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SCWC No. 23-0000185

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent-Plaintiff-Appellant, v. RANDALL HOFFMAN, Petitioner-Defendant-Appellee.	CAAP No. 23-0000185 CASE No. 5CPC-21-0000264 APPLICATION FOR WRIT OF *CERTIORARI* FROM THE JUDGMENT ON APPEAL OF THE HAWAIʻI INTERMEDIATE COURT OF APPEALS FILED APRIL 1, 2024 HONORABLE KEITH K. HIRAOKA HONORABLE CLYDE J. WADSWORTH HONORABLE KIMBERLY T. GUIDRY

RESPONDENT STATE OF HAWAII'S OPPOSITION TO
PETITIONER RANDALL HOFFMAN'S APPLICATION FOR WRIT OF *CERTIORARI*

& UNPUBLISHED AUTHORITY

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RESPONDENT STATE OF HAWAII'S OPPOSITION TO PETITIONER RANDALL HOFFMAN'S APPLICATION FOR WRIT OF *CERTIORARI*

Respondent-Plaintiff-Appellant State of Hawai'i, by and through Tracy Murakami, Deputy Prosecuting Attorney, County of Kaua'i, pursuant to Rule 40.1(e), Hawai'i Rules of Appellate Procedure, respectfully submits its Opposition to Petitioner Randall Hoffman's Application for Writ of Certiorari, filed on April 24, 2024. Respondent respectfully requests that this Honorable Court take judicial notice of the JEFS online dockets in 5CPC-21-0000264, State of Hawaii v. Randall Hoffman, and CAAP-23-0000185, State of Hawaii v. Randall Hoffman, pursuant to Rule 201(b)(2) of the Hawai'i Rules of Evidence.

I. Introduction

This Honorable Court should deny a writ of certiorari in this case, as the Intermediate Court of Appeals' decision reflects proper, detailed application of the relevant case law to the facts of this case. This Court should reject Petitioner's assertion that pursuant to the Hawai'i Constitution, a suspect's statements uttered in response to actions or statements made by a police officer that are "normally

attendant to arrest and custody," are inadmissible unless a court also finds that the officer's words or actions were not reasonably likely to elicit an incriminating response.

II. Factual Summary

On-duty DLNR Officer Warren Tavares observed Petitioner in the commission of Criminal Littering, HRS §708-829, actively disposing of green waste on the side of a public road. Thereafter, they had an exchange, culminating in Petitioner's arrest and commission of Resisting Arrest and Assault Against a Law Enforcement Officer, summarized as follows:

When Officer Tavares saw Petitioner disposing of green waste on the side of the road, he pointed to a nearby sign that prohibited the disposal of green waste in the area. He also instructed Petitioner to immediately stop disposing of his green waste. Petitioner replied, "Fuck you, I don't give a shit." He continued to dump green waste. So, Tavares again instructed him to stop. Petitioner said, "Fuck you." Tavares then told Petitioner that he would be arrested if he continued to dump green waste. Petitioner replied, "Fuck you." [*The ICA concluded that these first three (3) statements by Petitioner were "voluntary utterances," not the product of interrogation, as they were "normally attendant to arrest and custody." It reasoned that pursuant to HRS section 803-6(a)[1], Tavares had to explain why Petitioner could be arrested.*]

Officer Tavares explained to Petitioner that the State recently spent $100,000 to clean up the area, a high crime area. Petitioner replied that he had been turned away

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[1] HRS §803-6(a) (2007) [Arrest; how made] provides:

(a) At or before the time of making an arrest, the person shall declare that the person is an officer of justice, if such is the case. If the person has a warrant the person should show it; or if the person makes the arrest without warrant in any of the cases in which it is authorized by law, the person should give the party arrested clearly to understand for what cause the person undertakes to make the arrest, and shall require the party arrested to submit and be taken to the police station or judge. This done, the arrest is complete.

(b) ...

from the County transfer station because his trailer was too big. *[The ICA concluded that Petitioner's fourth statement was the product of interrogation, and therefore, inadmissible, as it was "reasonably likely to elicit an incriminating response."]*

Officer Tavares then arrested Petitioner, cuffing Petitioner's hands behind his back. Petitioner was able to move his hands to the front of his body while Tavares walked away to retrieve his citation book. Petitioner continued throwing green waste from his trailer onto the roadside. Tavares attempted to complete his arrest of Petitioner. During an ensuing scuffle, they both ended up on the ground. Petitioner wrapped his legs around Tavares' waist, causing Tavares pain. Tavares told Petitioner, "Stop resisting," and then punched Petitioner in the facial area. Petitioner did not respond, so Tavares punched him a second time in the facial area. Petitioner said, "Okay, I'm done." [*The ICA concluded that Petitioner's fifth statement was not a response to interrogation, as Tavares' acts and statement immediately preceding were "normally attendant to arrest and custody," pursuant to HRS § 803-6(a).]*

III. Argument

A. The ICA *individually* analyzed Petitioner's five (5) utterances to Officer Tavares to determine if they were the product of interrogation by Tavares.

The ICA individually analyzed Petitioner's five (5) statements/profanities made to Officer Tavares, to determine whether they were admissible in light of Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny. In determining that four out of his five statements were admissible (as they were not the product of interrogation), the ICA reasoned that those four statements were uttered in response to Tavares' statements that were "normally attendant to arrest and custody,"[2] HRS §803-6(a). In ruling that

[2] In support of his position that the ICA gravely erred, Petitioner argues that the ICA found that some of Officer Tavares' actions were "attendant to arrest and custody."

one of Petitioner's utterances was inadmissible as it was the product of "interrogation," the court reasoned that it was preceded by comments from Officer Tavares that "went beyond those normally attendant to arrest and custody," and were reasonably likely to elicit an incriminating response from Petitioner. ICA opinion at page 3. Thus, the ICA individually analyzed whether each of Petitioner's five (5) statements to Officer Tavares was admissible in light of Miranda and its progeny.

B. Nothing in the *Pa'ahana* decision even suggests that this Court rejected the categorical exception to the scope of interrogation, "normally attendant to arrest and custody."

Petitioner's certiorari application gives a false impression that the ICA disregarded the State v. Paahana decision. Certiorari application at page 5. In ruling that Petitioner's first two statements fell outside the scope of "interrogation" (as they were in response to Officer Tavares' statements that were normally attendant to arrest and custody), the ICA explicitly relied on State v. Paahana, 66 Haw. 499, 666 P.2d 592 (1983), noting that Mr. Paahana was not subjected to "coercive conduct" when asked if he was aware that growing marijuana was illegal. ICA opinion at pages 2-3.

Petitioner claims that under the Hawai'i Constitution, "there are no categorical exclusions" to the Pa'ahana custodial interrogation test. Certiorari Application at page 5. *Paahana* is *not* instructive as to the viability of the categorical exclusion (from the definition of "interrogation") for an officer's words or actions that are "normally attendant to arrest and custody"[3] because this Court in *Paahana* did *not* analyze

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Certiorari application at page 7. He omitted the word "normally," an operative part of the phrase, "normally attendant to arrest and custody," one of the exceptions to the definition of "interrogation" as stated in State v. Trinque, infra. See section E, infra. Petitioner uses the incomplete phrase, "attendant to arrest and custody," a number of other times in his certiorari application. Certiorari application at pages 5, 8, & 9.

[3] In Rhode Island v. Innis, 446 U.S. 291, 301 (1980), the United States Supreme Court noted that "interrogation" under Miranda does not include words or actions by the police that are "normally attendant to arrest and custody."

whether the officers' comments to Mr. Paahana were normally attendant to arrest and custody.

In Paahana, this Court opined that during his encounter with the officers, Mr. Paahana was not "in custody." Specifically, the officers' statement and question to him fell within "the category of general on-the scene questioning." Pa'ahana, 66 Haw. at 503, 666 P.2d at 596. This Court also noted that Mr. Paahana's exclamation to Officer Young not to pull out the marijuana plants was "spontaneously volunteered without compulsion or reasonable provocation." This Court in Paahana did not closely analyze the scope of "interrogation," as a discrete concept, distinct from the more general concept of "custodial interrogation."

Moreover, Paahana was decided decades before this Court decided State v. Kazanas, 138 Hawaii 23, 375 P.3d 1276 (2016), and State v. Trinque, infra. In Kazanas, this Court agreed with the Rhode Island v. Innis, 446 U.S. 291 (1980), definition of "interrogation" as categorically excluding an officer's words and actions "normally attendant to arrest and custody." Kazanas, 138 Hawaii at 35, 375 P.3d at 1273. In Trinque, this Court noted that an officer's words and actions "normally attendant to arrest and custody" do not amount to "interrogation." See discussion at section C, infra.

The Paahana opinion simply does not shed light on the issue here: whether, in order for the "normally attendant to arrest and custody" categorical exclusion from "interrogation" to apply, a court must also find that an officer's words or actions were not reasonably likely to elicit an incriminating response.

C. This Court in *State v. Skapinok* did *not* modify the 3-part test defining "interrogation" articulated in *State v. Trinque* – a court's finding that an officer's words or actions are "normally attendant to arrest and custody" renders those words and actions outside the scope of "interrogation," *without need* for the court to also find that those words and actions were "not reasonably likely to elicit an incriminating response."

Petitioner argues that even if a court finds that an officer's words or actions are "normally attendant to arrest and custody," a suspect's responsive utterances are still subject to suppression unless the court also finds that the officer's words or actions were "not likely to elicit an incriminating response." In making this argument, Petitioner relies on State v. Skapinok, 151 Hawaii 170, 510 P.3d 599 (2022). Certiorari application at pages 4-8.

However, this Court in Skapinok did not modify the "interrogation" test that it articulated in State v. Trinque, which functionally provides that once a court determines that an officer's words or actions are normally attendant to arrest and custody, those words or actions do not amount to "interrogation." A court does not need to make a separate finding that the officer's words or actions were not reasonably likely to elicit an incriminating response in order for those words and actions to be deemed outside the scope of "interrogation." More specifically, in Trinque this court articulated a three-part test for the definition of "interrogation" under Miranda, pursuant to the Hawai'i Constitution: (1) any words, actions, or practice on the part of the police, not only express questioning; (2) other than those normally attendant to arrest and custody; and (3) that the police should know is reasonably likely to invoke an incriminating response. State v. Trinque, 140 Hawaii 269, 277, 400 P.3d 470, 478 (2017). In effect, an officer's words or actions that are "normally attendant to arrest and custody" do not constitute "interrogation," because all three parts of the test have to be met before the officer's words or actions will be deemed to amount to interrogation. So, once a court determines that the officer's words or actions are

"normally attendant to arrest and custody," there is no need for it to determine whether they were reasonably likely to elicit an incriminating response. Pursuant to this Court's opinion in Trinque, a court's determination that an officer's words or actions are normally attendant to arrest and custody takes those words or actions out of the scope of "interrogation."

Petitioner claims that this Court in Skapinok eliminated the categorical exclusion (from the definition of "interrogation") for an officer's words or actions that are normally attendant to arrest and custody. Certiorari application at pages 6-7. This Court should reject Petitioner's claim. Importantly, in Skapinok, the issue was whether the officer's words and actions, in asking the suspect whether she would participate in field sobriety testing and asking her the corresponding medical rule out questions, constituted interrogation. This Court labeled the police officer's words and actions preceding field sobriety testing as "attendant to a routine, legitimate police procedure." Skapinok, 151 Hawaii at 182-83, 510 P.3d at 611-612.

In explaining its reason for rejecting the State's proposed categorical exclusion (from the definition of "interrogation") for questions "attendant to routine, legitimate police procedure," this Court did not alter the analysis for an officer's words or actions "normally attendant to arrest and custody." It noted specifically:

> We decline to adopt an exception to the interrogation test that obviates the need to inquire into whether the question would elicit an incriminating response when the question is attendant to the SFST or otherwise "necessarily 'attendant to' the legitimate police procedure." While we have explicitly recognized the "attendant to arrest and custody" carve-out to the definition of "interrogation," Hawaii law points against eliminating the "incriminating response" inquiry even when the police ask questions "attendant to" a routine, legitimate procedure.

Skapinok, 151 Hawaii at 182, 510 P.3d at 611, citing Trinque, 140 Hawaii at 277, 400 P.3d at 478 (other citations omitted). This quote indicates that in declining to adopt the State's proposed, new categorical exception for an officer's questions "attendant to

a routine, legitimate police procedure," this Court in Skapinok distinguished the "normally attendant to arrest and custody" categorical exclusion articulated in Trinque, supra.

Petitioner asserts that this same quoted passage from Skapinok supports his position that this Court equated the "attendant to a routine, legitimate police procedure" exception with the "normally attendant to arrest and custody" exception, and then for both those exceptions, refused a categorical "carve-out" from the definition of "interrogation." Certiorari application at page 5. However, later in the Skapinok opinion, this Court clarified that it did not eliminate the carve-out exception to "interrogation" for questions or actions by an officer that are "normally attendant to arrest and custody." This Court in Skapinok noted that in State v. Ketchum, 97 Hawaii 107, 128, 34 P.3d 1006, 1027 (2001), it rejected a categorical police "booking questions" carve-out to the definition of "interrogation," and still required a finding whether the officer's words or actions were likely to elicit an incriminating response. Skapinok, 151 Hawaii at 182, 510 P.3d at 611. By acknowledging in Skapinok that "normally attendant to arrest and custody" remained a "carve-out" to the definition of "interrogation" (and that it had refused a carve-out for "booking questions"), this Court clearly indicated that a determination of whether an officer's words or actions is likely to elicit an incriminating response is unneeded. Then, this Court in Skapinok equated the State's proposed "attendant to a legitimate police procedure" exception to the definition of interrogation with the "booking questions" exception, noting that an officer's questions falling within either of these two categories will ultimately amount to interrogation, unless they are found not to have been reasonably likely to elicit an incriminating response. Skapinok, 151 Hawaii at 183, 510 P.3d at 612. Importantly, this Court in *Skapinok* declined to equate

questions "attendant to a legitimate police procedure" with those that are "normally attendant to arrest and custody." Id.

Therefore, this Court must conclude that Skapinok did not modify the three-part test from Trinque, which in effect provides that police words or actions "normally attendant to arrest and custody" fall outside the scope of "interrogation," without need for a separate finding that the officer's words or actions were not reasonably likely to elicit an incriminating response.

D. The ICA accurately determined that nearly all of Officer Tavares' words or actions were in fact normally attendant to Petitioner's arrest and custody.

Petitioner argues that "a uniformed patrol officer" telling him, agitated after being turned away from the transfer station, to "stop breaking the law" was reasonably likely to prompt him to respond. Certiorari application at page 8. This Court should reject his assertion that Officer Tavares' instruction to stop breaking the law does not constitute words or actions "normally attendant to arrest and custody."

The ICA accurately determined that four (4) out of five (5) of Officer Tavares' utterances to Petitioner were normally attendant to arrest and custody. Tavares informed Petitioner that disposing of green waste in the area was illegal; and he instructed him to stop doing so; and then he repeated his directive to stop disposing of the green waste. An officer's instruction to a suspect to stop engaging in illegal conduct and explanation that his or conduct is illegal are both "normally attendant to arrest and custody." State v. Dean, 481 P.3d 322, 329 (Or. App. 2021) ("Those questions or statements that are normally attendant to arrest and custody may include statements informing the defendant of the charged crime or the reasons for the defendant's arrest." (Citation omitted.))

Likewise, Tavares' instruction to Petitioner to "stop resisting," coupled with his two punches to Petitioner, in response to Petitioner pinning Tavares on the ground,

between Petitioner's legs, are also "normally attendant to arrest and custody." It is reasonable that when an arrestee pins an officer to the ground, he or she will be instructed to "stop resisting" and will be subjected to non-lethal force. It would be absurd for this court to conclude that under these circumstances, it was unreasonable for Officer Tavares to subject Petitioner to physical force.

Petitioner asserts that the record is "too underdeveloped," as to the scuffle between him and Officer Tavares (after Tavares placed him in handcuffs), for the ICA to have determined that Tavares' actions and words then were normally attendant to arrest and custody pursuant to HRS §803-7(a).[4] Certiorari application at note 8. This Court should reject his claim of an underdeveloped record because the defense failed to file a cross-appeal in response to the State's Notice of Appeal of the circuit court's suppression order. See Rule 4.1, Hawaii Rules of Appellate Procedure; Siminski v. Kihei Youth Center, 118 Hawaii 352, 190 P.3d 192 (2008), Summary Disposition Order, at note 6 (by failing to file a cross-appeal, appellees waived the argument made in their answering brief that they were not liable for the plaintiff's injuries.) The State timely filed a Statement of Points of Error, putting the defense on notice that it would challenge the suppression of all of Petitioner's statements. CAAP-23-0000185 at docket #8. Moreover, Petitioner did not argue before the ICA or the circuit court that he was subjected to excessive force which impacted his Miranda rights. 5CPC-21-0000264 at docket #111 & CAAP-23-0000185 at docket #38. The defense also chose not to cross-examine Officer Tavares as to this scuffle in particular. See CAAP-23-

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[4] HRS §803-7 (2023) [Use of force; duty to intervene and report unnecessary or excessive force] provides in part:

(a) In all cases where the person arrested refuses to submit or attempts to escape, a degree of force may be used by a law enforcement officer as is necessary to compel the person to submission.

(b) ...

0000185, docket #20, Transcript 3/21/23 at page 24. There is nothing in Tavares' testimony that indicates that his use of force against Petitioner was excessive, as he was trying to complete his arrest of Petitioner, while Petitioner had his legs wrapped around Tavares' waist, causing Tavares pain. Id. at pages 17-19. Defense counsel, who drafted the circuit court's suppression order, did not even propose a finding concerning Petitioner having been subjected to excessive force. CAAP-23-0000185 at docket #1 (Exhibit A).

E. Petitioner does *not* even assert that courts are *unable* to distinguish an officer's words or actions normally attendant to arrest and custody from those that are not normally so attendant.

The ICA did not dilute *Miranda* protections. The ICA did not collectively consider Petitioner's statements and conclude that they were all not the product of interrogation, simply because they occurred around the time of his arrest.

Moreover, although an officer's directive while handcuffing a suspect, "*Put your hands behind your back*," is normally attendant to arrest and custody and therefore, does not constitute interrogation, the State freely acknowledges that a simple modification of that directive can take it outside the scope of the stated exception. If an officer instead utters an abnormal statement, one not normally attendant to arrest and custody, "*Put your murdering hands behind your back*," then the directive will amount to interrogation unless the court also finds that the directive was not reasonably likely to elicit an incriminating response. Petitioner has not shown that courts are unable to distinguish an officer's words or actions normally attendant to arrest and custody from those that are not normally so attendant.

IV. Conclusion

The ICA properly applied the relevant Miranda precedent to the facts of this case, individually analyzing Petitioner's statements, and determining that four out of

five of them were made in response to Officer Tavares' words or actions that were "normally attendant to arrest and custody," and consequently, fell outside the scope of "interrogation," as that term was defined in State v. Trinque, supra. In concluding that these four (4) of Petitioner's statements were not the product of interrogation, the ICA correctly ruled that the circuit court erred by suppressing them from evidence. The ICA also correctly directed that one of Petitioner's statements was the product of interrogation, as Petitioner uttered it in response to Tavares' comments that were not "normally attendant to arrest and custody." The ICA correctly determined that this lone statement was correctly suppressed from evidence by the circuit court. This Court should decline to consider eliminating the categorical, "carve-out" exception to the scope of interrogation, "normally attendant to arrest and custody."

Therefore, Respondent State of Hawai'i respectfully requests that this Honorable Court deny Petitioner's Certiorari Application. Alternatively, if this Court grants a writ of certiorari and ultimately concludes that the ICA should have determined whether Officer Tavares' words or actions were reasonably likely to elicit an incriminating response, the State of Hawai'i requests, in the interest of a timely resolution, that this Court make the determination or remand this case to the ICA (rather than the circuit court) for the determination. See Schmidt v. HSC, Inc., 131 Hawaii 497, 512, 319 P.3d 416, 431 (2014) (Hawai'i Supreme Court remanded the case to the ICA for determination of the merits of plaintiffs' claim).

Dated: Lihu'e, Kaua'i, Hawai'i, May 3, 2024.

/s/ Tracy Murakami
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for Respondent State of Hawai'i

118 Hawai'i 352
Unpublished Disposition
Unpublished disposition. See HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

Eda M. SIMINSKI, Claimant–Appellant,
v.
KIHEI YOUTH CENTER, and Hawaii Employers' Mutual Insurance Company, Employer/Insurance Carrier–Appellee.
and
Eda M. Siminski, Claimant–Appellant,
v.
Kihei Youth Center, and Hawaii Employers' Mutual Insurance Company, Employer/Insurance Carrier–Appellee.

Nos. 27604, 27605.
|
July 31, 2008.

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).

Attorneys and Law Firms

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RECKTENWALD, C.J., FOLEY and LEONARD, JJ.

SUMMARY DISPOSITION ORDER

***1** 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.

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.

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(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

***2** 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.

> 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.
>
> 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.
>
> 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.
>
> ....
>
> 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.
>
> ....
>
> 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.
>
> 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.
>
> ....
>
> [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.
>
> 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.
>
> ***3** 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.

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(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 citation omitted).

***4** 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:

> 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

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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.

***5** 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 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]

***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

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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 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.

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.

*7 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

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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.

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

All Citations

118 Hawai'i 352, 190 P.3d 192 (Table), 2008 WL 2932779

Footnotes

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.

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).

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.

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

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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.

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.

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

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