NO. CAAP-19-0000478

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIʻI

GLENN JENKS, Claimant-Appellee-Appellee,
v.
PACIFIC OHANA HOSTEL CORPORATION, Employer-Appellant-Appellant,
and
HAWAII EMPLOYERS' MUTUAL INSURANCE COMPANY, INC.,
Insurance Carrier-Appellant-Appellant

APPEAL FROM THE LABOR AND INDUSTRIAL APPEALS BOARD
(CASE NO. AB 2018-174; DCD NO. 2-14-03659)

SUMMARY DISPOSITION ORDER
(By: Ginoza, Chief Judge, Leonard and Nakasone, JJ.)

Employer-Appellant-Appellant Pacific Ohana Hostel Corporation (**Pacific Ohana**) and Insurance Carrier-Appellant-Appellant Hawaii Employers' Mutual Insurance Co., Inc. (**HEMIC**) (collectively, **Appellants**) appeal from the Labor and Industrial Relations Appeals Board (**LIRAB's**) Decision and Order, filed June 13, 2019 (**2019 LIRAB Decision**).

Appellants raise points of error challenging Findings of Fact (**FOFs**) 1, 33, 39, 40, 41, and 42 of the LIRAB's August 4, 2016 Decision and Order (**2016 LIRAB Decision**).

The challenged 2016 LIRAB Decision FOFs state:

> 1. On October 7, 2013, Claimant filed a WC-5 claim for workers' compensation benefits for a February 27, 2013 work injury. In describing his injury, Claimant stated that while riding a moped to get supplies for work, he "blacked out, went down" and was hit by a car. Claimant identified injuries to his left eye, socket, cheek bone, ribs, and left foot.
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> . . . .

> 33. Employer filed no motions to compel discovery and did not demonstrate that it was unable to obtain or subpoena any medical records, emergency room records, police reports, or any other records of Claimant relating to the injury claim without his signed authorization.
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> . . . .
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> 39. Neither Claimant, nor Employer presented medical evidence about Claimant's alleged injuries.
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> 40. The presumption of compensability applies.
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> 41. Employer did not present substantial evidence to rebut the presumption of compensability of Claimant's October 7, 2013 claim for a February 27, 2013 work injury.
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> 42. Employer did not meet its burden of production to rebut the statutory presumption of compensability.

Appellants' points of error also challenge the LIRAB's Conclusions of Law (**COLs**) in the 2016 LIRAB Decision and 2019 LIRAB Decision that: (1) the LIRAB was required to apply the presumption of compensability to Claimant-Appellee-Appellee Glenn Jenks's (**Jenks's**) claim without requiring a preliminary showing of an accident or treatment of an injury; (2) Pacific Ohana's contention that the record contained no medical evidence of Jenks's injuries did not constitute substantial evidence sufficient to rebut the presumption of a covered work injury; and (3) Pacific Ohana is liable for medical care, services, and supplies.

Upon careful review of the record 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 the points of error as follows:

As Appellants recognize in their opening brief, there was no objection or challenge to FOF 1. Appellants present no argument on appeal, aside from making the bare allegation of error. The argument is thus waived. See Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rules 28(b)(4),(7).

In sum, Appellants' other points of error contend that the LIRAB erred in construing the statutory presumption in Hawaii Revised Statutes (**HRS**) § 386-85 (2015) as a presumption of an injury once a claim has been made, not just a presumption of the work-relatedness of an injury.

HRS § 386-85 states:

> **§ 386-85 Presumptions.** 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 another.

(Emphasis added).

HRS § 386-1 (2015) defines "work injury" as "a personal injury suffered under the conditions specified in [HRS § 386-3 (2015)]."[1] "Claim" is not defined in HRS Chapter 386, but Black's Law Dictionary defines it as "[a] statement that something yet to be proved is true" as well as "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional." Claim, Black's Law Dictionary (11th ed. 2019).

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[1] HRS § 386-3 states:

> **§ 386-3 Injuries covered.** (a) If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter.
>
> Accident arising out of and in the course of the employment includes the wilful act of a third person directed against an employee because of the employee's employment.
>
> (b) No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self-defense, or by the employee's intoxication.
>
> (c) A claim for mental stress resulting solely from disciplinary action taken in good faith by the employer shall not be allowed; provided that if a collective bargaining agreement or other employment agreement specifies a different standard than good faith for disciplinary actions, the standards set in the collective bargaining agreement or other employment agreement shall be applied in lieu of the good faith standard. For purposes of this subsection, the standards set in the collective bargaining agreement or other employment agreement shall be applied in any proceeding before the department, the appellate board, and the appellate courts.

Hawaiʻi appellate courts have "'consistently construed HRS § 386-85 liberally in accordance with the humanitarian purpose of workmen's compensation.'" Van Ness v. State Dep't of Educ., 131 Hawaiʻi 545, 558, 319 P.3d 464, 477 (2014) (quoting Lawhead v. United Air Lines, 59 Haw. 551, 559, 584 P.2d 119, 124 (1978)). "The Hawaiʻi workers' compensation statute 'is social legislation that is to be interpreted broadly.'" Cadiz v. QSI, Inc., 148 Hawaiʻi 96, 107, 468 P.3d 110, 121 (2020) (quoting Davenport v. City & Cnty. of Honolulu, 100 Hawaiʻi 481, 491, 60 P.3d 882, 892 (2002)). The primary purpose of the workers' compensation statute "'is to provide compensation for an employee for all work-connected injuries, regardless of questions of negligence and proximate cause.'" Id. (quoting Flor v. Holguin, 94 Hawaiʻi 70, 79, 9 P.3d 382, 391 (2000)). "The workers' compensation statute rests on the presumption that a claimed injury is work-connected and therefore compensable." Id. (emphasis added). This presumption "is one of the keystone principles of our workers' compensation plan." Id. (internal quotation marks omitted) (quoting Flor, 94 Hawaiʻi at 79, 9 P.3d at 391).

In the 2016 LIRAB Decision, the LIRAB relied on the supreme court's holding in Van Ness to determine that Jenks was entitled to the statutory presumption of compensability without being required to make a preliminary showing of an injury. In Van Ness, the supreme court held that "for any workers' compensation claim, 'it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim is for a covered work injury.'" 131 Hawaiʻi at 558, 319 P.3d at 477 (emphasis added; brackets omitted) (quoting Lawhead, 59 Haw. at 559, 584 P.2d at 124). There, the supreme court noted that construing HRS § 386-85 liberally was "in accordance with the humanitarian purposes of workers' compensation." Id. The supreme court went on to state that HRS § 386-85 "'nowhere requires . . . some preliminary showing . . . before the presumption will be triggered. Rather HRS § 386-85 clearly dictates that coverage will be presumed at the outset, subject to

being rebutted by substantial evidence to the contrary.'" Id. at 563, 319 P.3d at 482 (quoting Chung v. Animal Clinic, Inc., 63 Haw. 642, 650-51, 636 P.2d 721, 727 (1981)).

The ellipses in Van Ness omits a portion of the Chung quotation. Appellants argue that the omission was misinterpreted by the LIRAB as eliminating the "work-relatedness" requirement. In full, the portion of Chung quoted by Van Ness states:

> The statute nowhere requires, as appellants suggest, some preliminary showing that the injury occurred "in the course of employment" before the presumption will be triggered. Rather, HRS [§] 386-85 clearly dictates that coverage will be presumed at the outset, subject to being rebutted by substantial evidence to the contrary. This is so in all claims proceedings, regardless of the existence of conflicting evidence, as the legislature has determined that where there is reasonable doubt as to whether an injury is work-connected, it must be resolved in favor of the claimant. [Akamine v. Hawaiian Packing & Crating Co., 53 Haw. 406, 409, 495 P.2d 1164, 1166 (1972)].

Chung, 63 Haw. at 650-51, 636 P.2d at 727 (emphases added).

In 2020, in Cadiz, the supreme court stated:

> "When determining whether a worker's compensation claim is work-related, it is well established in Hawaiʻi that 'it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim is for a covered work injury.' HRS § 386-85 []." Panoke v. Reef Dev. of Hawaii, Inc., 136 Hawaiʻi 448, 461, 363 P.3d 296, 309 (2015). The presumption that a worker's claimed injury is "work-connected" and therefore compensable is one of "the 'keystone principles' of our workers' compensation plan." Flor v. Holguin, 94 Hawaiʻi 70, 79, 9 P.3d 382, 391 (2000).

148 Hawaiʻi at 99, 468 P.3d at 113 (emphasis added; brackets omitted).

One year later, in Skahan v. Stutts Contr. Co., 148 Hawaiʻi 460, 478 P.3d 285 (2021), the supreme court stated that "it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim is for a covered work injury." Id. at 466, 478 P.3d at 291 (brackets omitted) (citing HRS § 386-85(1)). It further reiterated that the statute does not require "some preliminary showing that the injury occurred 'in the course of employment' before the presumption will be triggered." Id. (quoting Chung, 63 Haw. at 650, 636 P.2d at 727).

We conclude that the plain language of HRS § 386-85 and the Hawaiʻi Supreme Court's interpretation of that statute establishes that a presumption of a work-related injury applies upon the filing of a claim and does not require a preliminary evidentiary showing of an injury before the application of the presumption.

We note that, with sufficient notice of the claim,[2] Appellants elected to waive a hearing and stipulate that the issue of compensability would be decided on the parties' submissions and on the record as it existed. And while Appellants' opening brief on this appeal thoroughly outlines Jenks's lack of cooperation and personal participation during the underlying proceedings, Appellants give short shrift to their own contribution to the circumstances that led to the scant record before the Disability Compensation Division (**DCD**) and LIRAB. Despite their stipulations to have the issue of compensability (and all other issues in dispute) determined on the briefs, Appellants now urge us to hold the lack of discovery against Jenks and argue that "the equities support placing the burden of proving the fact of injury on claimants[.]" Appellants' view of the equities are not supported by statute or case law, and run counter to the language and intent of the workers' compensation statute. See Van Ness, 131 Hawaiʻi at 558, 319 P.3d at 477; see also Cadiz, 148 Hawaiʻi at 107, 468 P.3d at 121.

Once the presumption of compensability is applied, the burden is on an employer to rebut it. To rebut the presumption that a claim is for a work-related injury, an employer has both the burden of production and the burden of persuasion. Cadiz, 148 Hawaiʻi at 99-100, 468 P.3d at 113-14.

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[2] HRS § 386-81 (2015) requires that written notice be provided to an employer "as soon as practicable." It further states that "notice of injury shall be deemed to have been waived by the employer if objection to the failure to give such notice is not raised at the first hearing on a claim in respect of such injury of which the employer is given reasonable notice and opportunity to be heard." HRS § 386-85(2) states that "it shall be presumed, in absence of substantial evidence to the contrary . . . . [t]hat sufficient notice of such injury has been given[.]" Appellants did not challenge notice in either the underlying litigation or on appeal, and we thus conclude that they were given sufficient notice of Jenks's claim.

Appellants offered no evidence to rebut the presumption that Jenks suffered a compensable work-related injury. Instead, their position is that because Jenks did not provide medical records, diagnosis, or evidence of treatment, they rebutted the presumption, that is, that they satisfied both the burden of production and the burden of persuasion. Appellants' arguments are without merit. Appellants twice stipulated to submitting the issue in dispute, which was limited to liability for work-related injuries, to the LIRAB without any discovery from Jenks.

We decline to address Appellants' argument regarding liability for possible future medical care, as this issue was not raised in the proceedings below, as well as Appellants' invitation to address other questions not properly before us on this appeal.[3]

For these reasons, the 2019 LIRAB Decision is affirmed.

DATED: Honolulu, Hawaiʻi, June 20, 2023.

On the briefs:

Steven L. Goto
for Employer-Appellant-
Appellant PACIFIC OHANA HOSTEL
CORPORATION and Insurance
Carrier-Appellant-Appellant
HAWAII EMPLOYERS' MUTUAL
INSURANCE COMPANY, INC.

Charles H. Brower
for Claimant-Appellee-
Appellee.

/s/ Lisa M. Ginoza
Chief Judge

/s/ Katherine G. Leonard
Associate Judge

/s/ Karen T. Nakasone
Associate Judge

[3] We note that Jenks's request, in the answering brief, for attorney's fees pursuant to HRS § 386-93 (2015), must be presented in a motion for attorney's fees consistent with HRAP 39, and therefore will not be addressed herein.