DISSENTING OPINION OF REIFURTH, J.

I agree with the majority's decision not to overturn *Jochola*'s holding that: "[s]imply because an injury returns to pre-work injury status does not necessarily mean that the duty to pay compensation ends." *Jochola v. Maui Econ. Opportunity, Inc. et al.*, Case No. AB 2005-206(M) (7-03-00739) (Haw. LIR App. Bd. Sept. 25, 2008). However, I disagree with the majority in several important respects. Therefore, I respectfully dissent.

First, I disagree that "[t]he LIRAB erred insofar as it held that a superceding or intervening event is *required* before an employer's liability under HRS § 386-21 terminates." (Emphasis added.) In my view, the majority misconstrues the Labor and Industrial Relations Appeals Board (the "Board") holding, and rejects an essential component of conclusion-of-law language that the Board regularly uses in this type of workers' compensation case.

Second, I disagree with the majority's assertion that any future treatment Watanabe needs will be for the purpose of treating her pre-existing condition. I believe, and apparently the Board believes, this to be a fact-specific, medical determination that should not be made until Watanabe submits any future claim. Indeed, Foodland offers no argument as to what difference this refusal-to-terminate conclusion of law ("COL") makes or why, therefore, we should not defer to the agency, which has made no findings of fact ("FOFs") that specifically address the claimant's need for future treatment. In fact, the only statement the Board *has* made regarding a possible need for future treatment arising out of Watanabe's compensable work injury is its statement in COL 1 that such treatment "may be warranted" in the future.

Irrespective of the decision here, Watanabe will be able to secure further compensation if and only if she establishes at the time of any subsequent claim that such treatment is "reasonably needed." *See Kuaimoku v. State, Dep't of Educ.-Kauai*, No. CAAP-11-0000616, 2014 WL 2921835, at *5 (Haw. Ct. App. June 27, 2014), *cert denied*, 2014 WL 4811494 (Haw. Sept. 29, 2014). Thus, this appeal appears to be about semantics, that

is, whether and when an employer/insurance carrier will be able to characterize the claim as "open" or "closed." Respectfully, I observe no legal basis upon which we may override the Board's decision, which I would affirm.

(1)(a) With all due respect, the majority's characterization of *Jochola*'s rule as a "test based *solely* on the existence of a 'terminating event'" is imprecise. (Emphasis added.) The Board has not determined that an employer's liability will never terminate in the absence of a qualifying event. Rather, COL 1, quoting *Jochola*, states that:

> [a]bsent a showing of an intervening or superseding event or cause . . , fraud . . , or other appropriate terminating event, *there is a likelihood that* such obligation to provide medical care, services, and supplies *will not terminate* . . . . However, a claimant's entitlement to such care, services, and supplies is dependent upon all other requirements of Chapter 386, HRS and the Hawaii Workers' Compensation Medical Fee Schedule being met, (e.g., such care, services, and supplies, *so long as reasonably needed* and as the nature of the injury requires, and appropriately requested, reported, authorized and billed).

From this, it is clear that the Board has not stated that an employer's liability will never terminate in the absence of a qualifying event. Therefore, any concern that "the express requirements of HRS § 386-21(a) would be violated" by adherence to *Jochola*'s rule is unwarranted.

Moreover, COL 1 expressly subjects the Board's determination that future liability may not yet be extinguished for Watanabe's March 11, 2010 work injury to all parts of the Decision & Order that precede it: "[Foodland] may be liable for, and [Watanabe] may be entitled to, medical care, services and supplies after May 3, 2010, for her low back injury *consistent with and subject to the foregoing*." (Emphasis added) As such, COL 1 does nothing to negate Watanabe's duty to demonstrate that a particular treatment is still "reasonably needed" in order to be successfully compensated for any future claims she might bring, should the need for such future treatment arise after the date of this disposition. *Perkins v. Puna Plantation Haw., Ltd.*, No. CAAP-12-0000563, 2013 WL 5019431, at *3 (Haw. App. Sept. 13, 2013) (construing HRS §§ 386-21 and 386-89(c) *in pari materia* and holding that § 386-89(c) provides the appropriate procedure for

injured workers to re-open their case if a need for treatment manifests itself at a future time).

Furthermore, I am unaware of any authority suggesting that HRS § 386-21(a) imposes a duty on the Board to expressly "terminate" an employer's liability when a workers' compensation claimant fails to make the requisite showing. *See, e.g., Nadine L. (Esmeralda) Cortez v. Alu Like, Inc. & First Ins. Co. of Haw.*, Case No. AB 93-518(WH) (9-90-02403), 1995 WL 1942798, at *3 (Haw. LIR App. Bd. 1995) (crediting three doctors' opinions "that the injury was a temporary aggravation of a pre-existing low back condition that reverted to pre-injury status within three to six months of the injury[,]" but nonetheless concluding that the Director's termination of the employer's liability for medical treatment more than one year after the condition reverted to pre-injury status was proper). In fact, this court has held that "an *award of future treatment* as part of the original claim *cannot be affirmed without* evidence in the record supporting a determination that future treatment will be 'reasonably needed' to relieve the claimant from the effects of the work injury." *Kuaimoku*, 2014 WL 2921835, at *5 (emphasis added) (citing *Barnes v. Workers' Comp. Appeals Bd.*, 2 P.3d 1180, 1185 (Cal. 2000); *Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705, 711-12 (Colo. 1988); *Foote v. O'Neill Packing*, 632 N.W.2d 313, 321 (Neb. 2001)). Yet here, there has been no award of future treatment for the Board to affirm or deny.

Instead, the Board has merely *refused to terminate* Foodland's *liability* for the effects of Watanabe's compensable work injury, holding that "[Foodland] may be liable for, and [Watanabe] may be entitled to, medical care, services, and supplies after May 3, 2010, for her low back injury consistent with and subject to the foregoing." If medical treatment becomes necessary and Watanabe files a claim for further medical benefits arising out of the work injury, *then* the Director will issue a decision regarding reasonableness of the treatment.

Thus, although "it is not clear *why* an employer would remain liable for future medical care" when credible physicians have found that the injury has already resolved to a baseline,

Alayon v. Urban Mgmt. Corp., No. CAAP-11-0000676, 2014 WL 7451297, at *8 (Haw. Ct. App. Dec. 31, 2014) (emphasis added) (making the aforementioned observation, yet declining to rule on its related COL for procedural reasons because it determined that "[t]he nature and extent of said injury . . . has yet to be determined by the Director"),[1/] I am unconvinced that the Board's reading of workers' compensation statutes "contravenes the legislature's manifest purpose" and therefore justifies our departure from the ordinary practice of affording "deference . . . to decisions of administrative agencies acting within the realm of their expertise." *Coon v. City & Cnty. of Honolulu*, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (quoting *In re Water Permit Applications*, 94 Hawai'i 97, 145, 9 p.3d 409, 457 (2000) and *Mahaulepu v. Land Use Comm'n*, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990)) (internal quotation marks and brackets omitted); *Kuaimoku*, 2014 WL 2921835, at *4 ("'[A] presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'" (quoting *Tam v. Kaiser Permanente*, 94 Hawai'i 487, 490, 17 P.3d 219, 222 (2001))).

Accordingly, I would hold that an employer's liability under HRS § 386-21 need not terminate simply because an injured worker fails to demonstrate that he or she is either presently symptomatic or undergoing treatment, and I would not require the Board to expressly terminate liability in the absence of such a showing.

(2) Foodland's second point of error contends that the Board failed to properly apply the law when it concluded that Foodland may be liable for, and Watanabe entitled to, medical

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[1/] Unlike the employer in *Alayon*, Foodland asks this court to foreclose *all possibility* of Watanabe's future recovery for the March 11, 2010 work injury. Yet Foodland has failed to show that it would be theoretically impossible for Watanabe to demonstrate, at some future time, that further treatment will be "reasonably necessary." Thus, it is unclear at this time whether some future treatment will be related to the aggravation of Watanabe's pre-existing condition. Accordingly, I would defer to the Board and refrain from foreclosing all possibility of her future recovery under this claim.

care, services and supplies after May 3, 2010.

(2)(a) The majority focuses on the Board's FOF 24 and the fact that the Board did not make a "finding that any future treatment would be reasonably necessary for the March 11, 2010 work injury[,]" as support for its disposition. In essence, then, the majority interprets the Decision & Order's omission of such a finding as the Board's affirmative statement that Watanabe will not *ever* propose a hypothetical future treatment plan that is "reasonably necessary" within the meaning of HRS § 386-21(a) to treat the effects of Watanabe's March 11, 2010 work injury. However, if this had been the Board's intent, then the Board likely would have made an express finding to that effect. Moreover, if this had been the Board's intent, then the Board likely would not have issued a COL explicitly stating that Watanabe "may" be entitled to compensation under some hypothetical future treatment plan.

I would not interpret the Board's lack of "reasonably necessary" findings as a statement that no reasonably necessary treatment can ever manifest itself. Rather, I view the Board's practice of issuing such findings, when appropriate, is an indication that the Board would have done the same here if it had intended the majority's reading to result. For example, in *Delaney v. Immanual Enterprises, Ltd.*, although the Board found that the claimant's work injury "resulted in a temporary aggravation of [his] preexisting low back condition," the Board also specifically determined that Delaney "*did not require further medical treatment*" beyond the date specified by the Director in his earlier decision. No. 29384, 2011 WL 5561154, at *3 (Haw. Ct. App. Nov. 15, 2011) (emphasis added). Here, similar to *Delaney*, the Board "credit[ed] the opinions of Drs. Kienitz, Brewer, and Scoggin that [Watanabe]'s March 11, 2010 work injury resulted in a temporary aggravation of her chronic low back pain, which resolved by May 3, 2010." Unlike *Delaney*, however, the Board made no blanket statements regarding Watanabe's need for future treatment. Rather, it denied the specific treatment plan before it, which was submitted by Watanabe's chiropractor, Dr. Alejandro Lazo, and in doing so explicitly left open the

possibility "that [Foodland] *may be liable for*, and [Watanabe] entitled to, medical care, services and supplies after May 3, 2010." (Emphasis added.)

(2)(b) The majority also supports its disposition by analogizing the instant case to *Perkins*, 2013 WL 5019431. There, we concluded that the Board has the authority to order an employer to pay for future medical treatment, even without a manifestation of symptoms or a specific course of treatment in dispute at the time of the decision, but we reversed the Board upon determining that there was "no evidence in the record that future treatment was 'reasonably needed.'" *Id.* at *3, *4. Here, however, the facts justify a different outcome.

For example, it is true that Drs. Kienitz, Scoggin and Brewer opined that "no further treatment was indicated" beyond a particular date to treat Watanabe's March 11, 2010 work injury, but, as the majority acknowledges, there is also evidence in the record indicating that Watanabe's overall prognosis is poor. No such evidence existed in *Perkins*. In fact, after the *Perkins* claimant underwent surgery to treat his work injury he admitted to the Board that "his condition [had] improved." *Id.* at *4. Watanabe has made no similar statements.

Further, the Board in *Perkins* determined that the claimant was no longer eligible for temporary disability benefits. *Id.* This determination related to potential future claims and lent itself to the inference that no future claims could ever be reasonably needed for the claimant's injury. *Id.* (recognizing that, "[a]lthough the right to treatment is distinct from the right to disability benefits . . ., the [Board's] findings support our conclusion that there was no showing that the temporary exacerbation of Claimant's pre-existing condition resulted in the need for post-surgery future medical treatment"); *see also Igawa v. Koa House Rest.*, 97 Hawai'i 402, 406, 38 P.3d 570, 574 (2001) (explaining that appellate courts must defer to an agency's expertise and experience and should not substitute their own judgment for that of the agency). The Board, however, made no similar findings here.

The *Jochola* rule states that "[s]imply because an

injury returns to pre-work injury status does not necessarily mean that the duty to pay compensation ends." AB 2005-206(M), at *11. Here, Watanabe's doctors appear to have based their opinions about her need for future treatment on the fact that Watanabe's March 11, 2010 work injury returned to her pre-injury status by May 3, 2010; as such, those opinions should not be read to foreclose the possibility of Foodland's future duty to pay.

(2)(c) Finally, even if I were to accept the rule adopted by the majority that "whether future medical treatment is 'reasonably necessary' is the proper test for the termination of an employer's liability under HRS § 386-21(a)", the proper disposition of the case, I believe, would be to remand to the Board.

As previously noted, the Board did not address the question of whether future treatment is "reasonably necessary" in its FOFs. Accordingly, the majority is correct: "[t]here is no finding that any future treatment would be reasonably necessary for the March 11, 2010 work injury." However, it is also true that the Decision & Order contains no finding that any future treatment would *not be reasonably necessary* for the March 11, 2010 work injury. *Cf. Igawa*, 97 Hawai'i at 406, 38 P.3d at 574. The Board has included such an express statement in its FOFs in other cases. *E.g., Delaney*, 2011 WL 5561154, at *3; *cf. Perkins*, 2013 WL 5019431, at *4 (finding claimant no longer eligible for total temporary disability benefits).

Rather than read an erroneous finding of fact into the Board's Decision & Order, the Board should be permitted to determine whether to enter such a finding under HRS § 386-21(a), aware now that the failure to do so requires a conclusion that the claimant's rights are otherwise terminated. *See Yarnell v. City Roofing Inc.*, 72 Haw. 272, 276, 813 P.2d 1386, 1389 (1991) ("We agree with petitioner that the ICA exceeded its scope of review on this portion of the odd-lot test, by making its own determination. . . . Since there was no factual finding on this portion of the odd-lot test to review, the case should have been rem[anded to the Board] for further proceedings."); *cf. Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re Kekauoha-Alisa)*,

674 F.3d 1083, 1093 (9th Cir. 2012) ("[R]ather than reading an erroneous finding of causation into the bankruptcy court's decision, we follow our ordinary procedure when a necessary factual finding is absent, and remand the case to the bankruptcy court to make the proper requisite findings of fact under HRS § 480-13. . . . This is the appropriate course because the factual record here may not be complete[.]" *In re Kekauoha-Alisa*, 674 F.3d at 1093 (citation omitted). Although the Decision & Order discusses Watanabe's trial testimony in FOF 10, for example, Foodland's Opening Brief does not mention any trial or hearing during which Watanabe testified, and the voluminous record on appeal contains no transcript. As such, if tasked with determining whether *any* future treatment *could possibly be* "reasonably needed," the Board might well draw on facts before it below that were not provided to this court on appeal, and which are therefore absent from our record on review.

Based on the foregoing, I would affirm the Labor and Industrial Relations Appeals Board's February 16, 2012 Decision and Order.

Lawrence M. Reifurth