IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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JAMES C. BORRSON,
Petitioner/Claimant-Appellee-Appellant,

vs.

BRENDA B. WEEKS,
Respondent/Employer-Appellant-Appellee,

and

SPECIAL COMPENSATION FUND,
Respondent/Appellee-Appellee.

SCWC-19-0000552

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000552; CASE NO. AB 2017-041(WH); DCD NO. 9-16-00359)

April 22, 2025

CONCURRING AND DISSENTING OPINION BY GINOZA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

Appellee Brenda Weeks (**Weeks**) is a registered nurse who owns property in Kona, Hawaiʻi, which includes several dwellings. She resided in one dwelling and rented the others to tenants. Between 2013 and 2015, Claimant-Appellant James Borrson (**Borrson**) and his wife rented a one-bedroom cottage from

Weeks under annual rental and related agreements. This case arises from injuries Borrson sustained after falling from a ladder while installing roof panels on Weeks's personal residence. The question is whether, as to this incident, Weeks was Borrson's employer such that Borrson is entitled to workers' compensation benefits from Weeks. The testimony of Weeks and Borrson conflict on whether Weeks agreed to have Borrson work on the roof. Under the written agreement between the parties specifying that Weeks must agree to any work beyond yard work, and the statutory requirements for "employment," this is a factual issue that must be resolved. The credibility of the parties is at the heart of this disputed fact.

The Labor and Industrial Relations Appeals Board (**LIRAB**) majority made finding of fact (**FOF**) 12, which is clearly erroneous. FOF 12 states:

> 12. The Board credits Ms. Weeks's testimony that Claimant did not have her permission to perform work on the roof on September 23, 2015. There is no evidence – not even Claimant's own testimony – that it was done at her request or that he received her prior authorization.

(Emphasis added.) As the Intermediate Court of Appeals (**ICA**) and this court's majority recognize, the second sentence in FOF 12 is clearly erroneous because Borrson testified to the LIRAB that Weeks approved his work on the roof project (whereas Weeks testified she did not approve it). Given the particular agreement in this case and the conflicting testimony on this

crucial fact, I agree with the ICA that the case should be remanded to the LIRAB so that it can properly consider all of the evidence on this issue. In my view, the LIRAB should resolve the ultimate question of whether Weeks carried her burden to show that Borrson was not her employee related to this incident.

I respectfully dissent, therefore, from this court's majority ruling that Weeks's approval or non-approval of Borrson's roof work was insignificant under the "relative nature of the work" test. Rather, under Hawai'i's workers' compensation law, whether Weeks agreed to Borrson working on the roof is a threshold question in this case bearing on whether there was an employment relationship and whether Weeks met her burden under Hawai'i Revised Statutes (**HRS**) § 386-73.5 (2015).

I concur with the majority that the "substantial evidence" standard, to overcome the presumption of a covered work injury under HRS § 386-85 (2015), is lower than the "preponderance of the evidence" standard that the LIRAB utilized in this case. Thus, I also agree that when the LIRAB makes a finding based on the preponderance of the evidence standard, and that finding is challenged on appeal, we may not need to remand to the LIRAB to apply the correct lower standard. However, given the LIRAB majority's erroneous FOF 12, which misstates the evidence in the record and addresses a crucial finding in this

case, remand to the LIRAB is needed to properly consider the evidence. I disagree with the majority deeming FOF 12 insignificant and remanding to the LIRAB only to compute the compensation owed by Weeks to Borrson.

This case also presents an opportunity to provide further guidance regarding the "relative nature of the work" test. The two factors applied by the majority for the "relative nature of the work" test were stated in Locations, Inc. v. Hawai'i Department of Labor & Industrial Relations, 79 Hawai'i 208, 212, 900 P.2d 784, 788 (1995). However, the two-factor test was *dicta* in Locations, because that decision then rejected the "relative nature of the work" test for workers' compensation cases. Id. The following year, the Legislature adopted HRS § 386-73.5, making both the control test and the "relative nature of the work" test applicable to workers' compensation cases. The Legislature did not define the "relative nature of the work" test.

Given the challenge of determining whether a claimant is an "employee," especially in circumstances like this when someone has purportedly hired another person to do repair, maintenance, or similar work, additional factors or considerations for analyzing the "relative nature of the work" test would be helpful. Without better clarity, unsuspecting "employers" are subject to paying workers' compensation

benefits, as well as possible penalties under HRS §§ 386-123 (2015) and 386-121 (2015).[1]

[1] HRS § 386-121 provides, with exceptions not pertinent here, that employers must secure workers' compensation benefits for their employees in one of several ways, including by insuring such benefits with an insurer or maintaining security with the state director of finance. In turn, HRS § 386-123 establishes penalties when an employer fails to comply with HRS § 386-121. As applicable to this case, HRS § 386-123 in 2015 stated:

> If an employer fails to comply with section 386-121, the employer shall be liable for a penalty of not less than $250 or of $10 for each employee for every day during which such failure continues, whichever sum is greater, to be recovered in an action brought by the director in the name of the State, and the amount so collected shall be paid into the special compensation fund created by section 386-151. The director may, however, in the director's discretion, for good cause shown, remit all or any part of the penalty in excess of $250, provided the employer in default complies with section 386-121. With respect to such actions, the attorney general or any county attorney or public prosecutor shall prosecute the same if so requested by the director.
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> In addition, if any employer is in default under section 386-121 for a period of thirty days, the employer may be enjoined, by the circuit court of the circuit in which the employer's principal place of business is located, from carrying on the employer's business anywhere in the State so long as the default continues, such action for injunction to be prosecuted by the attorney general or any county attorney if so requested by the director.

HRS § 386-123 was amended in 2016, to increase penalty amounts, and in 2017, to amend the second paragraph related to enjoining an employer's business. See 2016 Haw. Sess. Laws Act 187, § 4 at 582; 2017 Haw. Sess. Laws Act 135, § 1 at 515.

In this case, the Director of the Disability Compensation Division found that Borrson was an employee of Weeks, that Weeks had to provide workers' compensation benefits, and that Weeks had failed to secure compensation for her employee as required by HRS § 386-121 and was thus subject to penalties under HRS § 386-123. The penalty amount was deferred by the Director pending further investigation. In the LIRAB, the parties agreed to resolve and dismiss the penalty issue, with Weeks stipulating to pay $250 to the Special Commission Fund "as a compromise," not an "admission by Weeks that she is the employer of Claimant."

I. Brief Background

Borrson was injured on September 23, 2015, falling from a ladder while working on the roof of property owner Weeks's personal residence. Weeks testified that she did not know Borrson was working on her roof. According to Weeks, she heard noise on the day of the incident, came down the stairs of the two-story cabin, and asked him what he was doing. He fell shortly after. Borrson, on the other hand, testified that Weeks told him to do the roof work.

Borrson filed a claim for workers' compensation benefits seven months later, on April 21, 2016. The LIRAB majority's uncontested finding, based on Borrson's testimony, was that he claimed to be Weeks's employee after he received a letter from Weeks's homeowners insurance company stating that it would only make payment to a visitor, unless he was Weeks's employee.

Borrson and his wife started renting a one-bedroom, one-bathroom home from Weeks beginning in May 2013. They initially entered a one-year rental agreement, and then later entered additional one-year rental agreements on August 1, 2014, and on July 8, 2015. In 2013 and 2015, there were also Yard Maintenance Agreements. There is conflicting testimony as to whether other tenants had similar yard maintenance agreements with Weeks. A handwritten entry on the applicable Yard

Maintenance Agreement between the parties, dated July 8, 2015, stated: "mowing specified grounds[,] weed whacking prn[,] poisoning prn of rental and main grounds, brush trimming + clearing + any **agreed upon** work of the parties not more than 10 hrs month – monthly work to B document[ed] + given to landlord monthly." (Emphasis added.) This Yard Maintenance Agreement also had a handwritten entry stating: "[a]ny **agreed upon** work over 10 [hours] monthly @ $15.00 hr for [Borrson and his wife] – [a]lso any reimbursed purchases require prior authorization." (Emphasis added.) Weeks testified she added these handwritten provisions because Borrson had previously done work without her approval and had asked to be paid.

The parties do not dispute the LIRAB majority's finding that "Weeks specifically requested [Borrson's] assistance on certain projects, for which she paid him by way of rent reductions and reimbursements for material and supplies."

As noted above, Weeks resided in the cabin where Borrson's injury occurred. Previously, she had lived in the "main house" on the property but testified that after her husband died, she wanted to move into the smaller cabin. Weeks testified that a deck, pantry and closet organizer were put into the cabin so she could move there. According to Weeks, Borrson learned she wanted to make the pantry and deck, and he approached her about doing that work. All the projects for the

cabin were done around the same time, before she moved in. Weeks testified that Borrson did the framing for the pantry, while Weeks's neighbors did the drywall for it; Borrson did the deck by himself; and Borrson, Weeks and her friend did the closet organizer together.

The parties do not dispute the LIRAB majority's findings that Weeks was a landlord and had a business renting homes; and that Borrson "previously worked as a journeyman carpenter and utilized his professional knowledge in performing said work."

The LIRAB majority determined that Weeks carried her burden to show that Borrson was not her employee on the date of the incident, and thus was not obligated to provide workers' compensation coverage. In a minority opinion, the LIRAB chair concluded to the contrary that Weeks had failed to carry her burden of proof and that under the applicable presumption of coverage, Borrson was Weeks's employee and entitled to workers' compensation benefits. The LIRAB majority and minority decisions have conflicting findings as to whether Weeks agreed to Borrson working on the roof.

Borrson appealed the LIRAB's Decision and Order (**LIRAB Decision**) to the ICA, asserting that twelve FOFs by the LIRAB majority are clearly erroneous. Further, based on the alleged erroneous FOFs, Borrson asserted to the ICA that LIRAB's

conclusions of law (**COL**) 1 and 2 were wrong.[2] COL 1 and 2 state that "Weeks was not Borrson's employer on September 23, 2015" and "[Borrson] was not an employee of [Weeks] on September 23, 2015."

The ICA held, in pertinent part, that ten of the LIRAB majority's FOFs challenged by Borrson were not clearly erroneous; that FOF 12 was clearly erroneous because it misstated the evidence; and that the LIRAB erred in FOF 19 because it applied the preponderance of the evidence standard rather than the substantial evidence standard. The LIRAB majority's FOF 19 states: "Applying the preponderance of the evidence standard, the Board finds that Ms. Weeks met her burden of establishing, under the control test and the relative nature of the work test, that coverage for [Borrson's] injury is not proper." The ICA vacated FOFs 12 and 19. It further held, *inter alia*, that because the LIRAB applied the wrong standard for FOF 19, the LIRAB majority's COLs 1 and 2 must also be vacated. The ICA remanded the case to the LIRAB for further proceedings consistent with its decision.

II. Standard of Review

In cases that have undisputed facts, the question of whether an individual is an employee for workers' compensation

[2] In his appeal to the ICA, Borrson also challenged the LIRAB majority's COLs 3 and 4, which are not pertinent to his appeal to this court.

purposes is a question of law reviewed *de novo*. See Locations, 79 Hawaiʻi at 209-10, 900 P.2d at 785-86 (reviewing whether licensed real estate agents were independent contractors or employees of a real estate company based on undisputed facts submitted in a petition to the Department of Labor and Industrial Relations (**DLIR**)).

In this case, however, the factual circumstances are very much in dispute, as well as the proper application of Hawaiʻi's workers' compensation statutes. The following pertinent parts of HRS § 91-14(g) (2016 Supp.) apply here:

> Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of . . . statutory provisions;
>
> . . . .
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]

We review conclusions of law *de novo* under the right/wrong standard, and review findings of fact under the clearly erroneous standard. Korsak v. Haw. Permanente Med. Grp., Inc., 94 Hawaiʻi 297, 302-03, 12 P.3d 1238, 1243-44 (2000).

> [A]ppeals taken from FOFs set forth in decisions of the LIRAB are reviewed under the clearly erroneous standard. Thus, the court considers whether such a finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The clearly erroneous standard requires

> the court to sustain the LIRAB's finding unless the court is left with a firm and definite conviction that a mistake has been made[.]

Id. (citations and brackets omitted).

III. Discussion

A. Statutory Provisions

The injuries covered by workers' compensation include personal injury suffered by an employee due to an accident "arising out of and in the course of the employment[.]" HRS § 386-3 (2015); HRS § 386-1 (2015) (defining "work injury" as "a personal injury suffered under the conditions specified in section 386-3").

For purposes of determining whether there is an employment relationship, HRS § 386-73.5 provides in pertinent part:

> Except in cases where services are specifically and expressly excluded from "employment" under section 386-1, it shall be presumed that coverage applies unless the party seeking exclusion is able to establish under both the control test and the relative nature of the work test that coverage is not appropriate under this chapter.

(Emphases added.)

Under Chapter 386, "employment" is defined in relevant part as: "**any service** performed by an individual for another person **under any contract of hire** or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into." HRS § 386-1 (emphasis added). The difficulty in applying the definition of "employment" is

apparent, however, because HRS § 386-1 also specifies fourteen categories of service that are not included under "employment."[3]

[3] HRS § 386-1 provides that the following fourteen categories of service are not "employment":

> "Employment" does not include:
> (1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity;
> (2) Service for a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received;
> (3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part;
> (4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of the minister's, priest's, or rabbi's ministry or by a member of a religious order in the exercise of nonsecular duties required by the order;
> (5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve-month period;
> (6) Domestic, in-home and community-based services for persons with developmental and intellectual disabilities under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, or when provided through state funded medical assistance to individuals ineligible for medicaid, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined by the department of human services, performed by an individual whose services are contracted by a recipient of social service payments and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments;
> (7) Domestic services, which include attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended, or when provided through state-funded medical assistance to individuals ineligible for

HRS § 386-1 defines an "employee" as "any individual in the employment of another person." HRS § 386-1 defines an "employer" as "any person having one or more persons in the

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medicaid, when performed by an individual in the employ of a recipient of social service payments. For the purposes of this paragraph only, a "recipient of social service payments" is a person who is an eligible recipient of social services such as attendant care or day care services;

(8) Service performed without wages for a corporation without employees by a corporate officer in which the officer is at least a twenty-five per cent stockholder;

(9) Service performed by an individual for a corporation if the individual owns at least fifty per cent of the corporation; provided that no employer shall require an employee to incorporate as a condition of employment;

(10) Service performed by an individual for another person as a real estate salesperson or as a real estate broker, if all the service performed by the individual for the other person is performed for remuneration solely by way of commission;

(11) Service performed by a member of a limited liability company if the member is an individual and has a distributional interest, as defined in section 428-101, of not less than fifty per cent in the company; provided that no employer shall require an employee to form a limited liability company as a condition of employment;

(12) Service performed by a partner of a partnership, as defined in section 425-101, if the partner is an individual; provided that no employer shall require an employee to become a partner or form a partnership as a condition of employment;

(13) Service performed by a partner of a limited liability partnership if the partner is an individual and has a transferable interest as described in section 425-127 in the partnership of not less than fifty per cent; provided that no employer shall require an employee to form a limited liability partnership as a condition of employment; and

(14) Service performed by a sole proprietor. As used in this definition, "religious, charitable, educational, or nonprofit organization" means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

person's employment." The crux, therefore, is whether there was an "employment" relationship between Weeks and Borrson with respect to the injury he sustained.

B. The Case Should be Remanded to the LIRAB To Resolve Material Factual Disputes

Given the handwritten provisions in the Yard Maintenance Agreement, a key factual issue in this case is whether Weeks agreed to have Borrson work on her roof. If she did not agree to this work, Borrson's actions on September 23, 2015 were outside his written agreement with Weeks. Under the circumstances of this case, the LIRAB should decide on remand if Weeks agreed to the roof work, considering all the pertinent evidence. In other words, the LIRAB should decide if Borrson's work on her roof was performed under a "contract of hire" with Weeks, whether express, implied, oral or written. If Weeks establishes that she did not agree to Borrson's work on her roof, there could be no "employment" relationship with Borrson when he was injured. If, on the other hand, the LIRAB finds that Weeks failed to overcome the presumption that she agreed to the roof work, she would have the further burden to establish under the control test and the "relative nature of the work" test that coverage is not appropriate.

I disagree with the majority's view that, under the "relative nature of the work" test, Weeks's approval or non-

approval of Borrson's roof work was insignificant. The majority's position would mean that anytime there was an "employment" relationship, the employee could engage in any type of "service" — even outside the "contract of hire" — and be covered for workers' compensation if injured.

Further, Hawai'i's workers' compensation law defines "employment" as a service performed under a "contract of hire" whether "express or implied, oral or written." HRS § 386-1. In this case, there is a written agreement between the parties specifying the type of work Borrson could do for Weeks, and it required that she agree to the work. The "relative nature of the work" test should not be interpreted to undermine the requirement of a "contract of hire" between the parties, which is part of the definition for "employment" under HRS § 386-1. The majority decision re-writes the agreement in this case.

In my view, given the specific agreement at issue, if Weeks meets her burden to establish that she did not agree to Borrson working on the roof, there would be no "employment" relationship for the incident. There is conflicting evidence on this threshold issue. There are also contrary findings by the LIRAB majority and LIRAB minority, primarily based on the respective assessments as to the credibility of Weeks and Borrson. Given the error in the LIRAB majority's FOF 12, this case should be remanded to the LIRAB to resolve these

credibility issues in light of all the evidence, which is within the purview of the LIRAB members who saw the witnesses testify. Igawa v. Koa House Rest., 97 Hawai'i 402, 410, 38 P.3d 570, 578 (2001) ("courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field" (citations omitted)); Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) ("the credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal" (citations omitted)).

In my view, if the LIRAB found that Weeks did agree to the roof work or that she cannot carry her burden on that issue, the LIRAB should then consider whether Weeks met her burden to overcome the presumption of employment for the roof work. In short, Weeks would then need to show under both the control test and the "relative nature of the work" test that workers' compensation coverage is not appropriate under HRS Chapter 386. HRS § 386-73.5.

C. "Relative Nature of the Work" Test

In Locations, this court stated:

> The relative nature of the work test "involves a balancing of factors regarding the general relationships which the employee has with regard to the work performed for each of his [or her] employers." [Yoshino v. Saga Food Service, 59 Haw. 139, 143, 577 P.2d 787, 790 (1978)]. The factors to be considered are: "whether the work done is an integral part of the employer's regular business; and whether the worker, in relation to the employer's business, is in a business or profession of his own." 1B A. Larson, *Larson's Workmen's Compensation Law* § 43.53 (1993).

79 Hawai'i at 212, 900 P.2d at 788. However, the court further discussed that, although the DLIR had expressed a preference for the "relative nature of the work" test, the court had disapproved of that test in Yoshino v. Saga Food Service, 59 Haw. 139, 577 P.2d 787 (1978).[4] Locations, 79 Hawai'i at 212,

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[4] In Yoshino, this court noted that the LIRAB had utilized both the "relative nature of the work test" and the "control" test in deciding whether more than one employer was responsible for workers' compensation benefits. 59 Haw. at 143, 577 P.2d at 790. The court stated that the "'relative nature of the work test' . . . involves a balancing of factors regarding the general relationships which the employee has with regard to the work performed for each of his employers." Id. However, the Yoshino court further stated:

> we must disapprove of the Board's primary emphasis upon the relative nature of the work test. Our decision in *Kepa v. Hawaii Welding Co.*, 56 Haw. 544, 545 P.2d 687 (1976), which we acknowledge was decided subsequent to the Board's decision in the instant case, made clear that the control test is the primary guideline for determining whether an employer is a special employer for workers' compensation purposes.

Id. (emphasis added).

In Harter v. County of Hawai'i, the question was whether an injured helicopter pilot was the employee of a helicopter services company or the County of Hawai'i, which had an agreement for the company to furnish a helicopter and pilot exclusively to the County for two years for firefighting and other county functions. 63 Haw. 374, 375, 628 P.2d 629, 630 (1981). In reference to Yoshino, we stated:

900 P.2d at 788. The court in Locations thus stated, "we now explicitly hold that the control test, and not the relative nature of the work test, is the proper test to determine whether an employer-employee relationship exists for purposes of workers' compensation laws." Id. (emphasis added).

In 1996, the year after Locations was issued, the Legislature adopted HRS § 386-73.5, requiring application of both the "control test" and the "relative nature of the work" test in determining whether there is employment. Under this statute, except where an express exemption to employment applies under HRS § 386-1, workers' compensation coverage is presumed to apply "unless the party seeking exclusion is able to establish under both the control test and the relative nature of the work test that coverage is not appropriate under this chapter." HRS § 386-73.5. HRS Chapter 386 does not define the "relative nature of the work" test and there is no legislative history to assist in this regard.

> We affirmed the decision of the Labor and Industrial Relations Appeals Board on the basis of the record and criticized the Board's primary reliance on a "relative nature of the work test" in reaching its conclusion. For HRS s 386-1, in our opinion, made "control" of the employee the predominant consideration in fixing compensation liability between a lending and a borrowing employer.

Id. at 379, 628 P.2d at 632.

Other than Locations, this court has only discussed the "relative nature of the work" test where a claimant was "lent" by one employer to another and it was unclear which employer was liable for workers' compensation. Harter v. Cnty. of Hawaii, 63 Haw. 374, 628 P.2d 629 (1981) (helicopter company lent a pilot to the county to support firefighting); Yoshino, 59 Haw. 139, 577 P.2d 787 (school lent a cafeteria worker to a food services employer). In these lent employee cases, this court stated the "relative nature of the work test" involved a "balancing of factors regarding the general relationships which the employee [had] with regard to the work performed for each of his employers." Yoshino, 59 Haw. at 143, 577 P.2d at 790. Because the court disapproved of the Board's reliance on this test in Yoshino, it did not provide further guidance on relevant factors. See id. In any event, Borrson and Weeks's relationship in this case is far removed from the lent employee context. Further, because there have been no Hawai'i appellate cases addressing the "relative nature of the work" test since HRS § 386-73.5 was adopted, this court should clarify the factors and considerations of the test beyond the lent employee context.

Given that HRS § 386-73.5 was adopted the year after Locations was decided, and because the Legislature did not define the "relative nature of the work" test, it is reasonable

to infer that the two-factor test in Locations was within its consideration. The source for the test in Locations was Larson's Workers' Compensation Law, which continues to endorse the two-factor test. See 5 Lex K. Larson, Larson's Workers' Compensation Law § 60.05[3] (Matthew Bender, Rev. Ed. 2024).

This leading treatise on workers' compensation also provides a further explanation of the "relative nature of the work" test as follows:

> Note that the factor here stressed is in two parts: the nature of the claimant's work, and its relation to the employer's work. The nature of the claimant's work, in the abstract, is seldom a safe guide in itself, and for this reason it is dangerous to rely on precedents classified solely by the character of the worker's job, for example, to say that window-washers are usually held to be employees while lawyers are usually held to be independent contractors. If I, as a private householder, call up a window-washing company and engage it to do what amounts to one days' work on my house, I am probably not an employer. But an industrial plant which at regular intervals keeps this same company busy doing what otherwise would be done through its own employees could be held an employer. Similarly, when I seek the services of a lawyer, on the occasion of one of my rare encounters with the legal process, the lawyer is obviously not my employee. But the same lawyer, engaged continuously by a law firm or insurance company, can be an employee.
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> This test, then, which for brevity will be called the "relative nature of the work" test, contains these ingredients: the character of the claimant's work or business — how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on — and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

Larson, supra § 60.05[2] (footnotes omitted). Professor Larson's treatise does not suggest that there is an employment

relationship under the "relative nature of the work" test when the work done is outside the terms of an agreement. Rather, it addresses situations where there is an engagement for work and the question is whether the individual doing such work is an independent contractor or an employee.

Where the work deals with repairs, the Supreme Court of Alaska's analysis in Nickels v. Napolilli, 29 P.3d 242 (Alaska 2001), provides useful guidance. In Nickels, the claimant entered into a written "cabin-for-chores" agreement with the Napolillis, who owned and lived on a forty-acre farm, which they operated as a small business. Id. at 245. Claimant's agreement with the Napolillis required an average of eighty hours of work per month, with any additional labor compensated at five dollars per hour. Id. The tasks were enumerated. Id. Claimant was injured while engaged in work the Napolillis had instructed her to do. Id. The Napolillis did not have workers' compensation insurance. Id. The Napolillis challenged the trial court's ruling that claimant was an employee and that her injuries were work related. Id. at 246.

In analyzing whether an employee-employer relationship existed, the court first stated "[a]n express or implied contract or agreement of employment must exist for there to be an employee-employer relationship[,]" id. at 252 (footnote omitted), which is similar to the requirement under Hawai'i

statute. In Nickels, there was no question that the claimant was injured doing work the Napolillis wanted her to do under their agreement. Id. The court further explained:

> Although the trial court found that Nickels and the Napolillis had an employment contract defining the terms of their relationship, **the existence of a contract does not end the inquiry**. The legal determination of whether an employee-employer relationship exists relies, in part, on consideration of the character of the "employee's" work and the relationship of work to the "employer's" business.

Id. (emphasis added) (footnote omitted).

The court explained the elements of the "relative nature of the work" test as follows:

> In evaluating the character of the claimant's work, the trier of fact is to consider the degree of skill involved, the degree to which it is a separate calling or business, and the extent to which it can be expected to carry its own accident burden. Concerning the relationship of the claimant's work to the purported employer's business, the trier of fact is to consider how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

Id. (quoting Searfus v. N. Gas Co., 472 P.2d 966, 969 (Alaska 1970)(footnote omitted)); see also Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc., 625 F.2d 1248, 1253 (5th Cir. 1980) (citations omitted) (providing similar factors).

The court in Nickels "recognized Professor Larson's distinction between consumptive activities which should not bear the burden of workers' compensation insurance, and productive business activities, which should." Id. at 253 (emphases added) (footnote omitted). This is because "[a] homeowner who hires

someone to perform an odd job for his own benefit is not appropriately considered an employer under the workers' compensation statute.[5] A business, unlike a homeowner, can pass the cost of workers' compensation insurance on to the consumers of the business's service or product." Id. The court thus determined that "[b]ecause [claimaint's] work for [the farm] and the Napolillis furthered the business, it [was] therefore within the scope of the workers' compensation system." Id.

The decision by the Supreme Court of Illinois in Bob Neal Pontiac-Toyota, Inc. v. Industrial Commission, 433 N.E.2d 678 (Ill. 1982), also provides helpful guidance. There, a general contractor initially hired and paid the claimant to do roof work, painting and other maintenance for a car dealership. Id. at 679. The general contractor completed the work for which he was hired. Id. When the car dealership needed additional work done, the general contractor suggested the car dealership deal directly with the claimant. Id. The dealership approached

[5] Notably, here, Borrson was injured while working on the roof of Weeks's personal residence. Even if Weeks agreed to the roof work and the residence could have been rented out as part of Weeks's rental business sometime in the future, Borrson's repairs to the roof were a "consumptive activity" that benefitted Weeks personally. Other jurisdictions have also recognized the consumptive versus productive business activity distinction in similar circumstances where the claimant performed repair work on the putative employer's personal residence. See, e.g., Stephens v. Indus. Comm'n, 547 P.2d 44, 44-45 (Ariz. Ct. App. 1976) (holding that workers' compensation did not apply to a claimant who constructed a real estate developer's personal residence); Schuler v. Holmes, 49 N.W.2d 818, 818-20 (Iowa 1951) (holding that a retired farmer leasing part of his farmland was not an employer to a claimant who repaired a structure on the farmland).

the claimant and told him about the additional work needed. Id. There was no agreement on how long the work would take, but it was agreed the claimant would be paid an hourly rate and that his adult son could assist for an additional hourly rate. Id. Claimant was injured when he fell from a ladder while painting a pillar in the car dealership's showroom. Id. at 680.

As explained by the court:

> This case presents the frequently recurring question of **whether one is an independent contractor or an employee** for purposes of workmen's compensation coverage. We have previously characterized the problem as "one of the most vexatious and difficult to determine in the law of compensation." (*O'Brien v. Industrial Com.* (1971), 48 Ill.2d 304, 307, 269 N.E.2d 471; *see also Kirkwood v. Industrial Com.* (1981), 84 Ill.2d 14, 20, 48 Ill.Dec. 556, 416 N.E.2d 1078; Ropiequet & Keefe, Coverage of the Illinois Workmen's Compensation Act, 1957 U.Ill.L.F. 169, 185.) Professor Larson acknowledges that "(t)he closest, the most controversial, and the most numerous cases on status are those involving services, such as repair, maintenance, and incidental construction or installation, that are not in the everyday mainstream of production activity * * * (including) window-washers, welders, well cleaners, watchmen, house detectives, steeple-jacks, roofers, plumbers, plasterers, painters, mechanics, machinists, engineers, electricians, carpenters, masons, boiler repairmen, blacksmiths, and repairmen of all kinds." (1C A. Larson, Workmen's Compensation sec. 45.31, at 8-174 (1980).) The problem, of course, is that there is no clear line of demarcation, for there can be no inflexible rule applicable to all factual situations. (*Coontz v. Industrial Com.* (1960), 19 Ill.2d 574, 577, 169 N.E.2d 94; *Immaculate Conception Church v. Industrial Com.* (1947), 395 Ill. 615, 620, 71 N.E.2d 70.) Indeed, the problem in this area generally lies not in the applicable rules, but in the varying nature of the factual situations presented. (See *O'Brien v. Industrial Com.* (1971), 48 Ill.2d 304, 307, 269 N.E.2d 471.) Since many jobs contain elements of both relationships, and the facts could, depending on their interpretation and the credibility of the witnesses, support either result, we have consistently held that the Commission alone is empowered to evaluate the testimony and draw reasonable inferences therefrom.

Id. (emphasis added).

With respect to the "relative nature of the work" test, the court in Bob Neal Pontiac-Toyota explained:

> Professor Larson emphasizes that "(t)he nature of the claimant's work, in the abstract, is seldom a safe guide in itself, and for this reason it is dangerous to rely on precedents classified solely by the character of the worker's job * * *." (1C A. Larson, Workmen's Compensation sec. 43.52, at 8-19 (1980).) "The independence of these artisans is not to be determined by looking at the artisan or job alone, but by judging how independent, separate, and public his business service is in relation to a particular employer." (1C A. Larson, Workmen's Compensation sec. 45.31, at 8-175 (1980).) "If the worker does not hold himself out to the public as performing an independent business service, and regularly devotes all or most of his independent time to the particular employer, he is probably an employee, regardless of other factors." (1C A. Larson, Workmen's Compensation sec. 45.31(a), at 8-175 (1980).) With respect to nonrecurring but substantial services, Professor Larson states that "if * * * the thing contracted for is a business service rather than the personal services of the worker, the status is that of independent contractor. Indicia of business service include the simultaneous carrying-on of other contracts; the absence of necessity for the contractor personally to do any physical work; and the contractor's advertising or holding himself out to the public as furnishing this business service." 1C A. Larson, Workmen's Compensation sec. 45.31(b), at 8-184 to 8-185 (1980).

Id. at 681-82 (emphasis added).

The court in Bob Neal Pontiac-Toyota determined that, where the claimant did not hold himself out to the public as providing an independent business service, did not advertise his services, had no business cards, did not have a telephone registered in his name, never submitted a contractor's bid, performed the work himself with only the help of his son, and devoted his full services to the dealership during the relevant period, the workers' compensation commission's finding that

claimant was an employee was not contrary to the evidence. Id. at 682.

The current version of Professor Larson's treatise continues to provide similar helpful insight about the "relative nature of the work" test in circumstances involving services such as repair, maintenance, and incidental construction work. Larson, supra § 62.06.

In this case, my view is that this court should clarify the factors and considerations under the "relative nature of the work" test. However, the case should be remanded to the LIRAB to resolve the threshold issue of whether Weeks can prove that she did not agree to have Borrson do the roof work. If Weeks cannot meet her burden on that issue, the LIRAB should then consider whether Weeks can "establish under both the control test and the relative nature of the work test that coverage is not appropriate" under HRS Chapter 386. HRS § 386-73.5.

For purposes of the "relative nature of the work test," this case demonstrates the need for better clarity of the test. Otherwise, there likely will be a variety of circumstances – including when services are obtained from an individual for repair, maintenance and similar work – where a question will arise whether an employment relationship has been created for purposes of workers' compensation coverage. The

Legislature may need to revisit and clarify the test it adopted in 1996.

IV. Conclusion

I respectfully concur in part and dissent in part, and would remand the case to the LIRAB for further proceedings consistent with the above.

/s/ Mark E. Recktenwald

/s/ Lisa M. Ginoza