appellees contend in their answering brief that they are not liable for Claimant's injuries on February 5, 2002 even on a temporary basis. Appellees have waived this argument because they did not file a cross-appeal pursuant to HRAP Rule 28(h). Similarly, Appellees argue that LIRAB erred in rejecting their argument that Siminski's claim was time-barred under HRS § 386-82 (1993). As they did not file an appeal of this decision, we will not consider the argument.

continued.[7] The onset of the seizure symptoms occurred at 9:30 a.m. Again, the record contained conflicting medical evidence. Some of the medical evidence suggested that Siminski was suffering various psychological disorders, rather than a seizure. Other medical evidence showed that she suffered a Todd's paralysis type seizure. Siminski had a history of seizures since approximately 1990 and had previously experienced similar incidents on at least four occasions, including as recently as five days before the August 23, 2002 seizure.[8] Evidence in the record indicates that Siminski was not taking her anti-seizure medication as recommended.[9] The LIRAB heard expert testimony that Siminski's employment did not contribute to her seizure, as well as testimony that a hostile work environment contributed to, exacerbated, aggravated and accelerated Siminski's symptoms of depression, anxiety, paranoid ideation, and confusion. Upon careful review, we are not left with a definite and firm conviction that a mistake has been made and we decline to otherwise pass on the weight of evidence and credibility of the witnesses before the LIRAB.

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[7] After the stroke, Siminski had returned to work on or about August 5, 2002. Between that date and the date of the seizure, there was also an incident where a particular youth specialist allegedly told Siminski that she was in charge and asked Siminski, who was cooking at the snack shop, to make her pancakes. Claimant testified that it bothered her because it was not her job to feed the youth specialist and the snack shop was for the kids. Siminski complained generally about changes at KYC during this period, particularly that she was not given tasks with greater responsibility, as she had in the past. However, evidence in the record indicates that she returned on "light duty" and that KYC was attempting to eliminate potential stressors, which would explain why, for example, she was not assigned to respond to after-hour alarms at the center, even though she lived nearby.

[8] At no point did Siminski claim that the August 18, 2002 seizure was work-related.

[9] Siminski's testimony on this issue was inconsistent. At one point, she stated she did not remember whether she had taken her seizure medication. At another point, she stated that she was not sure whether she had been taking it. Shortly thereafter, she testified that she knew she took her seizure medication. It appears that she told emergency room personnel that she had not been taking it.

Siminski also argues that a preexisting condition aggravated by employment is compensable. In support of this argument, she cites to the following:

> Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee.

1 Larson's Workers' Compensation Law § 9.02[1] (2005) (footnotes omitted) (hereinafter, "Larson's"). Although Larson's supports Siminski's proposition that a preexisting condition can be any kind of weakness, and aggravation of a pre-existing condition may support a claim, Larson's also recognizes that the question of aggravation is a question of fact. Larson's § 9.02[3], [5]. Findings of fact in this case depend on medical evidence, and Larson's explains that the specialized agency makes those findings of fact:

> Whether the employment aggravated, accelerated, or combined with the internal weakness or disease to produce the disability is a question of fact, not law, and a finding of fact on this point by the commission based on any medical testimony, or, in the commoner afflictions where the commissioners themselves have acquired sufficient medical expertise, based on the commission's expert knowledge even without medical testimony, will not be disturbed on appeal.

Larson's § 9.02[5]. This excerpt from Larson's provides additional support for this court's deference to the LIRAB's assessment of the medical evidence in this case. The record on appeal supports the LIRAB's conclusion that Appellees provided substantial evidence to show that work-related stress did not aggravate her preexisting condition to precipitate the seizure on August 23, 2002.

Therefore, we conclude that the LIRAB correctly applied Hawai'i law and the statutory presumption to Claimant's seizure claim. As noted above, on the record in this case, we are not left with a firm and definite conviction that a mistake has been made and, therefore, LIRAB's FOFs 4, 5, 21, 23, and 24, are not

clearly erroneous. Thus, we reject Siminski's claim that the LIRAB incorrectly concluded that she did not sustain a compensable personal injury on August 23, 2002, arising out of and in the course of employment.

(8) Finally, the Hawaii Administrative Rules (HAR) section 12-47-31 (2008)[10] confers upon the LIRAB the discretion to determine what discovery shall be allowed:

> After the filing of the notice of appeal any party may proceed to obtain discovery by deposition upon oral examination, written interrogatories, or request for production of documents in the manner and effect prescribed by the Hawaii Rules of Civil Procedure; provided that to protect a party or person from undue burden or expense or for other good cause, the board may on motion by any party or on its own motion, order that the discovery not be taken or be taken upon such terms and conditions as the board may specify.

Here, the LIRAB's Order on Claimant's motion to compel discovery denied six of the nine items requested in Claimant's First Request for Production of Documents, specifically item nos. 1 through 5, and 7. On appeal, Siminski presents only a superficial argument with regard to item no. 7, which requests the personnel files of Siminski, Jeff Rogers, and Amber Knight. Siminski appears to argue that her personnel file and those of Jeff Rogers and Amber Knight would have allowed her a chance to rebut the allegations that she was a problem employee whose work performance had deteriorated, and that there were continuing problems at the workplace after she returned to work on August 6, 2002. Claimant does not show how the LIRAB abused its discretion in denying item no. 7. In addition, in light of the substantial medical evidence rebutting the presumption that the seizure was work-related, any error in failing to compel the production of the personnel files was harmless.

Notwithstanding the LIRAB's denial of Siminski's request to compel production of item nos. 1 through 5, the record

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[10] The current rule was in effect at all times relevant to this case.

on appeal shows that Appellees complied with those requests, to the extent that the material existed. Based on the record on appeal, it does not appear that the LIRAB abused its discretion when it denied the discovery requests in item nos. 1 through 5, and 7 of Siminski's First Request for Production of Documents. In addition, any error in denying Siminski's motion was harmless because the requested materials were produced.

For the reasons set forth above, we affirm both of the LIRAB's Decision and Orders, entered on October 18, 2005, as well as the discovery order, entered on March 29, 2005.

DATED: Honolulu, Hawai'i, July 31, 2008.

Chief Judge

Associate Judge

Associate Judge

On the briefs:

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