IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KIMBERLY A. PASCO,
Respondent/Petitioner-Appellant,

vs.

BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM,
STATE OF HAWAIʻI,
Petitioner/Respondent-Appellee.

SCWC-13-0003629

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003629; CIV. NO. 12-1-3294)

MAY 22, 2018

DISSENTING OPINION BY NAKAYAMA J.,
IN WHICH RECKTENWALD, C.J., JOINS

The Employees' Retirement System (ERS) provides service-connected disability retirement to members of the ERS if they can demonstrate that they were permanently incapacitated for duty due to an "accident occurring while in the actual performance of duty at some definite time and place." See

Hawaiʻi Revised Statutes (HRS) § 88-336(a) (Supp. 2007).[1] After examining the language of HRS § 88-336(a), the Majority holds that Kimberly A. Pasco (Pasco), an ERS member, suffered such an "accident" when she manifested pain on April 17, 2007 from injuries to her elbow, arm, and hand due to overtyping at work. Majority at 2.

I respectfully disagree. I believe that the carefully worded language of the statute, our case law, and the facts of this case indicate that Pasco's manifestation of pain was not an "accident" within the meaning of the disability retirement statute. This leads me to conclude that Pasco cannot meet the statutory requirements for service-connected disability retirement.

I. BACKGROUND

On April 13, 2009, Pasco, a public health educator employed by the State Department of Health (DOH), submitted an application for service-connected disability retirement. In her application, she claimed that during April 2007, she injured her

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[1] HRS § 88-336(a) (Supp. 2007) provides in relevant part:

> (a) Upon application of a class H member . . . any class H member who has been permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, or as the cumulative result of some occupational hazard, through no wilful negligence of the member's part, may be retired by the board for service-connected disability[.]

(Emphasis added.)

elbow, arm, and hand due to "extensive and unreasonable amounts of typing up to 7 hours a day to meet project deadlines." Similarly, Pasco also claimed that "materials to train DOH/[Department of Education] staff were carried inter-island and this contributed to extensive injury." On December 29, 2009, the Board of Trustees of the Employees' Retirement System (ERS Board) preliminarily denied Pasco's application. The ERS Board received Pasco's statement of appeal on February 16, 2010, and a hearing officer was assigned to her case on March 2, 2010.

A hearing took place on September 12, 2011. At the hearing, Pasco testified that she was provided workers' compensation benefits for about a year after her injury in April 2007. Several subsequent findings of the hearing officer were either stipulated to or undisputed by both parties. First, the parties stipulated that Pasco was permanently incapacitated for further duty as a public health educator, and that her incapacitation was not the result of wilful negligence on her part. Second, the parties do not dispute the hearing officer's determination that Pasco had proven by a preponderance of the evidence that her permanent incapacitation was medial epicondylitis (an overuse injury) which led to complex regional pain syndrome (CRPS). Third, the parties do not dispute the hearing officer's conclusion that "it [was] credible that the

unnatural positioning of elbows asserted by [Pasco] while typing for extended periods of time could result in elbow pain."

However, the hearing officer also concluded that even if Pasco's medial epicondylitis permanently incapacitated her, Pasco "would not be entitled to service-connected disability retirement because her incapacity was not the result of an 'accident' or 'occupational hazard.'" Specifically, the hearing officer determined that "[o]veruse 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," and therefore, "[t]here was no accident as defined under [Hawaiʻi Administrative Rules (HAR)] § 6-22-2[2] that resulted in [Pasco's] injury." The hearing officer then recommended that the ERS Board deny service-connected retirement benefits to Pasco. The ERS Board adopted the hearing officer's recommended decision and rendered a final decision on December 19, 2012.

Pasco appealed the ERS Board's decision to the Circuit Court of the First Circuit (circuit court), where she argued that the ERS Board erred when it adopted the hearing officer's recommended findings of fact and conclusions of law determining

[2] HAR § 6-22-2 (effective 1989) defines "accident" as "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."

that she failed to prove "that her permanent incapacitation was the natural and proximate result of an accident at some definite time and place under HRS Section 88-336."[3] In a written decision and order filed on September 17, 2013, the circuit court affirmed the ERS Board's decision, but on June 17, 2016, the Intermediate Court of Appeals (ICA) vacated the circuit court's decision.

II. DISCUSSION

As discussed above, several determinations made by the hearing officer are undisputed or stipulated to. For purposes of evaluating Pasco's claim under HRS § 88-336(a), it is undisputed that Pasco was permanently incapacitated for duty as a public health educator and that her permanent incapacity was not the result of wilful negligence on her part. Furthermore, it appears that the hearing officer also concluded that Pasco's overtyping at work was the actual and proximate cause of her incapacity.[4]

The remaining issue is whether Pasco "suffered an

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[3] Pasco did not argue on appeal that the ERS Board erred when it determined that she failed to prove that she suffered an "occupational hazard" within the meaning of HRS § 88-336.

[4] The ERS Board argues that "Pasco failed to prove by a preponderance of the evidence that her permanent incapacity was the 'natural and proximate result' of her claimed accident of April 17, 2017." While the hearing officer concluded that "[t]here was no accident . . . that resulted in [Pasco's] permanent incapacity," the hearing officer did find credible that Pasco's "typing for extended periods of time could result in elbow pain." This suggests that the hearing officer concluded that typing at work was the natural and proximate cause of her incapacity -- CRPS.

Even if it can be argued that the hearing officer never made an explicit finding that overtyping caused Pasco's CRPS, because Pasco did not suffer an "accident" within the meaning of HRS § 88-336(a), see infra, I need not reach the causation issue to affirm the decision of the circuit court.

'accident occurring while in the actual performance of duty at some definite time and place.'" Majority at 16-17. This issue involves two different but interrelated inquiries. First, Pasco must prove that her injury was a result of an "accident" as we have previously construed that term under HRS § 88-336(a). Second, Pasco must also demonstrate that the accident occurred at a "definite time and place."

On both of these inquiries, my conclusion differs from that of the Majority. I believe that the plain language of HRS § 88-336(a) and our precedent indicate that Pasco's injury was not an "accident," because it was not an "unlooked for mishap or untoward event which is not expected or designed," and did not occur at "some definite time and place." Therefore, I conclude that Pasco is ineligible for service-connected disability retirement under HRS § 88-336(a).

A. Pasco's injury was not the result of "an unlooked for mishap or untoward event which is not expected or designed."

On February 1, 1983, this court decided two cases involving whether a claimant suffered an "accident" within the meaning of the disability retirement statute.[5] See Kikuta v. Bd.

[5] At that time, the applicable disability retirement statute was HRS § 88-77(a), which provided substantially similar language to the present HRS § 88-336. It read:

> [A]ny member who has been permanently incapacitated as the natural and proximate result of an accident occurring while

(continued...)

of Trs. of Emps.' Ret. Sys., 66 Haw. 111, 657 P.2d 1030 (1983); Lopez v. Bd. of Trs., Emps.' Ret. Sys., 66 Haw. 127, 657 P.2d 1040 (1983). In doing so, we applied the definition of "accident" from the workers' compensation context to the disability retirement statute, and defined "accident" as "an unlooked for and untoward event which is not expected or designed." See Kikuta, 66 Haw. at 114, 657 P.2d at 1033; Lopez, 66 Haw. at 130, 657 P.2d at 1043.[6]

On the merits of the claimants' cases, this court then concluded that the claimant in Kikuta suffered an "accident" within the meaning of the disability retirement statute, while the claimant in Lopez did not. In Kikuta, the decedent was assaulted at work. 66 Haw. at 112, 657 P.2d at 1032. We concluded that the decedent was injured in an accident because the assault was "unexpected and without design on [the decedent's] part," and reversed the ERS Board's decision to deny his beneficiaries disability retirement benefits. Id. at 114-17, 657 P.2d at 1033-35. On the other hand, in Lopez, this court

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[5](...continued)

> in the actual performance of duty at some definite time and place, or as the cumulative result of some occupational hazard, through no wilful negligence on his part, may be retired by the board of trustees for service-connected total disability.

HRS § 88-77(a) (1976).

[6] Similarly, the HAR later adopted this definition. See supra note 2.

determined that injuries resulting from "work pressures and stresses over a period time" were not unexpected or unforeseen. 66 Haw. at 131, 657 P.2d at 1043. Therefore, this court affirmed the ERS Board's determination that Lopez's mental illness did not constitute an "accident" and its decision denying him disability retirement. Id. at 130-31, 657 P.2d at 1043.

In a later case involving a claimant's application for disability retirement due to a back injury, this court also concluded that the claimant suffered an "accident" within the meaning of the disability retirement statute. Myers v. Bd. of Trs. of Emps.' Ret. Syst., 68 Haw. 94, 704 P.2d 902 (1985). In Myers, there was no dispute that the claimant was injured when he attempted to set down a "half-full one-hundred cup coffee maker weighing approximately thirty-five pounds." 68 Haw. at 95, 704 P.2d at 903. "At that point, [the claimant] heard a snap in his back. He experienced sharp pains across his left lower back into the hollow of his buttocks, and shortly began experiencing a pulsating pain radiating down his right leg." Id. On these facts, we affirmed the circuit court's decision reversing the ERS's denial of the claimant's application, because that "incident was, beyond question, an unlooked for mishap which was not expected or designed[.]" Id. at 96, 704 P.2d at 904.

These decisions demonstrate that an "unlooked for

mishap or untoward event," i.e., an accident, can include an injury sustained from an unexpected and unprovoked assault (Kikuta) or the lifting and carrying of a heavy item (Myers).[7] In contrast, a claimant's incapacity resulting from stress or job pressures that developed over a long period of time cannot be an "accident" because "there [is] no unexpected event or unforeseen occurrence which result[s] in the . . . incapacity." Lopez, 66 Haw. at 131, 657 P.2d at 1043.

The Majority believes that "[s]imilar to the injury in Kikuta, Pasco's pain, which manifested on April 17, 2007, was not 'expected or designed.'" Majority at 20. Therefore, the Majority concludes that "the onset of Pasco's medial epicondylitis . . . was an unexpected event constituting an 'accident.'" Majority at 24. However, as I read the record, it is far from clear that Pasco could not have expected that she would develop a severe elbow, arm, and hand injury from overtyping at work.

In fact, the record in this case contains multiple instances where Pasco herself reported that new work conditions put tremendous stress on her elbow, arm, and hand months before

[7] Notably, these cases do not explicitly engage in the second part of the analysis -- whether the accident took place at a "definite time and place" as HRS § 88-336 requires. But there was no reason for this court to engage in that particular analysis because the accidents that occurred in those cases clearly resulted from single acts.

she manifested pain on April 17, 2007. First, while Pasco's application for disability retirement described her accident as occurring "[d]uring [the month of] April 2007 [when she] was required to do extensive and unreasonable amounts of typing up to 7 hours a day," in Pasco's clinical documents, she reported experiencing elbow pain much earlier:

> [Pasco] reports that [her elbow pain] essentially started at work back in December 2006 when she took on a new job piloting and designing a very expensive program for the islands of Hawaii in her field of nutrition. She was doing an extensive amount of typing and carrying materials from place to place and on December 6, 2006, she started having significant elbow pain on her right side.

Second, Pasco stated in a written "work description and account of injuries" report that her job responsibilities became considerably more difficult in February 2007, when she was required to plan nutrition projects for multiple islands. At that time, Pasco noted that she "attempted again to hire staff," but no help was given. Pasco also stated that she did not have a permanent office, making it impossible to have an ergonomic setup.

Third, Pasco's employer stated that without a clerk, Pasco was forced to spend more time keyboarding, and that "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."

Fourth, Pasco further reported that in March 2007, her desk setup was "not ideal" because the L-shaped desk was uneven, and the right portion sat several inches lower than the rest of the desk. Therefore, Pasco stated that when she typed, her right elbow was on the lower part of the desk, while presumably her left elbow was elevated on the higher part of the desk.

While the hearing officer determined that "Pasco had no pre-existing injuries to her hands, wrists, and arms prior to April 17, 2017, and was asymptomatic until that time," as the Majority states, "[w]hether an event is not expected or designed is viewed from the perspective of the employee." Majority at 19. Based on the numerous instances where Pasco indicated that she suffered arm and elbow strain in the months prior to manifesting extreme pain on April 17, 2007, and the several reports indicating that Pasco's sub-optimal work conditions existed as early as February 2007, I cannot conclude that Pasco proved that her injury was unexpected.[8]

Therefore, unlike the unforeseen or unexpected

[8] The Majority posits that just as the claimant in Myers "did not expect to suffer severe back pain from lifting a coffee pot when, prior to the accident, he could lift sixty-five-pound bags of coral sand and ninety-five-pound bags of mortar mix without discomfort of any kind," here, Pasco could not have expected the onset of pain on April 17, 2007 while she typed. Majority at 23 (emphasis added).

But as just discussed, the record demonstrates that in the weeks preceding the onset of pain on April 17, 2007, Pasco actually did experience significant discomfort while typing. This further distinguishes Pasco's alleged "accident" from the claimant's accident in Myers.

incidents that occurred in Kikuta and Myers, Pasco's injury was the culmination of repetitive stress, which may have began as early as December 2006. This indicates to me that Pasco's injury is more akin to the claimant's injury in Lopez. Under the disability retirement statute, it unfortunately "is not enough . . . that work pressures and stresses over a period of time" contributed to Pasco's injury. Lopez, 66 Haw. at 131, 657 P.2d at 1043. Those pressures and stresses are simply not "an unforeseen or unexpected event" that the disability retirement statute requires in order to receive benefits.

B. The injury did not occur at some definite time and place.

I therefore cannot agree with the Majority that Pasco proved that her injury was "not expected or designed" as required by HRS § 88-336(a). But even if I did agree, the record indicates that Pasco did not prove that her injury occurred at a definite time and place, which also makes her ineligible for disability retirement.

In order to be retired by the ERS Board for service-connected disability, a claimant must also prove that his or her accident occurred while in the actual performance of duty "at some definite time and place." HRS § 88-336(a). Regarding this issue, I agree with the Majority that our decision in Panado v. Bd. of Trs., Emps.' Ret. Sys. informs our analysis. Majority at

27 (citing 134 Hawaiʻi 1, 332 P.3d 144 (2014)).

The claimant in Panado was employed by the City and County of Honolulu, and during a single eight-hour work shift, was tasked with lifting ten to fifteen boxes of paper. Panado, 134 Hawaiʻi at 3, 332 P.3d at 146. Although both parties stipulated that the claimant had suffered an injury sometime during that one work shift and was permanently incapacitated for work as a result of that injury, the ERS Board denied the claimant's application for disability retirement because "she had failed to show that the injury occurred at 'some definite time and place.'" Id.

The issue in Panado was "whether the statutory language of 'some definite time and place' should be construed broadly to encompass an entire eight-hour work period, or narrowly to require that the claimant pinpoint the exact moment when an injury occurs."[9] Id. at 12, 332 P.3d at 155. This court determined that all that the claimant must prove is that the time and place of injury be "clearly stated or decided; not vague or doubtful." Id. at 13, 332 P.3d at 156 (citing The New Oxford Dictionary 447 (2001)). In Panado, while the claimant could not pinpoint the exact time that her injury occurred or the exact box

[9] As such, we did not address whether the accident was "not expected or designed." See HAR § 6-22-2.

that caused her injury, because it was undisputed that the lifting of ten to fifteen boxes during a single eight-hour work period caused her injury, we concluded that the time period was narrow enough to be "clearly stated or decided." See id. Accordingly, we held that the claimant could not be denied service-connected disability retirement under the statute. Id. at 15, 332 P.3d at 158.

Here, while acknowledging that Pasco's injury was the result of "cumulative or repetitive stress," the Majority asserts that her injury "manifested as pain at a 'definite time and place' on April 17, 2007." Majority at 27-28. The Majority acknowledges that it may be difficult to actually determine when Pasco's injury, medial epicondylitis, actually occurred. Majority at 28. Nevertheless, the Majority states, "that Pasco's injury manifested as arm pain at some time after the moment she exceeded her physiological capacity to perform repetitive work does not mean that her accident did not occur 'while in the actual performance of duty at some definite time and place.'" Majority at 28 (emphasis added) (citing Panado, 134 Hawaiʻi at 14-15, 332 P.3d at 157-58).

In my view, this position improperly expands the rule we set in Panado. In Panado, we stated that "there [was] no indication the legislature intended to categorically exclude

coverage for accidents that do not result in immediate symptoms." Panado, 134 Hawaiʻi at 15, 332 P.3d at 158. We also stated that even if a claimant's symptoms did not manifest until later, the claimant could still qualify for disability retirement if he or she "[could] point to the exact period of work during which an accident occurred, but [was] unsure of which exact act caused his or her incapacitation." Id. However, we took care to note that a claimant must still point to a definite period of work (even if it need not be "the exact moment") in which an injury occurred in order to satisfy the requirement that the accident be "clearly stated or decided." 134 Hawaiʻi at 13, 332 P.3d at 156 (concluding that the claimant satisfied the "definite time and place" requirement by establishing that she was injured during her October 8-9, 2014 work shift).

Here, Pasco has not established that her injury occurred at any similarly "clearly stated" time period. First, as previously noted in Section II.A, the record suggests that Pasco's elbow pain began as early as February 2007 or December 2006. Therefore, Pasco's medial epicondylitis could conceivably have occurred months before she manifested debilitating pain from that injury on April 17, 2007. This is a substantially longer period of time than in Panado, where the claimant manifested pain from her neck and back injuries a day after she lifted the heavy

boxes. See 134 Hawaiʻi 14-15, 332 P.3d at 157-58. In my view, this takes the timing of Pasco's "accident" outside the boundaries in which a reasonable person might consider a "definite" time period, and improperly expands who might be eligible to receive disability retirement benefits beyond what the Legislature intended. See id. at 13, 332 P.3d at 156.

Furthermore, Pasco's problem in establishing a "definite time and place" of injury is compounded by the type of injury she suffered. Pasco's injury occurred due to "cumulative or repetitive stress." Majority at 27. This makes Pasco's injury distinguishable from the claimant's injury in Panado. In Panado, we concluded that the claimant there was entitled to disability retirement because it was undisputed that she had suffered a back injury by lifting, at most, ten to fifteen paper boxes. Id. at 3, 332 P.3d at 146. This also distinguishes Pasco's injury from the one in Myers, where the claimant there lifted a heavy coffee maker weighing approximately thirty-five pounds, and as he attempted to set it down, heard a "snap in his back." Myers, 68 Haw. at 95, 704 P.2d at 903.

Here, the nature of Pasco's "cumulative stress" injury from overtyping makes determining when any "accident" might have occurred impossible. This is so because by its nature, a cumulative injury is not caused by a single action (or several

actions, any one of which could have caused the injury), but is one in which multiple stresses over a period of time, together, caused the injury.[10] Accordingly, notwithstanding the difficulty in placing when Pasco's injury actually occurred, her cumulative stress injury from the overuse of her arm and hand could not have occurred at any "definite time and place." Cf. Lopez, 66 Haw. at 131, 657 P.2d at 1043 ("It is not enough, under the retirement law, that work pressures and stresses over a period time were contributory causes of [a permanent incapacity].").

III. CONCLUSION

Pasco was overworked in her position as a public health educator in the months preceding her permanent incapacity. In December 2006, she took on new job responsibilities piloting and designing a nutrition program for multiple islands. In February 2007, she lost her clerk, was forced to take on more typing responsibilities, and was not given any assistance. In March 2007, she spent long hours typing on an uneven desk that forced

[10] The Majority points out that in Panado, this court offered a slight variation on the facts in Myers and stated that even if the claimant in Myers had lifted the coffee maker twice and could not point to which one of the two lifts caused his incapacity, he should not be denied disability retirement if he could establish that it was either lift that caused the injury. Majority at 27 (citing Panado, 134 Hawaiʻi at 15, 332 P.3d at 158).

But as noted previously, the facts of this case present a significant deviation from the facts in Myers, involving weeks (and perhaps months) of overtyping at work. Therefore, denying disability retirement benefits in this particular situation would not, in my opinion, be "unjust and unreasonable in its consequences." Contra Panado, 134 Hawaiʻi at 15, 332 P.3d at 158.

one of her arms to be elevated over the other. Through no fault of her own, the injury she sustained, and the onset of pain that followed on April 17, 2007, permanently incapacitated her for duty as a public health educator. At that time, Pasco was entitled to, and received, workers' compensation benefits.

Unfortunately, even if a claimant becomes permanently incapacitated for duty through no fault of his or her own, qualifying for disability retirement under our statute requires more. The claimant must prove that his or her injury was a result of "an accident occurring while in the actual performance of duty at some definite time and place."[11] In my view, Pasco's manifestation of pain on April 17, 2007 is not such an accident. Consequently, Pasco has not demonstrated that she qualifies for service-connected disability retirement under HRS § 88-336.

Therefore, I would reverse the ICA's July 14, 2016 Judgment on Appeal entered pursuant to its June 17, 2016 Memorandum Opinion, and affirm the circuit court's September 17, 2013 "Decision and Order Affirming the Final Decision of

[11] If the Legislature wishes to allow a claimant who suffers a "cumulative stress" injury over a long period of time to recover under the disability retirement statute, the Legislature may amend the statute and remove language such as "accident" or "some definite time and place." However, as written, the plain language of the statute constrains my ability to interpret it in Pasco's favor. See State v. Dudoit, 90 Hawaiʻi 262, 271, 978 P.2d 700, 709 (1999) ("We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws.").

Respondent-Appellee Board of Trustees of the Employees' Retirement System of the State of Hawaii and Dismissing Petitioner-Appellant Kimberly Pasco's Appeal." Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama