NO. CAAP-13-0003629

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

KIMBERLY A. PASCO, Petitioner-Appellant, v. BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 12-1-3294)

MEMORANDUM OPINION
(By: Fujise, Presiding Judge, Leonard and Reifurth, JJ.)

In this secondary appeal, Petitioner-Appellant Kimberly A. Pasco (Pasco) appeals from the September 17, 2013 "Decision and Order Affirming the Final Decision of Respondent-Appellee Board of Trustees of the Employees' Retirement System of the State of Hawaii [(ERS)] and Dismissing [Pasco's] Appeal" (Decision and Order) and the September 17, 2013 "Final Judgment" entered by the Circuit Court of the First Circuit (Circuit Court)[1] affirming the ERS's December 19, 2012 "Final Decision" denying Pasco's application for service-connected disability retirement. This case arises out of an injury that developed while Pasco worked as a Public Health Educator IV for the Department of Health of the State of Hawaiʻi (DOH).

[1] The Honorable Rhonda A. Nishimura presided.

Pasco appears to argue[2] before this court that the ERS clearly erred when it adopted the April 23, 2012 Hearing Officer's and August 19, 2009 Medical Board's findings and conclusions denying her service-connected disability retirement on the basis that Pasco had failed to carry her burden of proving that her permanent incapacitation was the natural and proximate result of an accident at some definite time and place. Specifically, she argues the ERS erred because (1) it failed to apply Myers v. Bd. of Trs.,[3] in concluding there was no "accident" as defined in Hawaii Administrative Rules (HAR) § 6-22-2 causing Pasco's injury because the injury was caused by overuse over a period of time and therefore did not occur at a specific time and place and (2) the overuse of Pasco's arms in typing long hours and transporting heavy materials did not constitute an "unlooked for mishap or untoward event occurring at some definite time and place" and therefore did not constitute an accident" for the purposes of HAR § 6-22-2.

I.

In Pasco's April 13, 2009 "Application(s) for Disability Retirement; Hybrid Plan" (Application), she requested

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[2] Pasco's Opening Brief is in violation of Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28 in many respects, most notably that it lacks conforming citations to the record insofar as it fails to identify the volume number for its page citations, HRAP Rule 28(b)(3), and lacks a points on appeal section as required by HRAP Rule 28(b)(4). Pasco does include a section entitled "Statement of the Clearly Erroneous Acts" but, as her citations to the record suffer from the same defects as her other citations by not identifying the document to which she is referring, this section also does not substantially satisfy the requirements of HRAP Rule 28(b)(4). "[S]uch noncompliance offers sufficient grounds for the dismissal of the appeal." Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawaiʻi 81, 85, 979 P.2d 1107, 1111 (1999). See also Schefke v. Reliable Collection Agency, Ltd., 96 Hawaiʻi 408, 420, 32 P.3d 52, 64 (2001); Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 228, 909 P.2d 553, 556 (1995). Counsel is cautioned that future violations of the rules may result in sanctions.

Nevertheless, 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," Schefke, 96 Hawaiʻi at 420, 32 P.3d at 64 (internal quotation marks and citation omitted; emphasis added), and in several instances have addressed the merits of an appeal, noncompliance with the appellate rules notwithstanding. See, e.g., Housing Fin. & Dev. Corp., 91 Hawaiʻi at 85-86, 979 P.2d at 1111-12; O'Connor v. Diocese of Honolulu, 77 Hawaiʻi 383, 386, 885 P.2d 361, 364 (1994). Therefore, we will endeavor to do so here, where possible.

[3] 68 Haw. 94, 704 P.2d 902 (1985).

"service-connected disability retirement" and designated April 17, 2007 as the date of the accident and "State of Hawaii/Dept. of Health (Kauai)" as the place of the accident. She described the accident as follows:

> During April 2007 I was required to do extensive and unreasonable amounts of typing up to 7 hrs a day to meet project deadlines. A support staff including a clerk was not given so I injured bi-lateral elbow, arm, hand. Also materials to train DOH/DOE staff were carried inter-island and this contributed to extensive injury.

In June 2009, the DOH responded to the ERS's inquiry regarding Pasco's Application by way of an "Employer's Statement Concerning Service-Connected Disability" form that stated (1) Pasco was on duty at the time of the accident, (2) the accident was not the result of Pasco's own negligence, (3) Pasco appeared to have suffered a disability as "the actual and proximate result of such accident," (4) the disability rendered Pasco incapable of continued employment in her present grade, class or position, and (5) although Pasco had returned to work for short periods, as of June 30, 2008, she was no longer working in her position.[4]

On August 19, 2009, the Medical Board to the ERS (Medical Board) reported on Pasco's Application. Pertinent to the issues presented in the appeal before this court, the Medical Board summarized the various statements by Pasco and DOH

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[4] DOH also noted that as Pasco was appointed to her position for a limited term, her term was not extended due to her inability to do the work.

In its April 25, 2007 Report of Industrial Injury (WC-1) regarding the April 17, 2007 accident, DOH described the accident as follows:

> During the past three weeks, [Pasco's] job has required extensive amounts of typing and computer work of up to seven hours a day to meet project deadlines. In addition, the time spent keyboarding has been greater without a clerk. Working extensively on a laptop from Feb. - April 2007 due to her office not being operational put further strain and stress on her right arm, wrist, and hand.

DOH described the nature of Pasco's injury as follows:

> Starting April 17 [Pasco] noticed following the work day that her right arm, wrist, and hand were fatigued and painful. That night the pain was so severe that she did not sleep. She continued to experience pain, weakness and difficulty in using her right arm and hand to do her work. Physican [sic] has directed her to not use right arm while working.

regarding the accident as described above, summarized the medical records submitted, and concluded,

> The findings of the [Medical Board] are that [Pasco] is permanently incapacitated for the further performance of duty, but that such incapacity is not the natural and proximate result of an accident that occurred while in the actual performance of duty at a specific place and time, 04-17-07, and not as the cumulative result of an occupational hazard as explained above.
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> We recommend that [Pasco] be denied Service-Connected Disability Retirement.

At the December 14, 2009 meeting of the ERS, it adopted the Medical Board's recommendation "to preliminarily deny service-connected disability retirement . . . thereby permitting said individual[] to appeal the Board's adverse decision[.]"

Pasco appealed this decision to the ERS, because

> The decision to deny my service-related disability retirement claim was made without a thorough review of all my medical records pertaining to work injury on 4-17-07. Records from Dr. Shawn O'Driscol, M.D. and Douglas Katz P.A. from the Mayo Clinic, Dr. Jeffrey Wang M.D., and recent records from Dr. Raymond Martinez D.O. were not included. I receiving [sic] the most advanced medical diagnostic and treatment available which proved the work injury on 4-17-07. I am permanently disabled due to work injury as determined by [the Social Security Administration].

A contested case hearing was assigned to Hearing Officer Junell Y.K. Lee, Esq. (Hearing Officer), who conducted the hearing on September 12, 2011 and heard the testimony of Patricia Chinn, M.D. of the Medical Board, Raymond Martinez, M.D. on behalf of Pasco, Pasco, and her husband, Erik Pasco.

On April 23, 2012, pursuant to HAR § 6-23-17, the Hearing Officer issued a Recommended Decision. The Hearing Officer saw the issue in this case as "whether [Pasco's] permanent incapacitation for the further performance of duty as a Public Health Educator IV is or is not the natural and proximate result of an accident occurring while [Pasco] was in the actual performance of duty at some definite time and place, or the cumulative result of some occupational hazard." In the Recommended Decision, the Hearing Officer made the following relevant findings of fact:

> 31. On August 19, 2009, the Medical board certified that [Pasco] was permanently incapacitated for the further performance of duty, but such incapacity was not the natural and proximate result of an accident·that occurred while in the actual performance of duty at a specific place and time (April 17, 2007) and not as the cumulative result of an occupational hazard. The significant incapacitating diagnosis was myofascial pain syndrome of the arms. (Med. Bd. Exh. P).
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> 32. [Pasco] did not have pre-existing injuries of her elbow, arm and hands prior to the alleged accident of April 17, 2007. (Med. Bd. Exh. M at 5).
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> . . . .
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> 39. Overuse of [Pasco's] arm in typing long hours and transporting heavy materials does not constitute an unlooked for mishap or untoward event occurring at some definite time and place.
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> 40. There was no accident as defined under HAR § 6-22-2 that resulted in [Pasco's] permanent incapacity.
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> 41. Typing long hours and transporting heavy materials are not dangers or risks that are unique to [Pasco's] job and do not constitute an occupational hazard.
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> . . . .
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> 44. [Pasco] is permanently incapacitated for the further performance of duty as a Public Health Educator IV.
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> 45. The significant incapacitating diagnosis for [Pasco's] permanent incapacity is complex regional pain syndrome, left upper extremity greater than right upper extremity, and not myofascial pain syndrome.
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> 46. [Pasco's] permanent incapacity is not the natural and proximate result of an accident for purposes of disability retirement under Chapter 88, HRS.

The Hearing Officer made the following conclusions of law:

> 2. [Pasco] has proved by a preponderance of the evidence that she is permanently incapacitated for further performance of duty as a Public Health Educator IV and that her permanent incapacity is not the result of wilful negligence on her part.
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> 3. [Pasco] has proved by a preponderance of the evidence that her significant incapacitating diagnosis is complex regional pain syndrome, not myofascial pain syndrome.
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> 4. [Pasco] has failed to prove by a preponderance of the evidence that an accident, as used in retirement law context, occurred on April 17, 2007.
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> 5. [Pasco] has failed to prove by a preponderance of the evidence that an occupational hazard, as used in retirement law context, existed with respect to her job.

> 6. [Pasco] has failed to prove by a preponderance of the evidence that her permanent incapacity for further performance of duty was (a) the natural and proximate result of an accident which occurred at some definite time and place, or (b) the cumulative result of an occupational hazard, as required by HRS § 88-336.
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> 7. [Pasco] is not entitled to service-connected disability retirement.

On June 22, 2012, the ERS issued a Proposed Decision that adopted the Recommended Decision.

On July 6, 2012, Pasco filed her Exceptions to Proposed Decision. Pasco's exceptions were limited to contending that she had met her burden of proving by a preponderance of the evidence that her permanent incapacity was the result of an accident occurring while in the actual performance of duty at some definite time and place.

On December 19, 2012, the ERS issued a Final Decision that affirmed its Proposed Decision, adopted the Recommended Decision, and denied Pasco's application for service-connected disability retirement.

On December 26, 2012, Pasco filed a timely appeal from ERS's December 19, 2012 Final Decision in the Circuit Court and on September 17, 2013, the Circuit Court issued a "Decision and Order Affirming the Final Decision of [ERS] and Dismissing [Pasco's] Appeal" (Decision and Order) and a Final Judgment. The Circuit Court's Decision and Order found and concluded, in relevant part, the following:

> 4. As part of the Final Decision, [ERS] adopted [Hearing Officer's] Recommended Decision, dated April 23, 2012, including the Hearing Officer's findings and conclusions that [Pasco] had failed to prove by a preponderance of the evidence that an accident, as used in the retirement law context, occurred on April 17, 2007, and that [Pasco] had failed to prove by a preponderance of the evidence that her permanent incapacity for the further performance of duty was the natural and proximate cause [sic] of an accident which occurred at some definite time and place, as required by HRS § 88-336.
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> . . . .
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> 12. Whether an "accident" occurred within the meaning of HRS § 88-336 and HAR § 6-22-2 is a fact intensive inquiry, including determining when and how [Pasco's] injury or permanent incapacity occurred.

13. [Pasco's] descriptions in her applications for service-connected disability retirement and workers compensation benefits and her medical records regarding when and how her injury and permanent incapacity occurred provide reliable, probative, substantial, and persuasive evidence to support the Final Decision.

A. In her application for service-connected disability retirement, [Pasco] described her alleged accident as:

> During April 2007 I was required to do extensive and unreasonable amounts of typing up to 7 hrs a day to meet project deadlines. A support staff including a clerk was not given so I injured bi-lateral elbow, arm, hand. Also materials to train DOH/DOE staff were carried inter-island and this contributed to extensive injury.

See Record on Appeal ("ROA") 6.

B. In the WC-l Employer's Report of Industrial Injury, dated April 25, 2007, [Pasco's] alleged accident was described as:

> During the past three weeks, [Pasco's] job has required extensive amounts of typing and computer work of up to seven hours a day to meet project deadlines. In addition, the time spent keyboarding has been greater without a clerk. Working extensively on a laptop from Feb.-April 2007 due to her office not being operational put further strain and stress on her right arm, wrist, and hand.

See ROA 275.

C. In a Kauai Hand Therapy Daily Note regarding [Pasco], dated 5/14/2007, it states:

> Patient reports elbow was a cumulative trauma due to typing at work for 7 hours straight 5 days per week.

See ROA 282.

D. In a progress note, dated August 6, 2007, Surendra Rao, M.D., reports:

> Thank you very much for asking me to consult on [Pasco], a 36 yr old female delightful patient for the chief complaints of persistent pain in both elbows with repetitive stress injury
> . . . .

See ROA 284.

. . . .

15. The use of the words "repetitive stress," "cumulative trauma," and extensive or excessive typing or keyboarding, whether over weeks or months, to describe the cause of [Pasco's] injury or permanent incapacity does not describe or constitute an "accident" within the meaning of HRS § 88-336 and HAR § 6-22-2, nor do they describe or constitute an "accident occurring while in the actual

> performance of duty at some definite time and place" within the meaning of HRS § 88-336.
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> 16. [ERS's] findings that [Pasco] had failed to prove by a preponderance of the evidence that an accident, as used in the retirement law context, occurred on April 17, 2007, and that [Pasco] had failed to prove by a preponderance of evidence that her permanent incapacity for the further performance of duty was the natural and proximate cause [sic] of an accident which occurred at some definite time and place, as required by HRS § 88-336, were not clearly erroneous, not arbitrary or capricious, and not an abuse of discretion.
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> 17. [Pasco] has not claimed nor shown that [ERS's] Final Decision is affected by any error of law.

Pasco timely appealed from the Circuit Court's Final Judgment.

II.

As best as we can ascertain, Pasco is arguing it was error for the Hearing Officer to rule and for the Circuit Court to affirm, that a "repetitive stress injury over a period of time leading to permanent disability after [the date of the accident]" was not an "accident" which is defined[5] as "an unlooked for mishap or untoward event occurring at some definite time and place."

In Panado v. Bd. of Trs. Emps.' Ret. Sys., 134 Hawaiʻi 1, 332 P.3d 144 (2014), the Hawaiʻi Supreme Court considered whether the ERS correctly construed the "some definite time and place" requirement of HRS § 88-79 to deny Panado's application for disability retirement benefits. Relying on the plain language of the statute there, as supported by the dictionary

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[5] Pasco cites to "HRS Section 88-77(a)" for the statutory definition of "accident." However, HRS § 88-77 (1985) was repealed in 1998. See Act 151 § 13, 1998 Session Laws of Hawaii at 545. For Class H public employees, this provision was replaced by HRS § 88-336 (2004). Neither provision contains a definition of the term "accident."

We presume Pasco refers to the definition contained in HAR § 6-22-2, which provides,

> "Accident" means an unlooked for mishap or untoward event which is not expected or designed, occurring while in the actual performance of duty at some definite time and place.

Hawaii Administrative Rules, Title 6, Department of Budget and Finance, Employees' Retirement System, Chapter 22, Certification and Findings of the Medical Board, which may be found at http://budget.hawaii.gov/wp-content/uploads/2012/11/Chapter-22.pdf (last accessed June 4, 2016).

definition of "definite," the supreme court rejected the notion that the exact moment of injury need be identified and concluded that "Panado satisfied the provision's requirement that an accident occurred 'while in the actual performance of duty at some definite time and place' by establishing that she was injured during her October 8-9, 2004 work shift." Id. at 13, 332 P.3d at 156. The supreme court also examined the legislative history of HRS § 88-79 and concluded that the legislature "was concerned with whether an accident occurred during work, not with whether the employee could pinpoint the exact moment of injury." Id. at 14, 332 P.3d at 157. Finally, the supreme court identified other reasons for rejecting the restrictive reading of the statute by the ERS, including that such an interpretation "unreasonably excludes those service-connected disabilities in which symptoms do not manifest at the exact moment of the accident." Id.

Turning to the circumstances underlying Pasco's claim, and in light of the Hawaiʻi Supreme Court's interpretation of the analogous and identical language of HRS § 88-79, we conclude that the Hearing Officer and the Circuit Court erred by construing the "definite time and place" language in HRS § 88-336 to disqualify Pasco because her injury did not occur in one particular incident or on one particular date. Pasco described her injury as resulting from extensive keyboarding that was required at her job as the cause of her disability. She could point to the period of time, "April 2007" when this activity intensified, leading up to the point, on April 17, 2007, that the pain from her injury was so severe that it caused her to seek medical attention. Her employer, DOH, did not contest these assertions. Thus, Pasco was able to identify a "definite" time and place of her work-related injury.

III.

Therefore, we vacate the September 17, 2013 "Decision and Order Affirming the Final Decision of Respondent-Appellee Board of Trustees of the Employees' Retirement System of the State of Hawaii and Dismissing Petitioner-Appellant Kimberly

Pasco's Appeal" and the September 17, 2013 "Final Judgment" and remand this case to the Circuit Court of the First Circuit with directions to vacate the Board of Directors of the Employees' Retirement System's denial of disability retirement to Pasco and for further proceedings consistent with this memorandum opinion.

DATED: Honolulu, Hawaiʻi, June 17, 2016

On the briefs:

Edmund L. Lee, Jr.,
for Petitioner-Appellant.

Presiding Judge

Patricia Ohara and
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Associate Judge

Associate Judge