OPINION OF ACOBA, J., CONCURRING IN PART AND
DISSENTING IN PART, WITH WHOM RAMIL, J., JOINS

While I concur in the result reached, I write separately (1) to emphasize that no "presumption of validity" standard of review applies to evaluation of witness credibility or the weight of the evidence by the Labor and Industrial Relations Appeals Board (the Board), (2) to urge that an "unjust and unreasonable" standard not be utilized in workers' compensation cases, and (3) to reiterate that review of the Board's decisions necessitates that it expressly frame its decisions in terms of the standards applicable in this area of the law.

The first standard -- that a presumption of validity be given to an administrative agency decision -- is wrongly utilized in some cases with reference to the Board's determination of witness credibility and the weight to be given the evidence. The second standard -- that the claimant-appellant carries a heavy burden to make a convincing showing that the decision is unjust and unreasonable -- is erroneously imported from utility rate-making statutes having nothing to do with workers' compensation cases. The use of these two standards in workers' compensation cases is, at its best, confusing and contradictory as to the basis for challenge and review of the Board's decisions and, at its worst, destructive of the presumption of work connectedness under Hawai'i Revised Statutes (HRS) § 386-85(1) (1993) and the

clearly erroneous standard of review under HRS § 91-14(g)(5) (1993).[1] I cannot agree with the reliance on these two standards in conjunction with well-established benchmarks for review. To do so raises additional barriers for parties challenging the Board's decisions and further constricts our already limited scope of review of such decisions. The citation by the Intermediate Court of Appeals (the ICA) to such standards in its memorandum opinion is understandable, however, in light of the impreciseness of some of our past appellate decisions.

I.

The framework for this court's review of workers' compensation decisions by the Board is well-settled. See Igawa v. Koa House Rest., 97 Hawai'i 402, 411-12, 38 P.3d 570, 579-80 (2001) (Acoba, J., concurring and dissenting). In a nutshell, "HRS § 386-85(1) 'creates a presumption in favor of the claimant that the subject injury is causally related to the employment activity.'"[2] Id. at 411, 38 P.3d at 579 (quoting Chung v. Animal Clinic, Inc., 63 Haw. 642, 650, 636 P.2d 721, 726-27 (1981)

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[1] See Ras v. Hasegawa, 53 Haw. 640, 641, 500 P.2d 746, 747 (1972) ("[T]he Department of Labor and Industrial Relations, including its director and appellate board, is an 'agency' within the meaning of HRS § 91-1(1).")

[2] HRS § 386-85(1) provides as follows:

> **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[.]

(Boldfaced font in original.) (Emphases added.)

(footnote omitted)). "[T]he employer must marshal [substantial evidence] to overcome the presumption. [See supra note 2. This] signifies a high quantum of evidence which, at the minimum, must be relevant and credible evidence of a quality and quantity sufficient to justify a conclusion by a reasonable person that an injury or death is not work connected." Id. (citations, internal quotation marks, and brackets omitted).[3] "If the evidence is substantial, the Board must weigh and consider the evidence offered by the employer against the evidence offered by claimants supportive of the claim." Id. (internal quotation marks and citations omitted). And "if, as a result of the weighing, there is a reasonable doubt as to whether an injury is work connected,

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[3] The definition of the term "substantial evidence," as used in workers' compensation cases and in HRS § 386-38(1), was borrowed from the "substantial evidence" test used by courts on appellate review. See Acoustic, Insulation & Drywall, Inc. v. Labor and Indus. Relations Appeal Bd., 51 Haw. 312, 459 P.2d 541 (1969) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Citing Appalachian Elec. Power Co. v. National Labor Relations Bd., 93 F.2d 985, 989 (4th Cir. 1938); National Labor Relations Bd. v. Thompson Prods., 97 F.2d 13, 15 (6th Cir. 1938); Ballston-Stillwater Knitting Co. v. National Labor Relations Bd., 98 F.2d 758, 760 (2 Cir. 1938). The cases relied upon by Acoustic referenced 29 U.S.C.A. § 160(e), which provided the standard of review for courts under the National Labor Relations chapter:

> Section 10(e) of the Act, 29 U.S.C.A. § 160(e), provides that[,] "[t]he findings of the Board as to the fact, if supported by evidence, shall be conclusive." Hence this court is not at liberty to review the evidence and make its own findings; but neither is it bound to accept findings based on evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted. The statute means that the [National Labor Relations] Board's findings are conclusive if supported by substantial evidence.

Ballston-Stillwater Knitting Co., 98 F.2d at 760 (internal citations omitted). However, HRS § 386-85(1)'s use of the term "substantial evidence" should not be confused with the same term in HRS § 91-14(g)(5), which establishes the standard for judicial review of the sufficiency of an agency's record.

it must be resolved in favor of the claimant." Id. (internal quotation marks and citations omitted).

However, the ICA cites to Mitchell v. Department of Educ., 85 Hawai‘i 250, 942 P.2d 514 (1997), which, in effect, stacks onto this framework two additional appellate standards of review, to the effect that,

> [appellate] review is "further qualified by the principle that [(1)] the agency's decision carries a presumption of validity and [(2)] appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Sussel v. Civil Serv. Comm'n, 74 Haw. 599, 608, 851 P.2d 311, 316, reconsideration denied, 74 Haw. 650, 857 P.2d 600 (1993) (citation and internal brackets omitted); Bragg v. State Farm Mut. Auto. Ins. Co., 81 Hawai‘i 302, 304, 916 P.2d 1203, 1205 (1996) (citation omitted).

85 Hawai‘i at 254, 942 P.2d at 518.

II.

A.

The standard granting "a presumption of validity" to agency decisions is also cited to by the employer, University of Hawai‘i (UH). Citing Dole Hawaii Div. - Castle & Cooke v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1980), UH suggests, in its Petition, that, "[w]hen considering mixed questions of fact and law, an appellate court must give deference to the agency's expertise and experience in the particular field." (Emphasis added.) Contrary to wayward suggestions in the cases, deference to the expertise of an agency is not the same as the deference afforded the Board "in assessing the relative credibility and

weight of the evidence for and against compensability[.]" Majority opinion at 20.

In deferring to the Board's resolution of conflict in testimony or the weight of the evidence, we do no more than recognize the role of the Board as fact finder.[4] That is an entirely different matter from affording "a presumption of validity" to an agency decision, or doing so because of the "expertise" of an agency in making technical, scientific, or policy determinations that the legislature has specifically left to the agency. See, e.g., New York Times Sales v. Commissioner of Revenue, 667 N.E.2d 302, 304 (Mass. Ct. App. 1996) (appellate tax board's expertise in tax matters), review denied by 671 N.E.2d 952 (Mass. 1996); Morton Int'l v. Auditing Div. of Utah State Tax Comm'n, 814 P.2d 581, 586 (Utah 1991) (observing that "it is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review[,]" but, rather, "the dispositive factor is whether the agency, by virtue of its

[4] See De Victoria v. H&K Contractors, 56 Haw. 552, 545 P.2d 692 (1976). In that case, this court traced the legislative history of the "clearly erroneous" standard in HRS § 91-14(g)(5). "The specific language of original HRS [§] 91-14(g) was taken from the corresponding section of the first tentative draft of the revision of the Model State Administrative Procedure Act." Id. at 557, 545 P.2d at 697. Referring to the Commissioners' Note pertaining to this provision, 9C U.L.A. 159 (Supp. 1967), this court determined that the correct review of administrative decisions under the "clearly erroneous" test of HRS § 91-14(g)(5) was similar to that of fact finders under the Federal Rules of Civil Procedure (FRCP) Rule 52(a). See id. at 558, 545 P.2d at 697. The replacement of the substantial evidence rule with the clearly erroneous rule "places court review of administrative decisions on fact questions under the same principle as that applied under the [FRCP] in connection with review of trial court decision[s]." Id.

experience or expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved" (emphasis added)).

Deference, with respect to the credibility of witnesses and the weight of the evidence, is accorded to fact finders sitting in administrative and judicial forums. See, e.g., Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) (stating that "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" in a worker's compensation case (citing State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000)); Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 390-91, 984 P.2d 1198, 1216-17, reconsideration denied, 91 Hawai'i 372, 984 P.2d 1198 (1999); In re Estate of Herbert, 90 Hawai'i 443, 454, 979 P.2d 39, 50, as amended on denial of reconsideration by 90 Hawai'i 443, 979 P.2d 39 (1999); State v. Kekaualua, 50 Haw. 130, 132, 433 P.2d 131, 133 (1967) ("The jury is the sole judge of the credibility of the witnesses or the weight of the evidence." (Internal citations omitted.)).

On appeal, such determinations of credibility and of the weight of evidence are not subject to a presumption of validity or to deference based on any specific agency "expertise." Rather, inasmuch as it is the fact finder who observes the demeanor of the witnesses and receives the evidence, it is the fact finder who is best qualified to make decisions regarding the credibility of testimony and the weight to be given

evidence. Our acknowledgment of the fact finder's superiority in this realm stems from recognition of the division of function between the agency as the fact finder and our role as reviewer of the record.

Accordingly, we defer to the Board's evaluation for the foregoing reasons, unless we believe it to be clearly erroneous, and not because of any "presumption" or because of any scientific or technical expertise. Cf. Kekaualua, 50 Haw. at 133, 433 P.2d at 132 ("When a jury verdict involves conflicting evidence and depends on the determination of credibility of witnesses or the weight of evidence, the test on appeal is whether there is substantial evidence to support the verdict of the jury." (Citing, inter alia, Territory v. Ebarra, 39 Haw. 488, 492 (1952); State v. Carvelo, 45 Haw. 16, 33, 361 P.2d 45, 54-55 (1961); State v. Tamanaha, 46 Haw. 245, 251, 377 P.2d 688, 692 (1962), reh'g denied, 46 Haw. 345, 379 P.2d 592 (1963).)).

For, presuming the validity of the Board's decisions as to credibility and weight, or because of its "expertise," undermines the clearly erroneous rule imposed by statute, see HRS § 91-14(g)(5) (establishing that a finding of fact is subject to a determination of whether it is "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record"), and confirmed in our case law, see, e.g., Korsak v. Hawaii Permanente Med. Group, Inc., 94 Hawai'i 297, 302-03, 12 P.3d 1238, 1243-44 (2000); Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 102-03, 881 P.2d 1246, 1248-49 (1994); Chung, 63

Haw. at 651-52, 636 P.2d at 727. The result would be to supplant the "clearly erroneous" standard in this context, see id., in favor of one in which appellate courts would essentially decline to provide any review at all.

B.

In connection with the foregoing, the majority, in my view, mischaracterizes Chung. The majority states that "Chung does not stand for the broad proposition that the Board is mandated to reconcile conflicting expert testimony in favor of the claimant; that proposition would eviscerate the well established rule that the Board's determinations of credibility and weight are entitled to deference." Majority opinion at 20 (citation and emphasis omitted). I believe that this statement confuses what is required of the Board with what is required of appellate courts, and invites error by both bodies.

As to the Board's responsibility, nowhere does Chung intimate, as the majority states, that the principle that "conflicting expert opinion should be resolved in favor of the claimant derives from . . . the presumption [that] compensability is not rebutted when there is equally credible conflicting evidence as to causation[.]" Majority opinion at 20. Rather, the Chung court said that "coverage will be presumed at the outset, subject to being rebutted by substantial evidence[,]" 63 Haw. at 651, 636 P.2d at 727 (citing HRS § 386-85), and "where there is a reasonable doubt as to whether an injury is work-

connected, it must be resolved in favor of the claimant." Id. (citation omitted) (emphases added).

As to this court's responsibility, rather than couching review in terms of a "due deference" standard, majority opinion at 20, 21, the appropriate standard of review, long set down in cases and specifically held so in the work-relatedness question raised in Chung, is whether the agency decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" 63 Haw. at 651, 636 P.2d at 727 (citations omitted).

> The standard of review governing this court's examination of the [Board]'s decision is contained in Hawaii's Administrative Procedure Act, which provides, in pertinent part, that "the court may affirm or reverse the decision and order of an administrative body if the administrative findings, conclusions, [decisions,] or orders are: . . . (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . ." HRS § 91-14(g) (1976); DeFries v. Ass'n Owners, [57 Haw. 296, 302, 555 P.2d 855, 859 (1976)]; De Victoria v. H&K Contractors, 56 Haw. 552, 556, 545 P.2d 692, 696-97 (1976). The "clearly erroneous" standard requires the court to sustain the Board's findings unless the court is "left with a firm and definite conviction that a mistake has been made." Id. at 557-58, 545 P.2d at 697-98.

Id. at 651-52, 636 P.2d at 727 (some ellipsis points omitted) (emphasis added).

III.

The second standard, imposing a "heavy burden" on the appellant to "convincing[ly]" show an "unjust and unreasonable" result, is wrongly applied in workers' compensation cases. The history of that standard plainly demonstrates its inapplicability to workers' compensation cases. In In re Application of Kauai

Elec. Div. of Citizens Utilities Co., 60 Haw. 166, 590 P.2d 524 (1978) [hereinafter Kauai Electric], this court indicated that the standard to be applied in energy rate adjustments is "just and reasonable," because the applicable statute, HRS § 269-16, "requires that all rates and charges must be 'just and reasonable.'" Id. at 181, 590 P.2d at 535. Observing that "[t]he language of the statute grants to the [Public Utilities] Commission [(Commission)] broad discretionary power in the area of rate regulation," id. at 179, 590 P.2d at 534, this court said that

> [t]he rule is that the burden is always on the applicant to prove justification for a requested increase before the Commission. In re Application of Hawaiian Electric Co., Ltd., 56 Haw. 260, 270, 535 P.2d 1102[, 1109] (1975). However, once the Commission has made an order, the order carries a presumption of validity and one seeking to upset the order carries "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." Federal Power Commission v. Hope Natural Gas Co., . . . 320 U.S. [591,] 602 [(1944).]

Id. at 187, 590 P.2d at 538 (some internal citations omitted).

The Kauai Electric court adopted the standard set forth in Hope Natural Gas, which construed a similar federal statute, 15 U.S.C. § 717c,[5] requiring that rates set by the Federal Power

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[5] In pertinent part, 15 U.S.C. § 717c(a) states:

> a) Just and reasonable rates and charges
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> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(Emphases added.)

Commission be "just and reasonable." In that case, the United States Supreme Court relied specifically upon the language of the statute in declaring that "when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act." Hope Natural Gas, 320 U.S. at 602.

> We held in Federal Power Commission v. Natural Gas Pipeline Co., [315 U.S. 575 (1942)], that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

Hope Natural Gas, 320 U.S. at 602 (emphasis added). Subsequently, several Hawai'i cases cited to and quoted from this proposition, primarily within the context of "just and reasonable" rate-setting under HRS § 269-16. See In re Application of Hawaiian Elec. Co., 81 Hawai'i at 465, 918 P.2d at 567 (rule-making by the Public Utilities Commission); In re Application of Hawaiian Tel. Co., 67 Haw. 370, 381, 689 P.2d 741, 749 (1984) (HRS § 269-16(b)); In re Application of Hawaii Elec. Light Co., 67 Haw. 425, 432, 690 P.2d 274, 279 (1984) (treatment of special revenue bonds in rate-making); Application of Hawaiian

Tel. Co., 65 Haw. 293, 296, 651 P.2d 475, 479 (1982) (HRS § 269-16(b)), overruled in part by Camara v. Agsalud, 67 Haw. 212, 685 P.2d 794 (1984); Jones v. Hawaiian Elec. Co., 64 Haw. 289, 292, 639 P.2d 1103, 1107 (1982) (HRS § 269-16), overruled in part by Camara, supra; In re Application of Hawaii Elec. Light Co., 60 Haw. 625, 630, 594 P.2d 612, 616 (1979) (HRS § 269-16(f)); In re Hawaiian Elec. Co., 42 Haw. 233, 243 (1957) ("Under [Revised Laws of Hawaii] 1955, § 104-15, the Public Utilities Commission is authorized to prescribe an accounting system for a public utility which shall be just and reasonable[.]"), reh'g denied, 42 Haw. 298 (1958).

However, the unjust and unreasonable language in rate-making cases has crept into appellate court decisions in workers' compensation cases, see e.g., Tam v. Kaiser Permanente, 94 Hawai'i 487, 490, 17 P.3d 219, 222 (2001) ("Tam failed to carry her burden of convincingly demonstrating that the Director's order violated HAR § 12-10-75(c), see In Re Gray Line Hawai'i, Ltd., 93 Hawai'i 45, 53, 995 P.2d 776, 784 (2000) ('[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[.]'" (Citations omitted.)).); Potter v. Hawaii Newspaper Agency, 89 Hawai'i 411, 421, 974 P.2d 51, 61 (1999); Government Employees Ins. Co. v. Dang, 89 Hawai'i

8, 11, 967 P.2d 1066, 1069 (1998); Mitchell, 85 Hawai‘i at 254, 942 P.2d at 518; Bocalbos v. Kapiolani Med. Ctr. for Women & Children, 93 Hawai‘i 116, 131 n.29, 997 P.2d 42, 57 n.29 (App.), cert. denied, 93 Hawai‘i 116, 997 P.2d 42 (2000), as an additional expression of deference to agencies.[6] Inasmuch as the "unjust and unreasonable" standard is one derived from the text of a specific statute enacted with respect to rate-making, it is entirely alien to the workers' compensation area and should not be further employed by the appellate courts in subsequent workers' compensation cases.

IV.

Recently, in Igawa, the majority upheld the Board's decision "[d]espite the Board's failure to expressly address the standards it applied[.]" 97 Hawai‘i at 409 n.6, 38 P.3d at 577 n.6. In so holding, I believe the majority in Igawa effectively removed from this court's review, the question of whether the agency had performed "reasoned decision making[.]" Id. at 412, 38 P.3d at 580 (Acoba, J., concurring and dissenting) (quoting In re Application of Hawaii Elec. Light Co., 60 Haw. at 642, 594 P.2d at 623).

[6] Such language has also been incorrectly used in non-rate-making cases. See, e.g., Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai‘i 217, 229, 953 P.2d 1315, 1327 (1998); Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai‘i 66, 68, 947 P.2d 378, 380 (1997); Sussel, 74 Haw. at 608, 851 P.2d at 316; Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 639, 675 P.2d 784, 789 (1983) (decisions by the Land Use Commission), cert. denied, 67 Haw. 1, 677 P.2d 965 (1984).

As in Igawa, here again, the Board did not indicate that the employer, UH, adduced substantial evidence to overcome the presumption in HRS § 365-85(1) that claimant Bruce Nakamura's injury was work-related. "An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision." Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988) (citing Nani Koolau Co. v. K & M Constr., 5 Haw. App. 137, 140-41, 681 P.2d 580, 584 (1984)). Despite the fact that this court has said the Board "should generally state whether or not it has in fact applied the presumption[,]" Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 107, 881 P.2d 1246, 1254 (1994) (quoting Survivors of Freitas v. Pacific Contractors Co., 1 Haw. App. 77, 85, 613 P.2d 927, 933 (1980)), and that the purpose behind requiring agencies to expressly set out their findings is "to assure reasoned decision making by the agency and enable judicial review of agency decisions," In re Application of Hawaii Elec. Light Co., 60 Haw. at 642, 594 P.2d at 623, such entreaties have gone unheeded.

As a result, the decision making process by the Board is not validated by our review, see Igawa, 97 Hawai'i at 412, 38 P.3d at 580 (Acoba, J., concurring and dissenting) (citing In re Application of Hawaii Elec. Light Co., 60 Haw. at 641-42, 594 P.2d at 623), and agency decisions are largely placed beyond the purview of this court, as well. With all due respect, the

narrowing scope of review countenanced by the majority abdicates the responsibilities owed to the parties who appeal these cases to this court.