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Supreme Court
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SCWC-16-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAII

LARRY BOSWORTH,
Petitioner/Claimant-Appellant,

vs.

FOSS MARITIME COMPANY,
Respondent/Employer-Appellee,

and

ACCLAIM RISK MANAGEMENT,
Respondent/Insurance Carrier-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000315; AB 2014-352; DCD NO. 2-14-03204)

DISSENT
(By: Nakayama, J.)

I dissent. Petitioner/claimant-appellant Larry Bosworth did not timely pay the required court filing and docketing fees or timely file a proper motion for leave to proceed on appeal in forma pauperis. Pursuant to the Hawai'i Rules of Appellate Procedure (HRAP), which permits an appeal to be dismissed if the appellant fails to either pay the required court fees or obtain an order allowing the appellant to proceed

in forma pauperis, the Intermediate Court of Appeals (ICA) did not gravely err in dismissing Bosworth's appeal.

The following facts are taken from the record:

(1) On April 1, 2016, Bosworth filed in the Labor and Industrial Relations Appeals Board (the Board) a notice of appeal, and a motion for leave to proceed on appeal in forma pauperis. On both filings, Bosworth provided a Hawai'i Island address as part of his contact information.

(2) On April 13, 2016, the Board denied without prejudice Bosworth's motion for leave to proceed on appeal in forma pauperis, explaining that the affidavit filed by Bosworth was not in conformance with HRAP Rule 24.

(3) On June 6, 2016, the appellate clerk mailed to Bosworth a notice of default of record on appeal (notice of default), notifying Bosworth that: the filing and docketing fees had not been paid, and that the record could not be prepared and filed without a payment of the fees or an order allowing Bosworth to proceed in forma pauperis; the appellate court would be notified of the default on June 16, 2016, and; at that time the court could dismiss the appeal pursuant to HRAP Rule 11(c)(2).

(4) On June 14, 2016, the notice of default was returned to the appellate clerk's office with a label from the post office stating: "Return to sender/Unclaimed/Unable to forward."

(5) Bosworth did not pay the required fees or file another motion for leave to proceed on appeal in forma pauperis.

(6) On July 6, 2016, the ICA entered an order dismissing Bosworth's appeal. This order, mailed to the same Hawai'i Island address as the notice of default, was not returned to the appellate clerk's office

(7) On July 19, 2016, Bosworth filed in the Hawai'i Supreme Court an application for writ of certiorari and a motion for leave to proceed in forma pauperis. On these filings, Bosworth provided an O'ahu address as part of his contact information. In his application for writ of certiorari, Bosworth explained that he had received the order dismissing his appeal, but not the notice of default.

HRAP Rules 11(b) (2),¹ and (c) (2)² permit an appeal to be dismissed where the appellant has failed to pay the required fees or obtain an order allowing the appellant to proceed in

¹ HRAP Rule 11(b) (2) provides in full:

If the notice of appeal is filed without payment of the required fees and the appellant has not obtained an order allowing the appellant to proceed in forma pauperis, the clerk of the court shall not be required to prepare the record on appeal until the required fees are received or an order allowing the party to proceed in forma pauperis is obtained.

² HRAP Rule 11(c) (2) provides in full:

When the index to the record on appeal is not filed within the time required, the appellate clerk shall give notice to the appellant that the matter will be called to the attention of the appellate court on a day certain for such action as the appellate court deems proper, including dismissal of the appeal.

forma pauperis. While it appears that Bosworth may have moved after filing his initial motion for leave to proceed in forma pauperis, and was thus unaware of the notice of default, Bosworth had an obligation to notify the court of his change in address. See HRAP Rule 25(f). Because Bosworth failed to notify the court of a change in address, or fulfill the requirements of HRAP Rule 11(b)(2), I would affirm the ICA's dismissal of his appeal.

DATED: Honolulu, Hawai'i, September 2, 2016.

/s/ Paula A. Nakayama

