DISSENTING OPINION OF ACOBA, J.

I respectfully dissent, inasmuch as I believe the presumption that the work injury was covered in Hawai‘i Revised Statutes (HRS) § 386-85 (1993)[1] governs and was to be applied in deciding the case of Claimant-Appellant Richard S. Kawakami (Claimant) as in every other worker compensation case. Because the Labor and Industrial Relations Appeals Board (Board) failed to apply this presumption and instead applied a special categorical rule, I would remand the case to the Board for application of the presumption.

In this case, it is apparent that the City and County of Honolulu Board of Water Supply (Employer) maintained a mandatory policy of assigning trucks to certain employees and requiring those employees to return the truck at the end of the day. It is undisputed that Claimant was injured while he was in his assigned vehicle and claimed he was returning it to work; hence, the presumption was implicated.

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[1] HRS § 386-85 states:

> 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.).

I.

A.

In Chung v. Animal Clinic, Inc., 63 Haw. 642, 636 P.2d 721 (1981), this court explained that "HRS § 386-85(1) creates a presumption in favor of the claimant that the subject injury is causally related to the employment activity." Id. at 650, 636 P.2d at 727. In addition, this court recognized the "liberal, unitary concept of work-connection" for determining whether an injury was work-related. Id. at 648, 636 P.2d at 725. The unitary test requires "the finding of a causal connection between the injury and any incidents or conditions of employment." Id. (emphasis added). The extent to which that connection will be drawn was exemplified in Chung. In that case, this court found a causal connection between high-stress conditions at work and a heart attack, even though the heart attack occurred after work and while the claimant was jogging and not engaged in any employment activity. See id. at 652, 636 P.2d at 727.

Accordingly, the presumption in HRS § 386-85(1) "imposes upon the employer both the heavy burden of persuasion and the burden of going forward with the evidence." Id. (citing Akamine v. Hawaiian Packing & Crating Co., 53 Haw. 406, 408, 495 P.2d 1164, 1166 (1972)). To the extent the presumption imposes a "heavy burden of persuasion[,]" id. at 650, 636 P.2d at 726, upon the employer, the presumption itself is enough to establish prima facie evidence of the causal relationship. The Board must determine "whether [any] evidence adduced by the employer is

substantial[.]" Acoustic, Insulation & Drywall, Inc. v. Labor & Indus. Relations Appeal Bd., 51 Haw. 312, 317, 459 P.2d 541, 544 (1969). "The term 'substantial evidence' 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.'" Chung, 63 Haw. at 650, 636 P.2d at 727 (quoting Akamine, 53 Haw. at 408-09, 495 P.2d at 1166). In the absence of substantial evidence, "the claimant must prevail[.]" Id. at 650, 636 P.2d at 726.

B.

Applying the the statutory presumption, it is arguable that Claimant's injuries were compensable. This case is analogous to Corden v. Paschoal's Ltd., 52 Haw. 242, 473 P.2d 561 (1970). The employee in Corden was responsible for driving small rental cars to Kahului, where he lived, and exchanging them for larger cars to be driven back to work in Lahaina. See id. at 243, 473 P.2d at 562. After work one night, the employee picked up his girlfriend and went out to dinner and "to several nightclubs to drink and dance." Id. Around midnight, he began his trip back to Kahului. See id. He was later "discovered unconscious at the bottom of a cliff next to the wrecked [car]." Id.

In Corden, this court expressly held that "as soon as [the decedent] undertook [a business related trip], it was then

and there that he commenced to perform his duties as an employee" and that "[w]hatever the decedent did prior to starting this trip towards [the destination] is immaterial on this issue and it may be deemed that it was his personal business or doings." Id. at 245, 473 P.2d at 563. This court acknowledged the deviation doctrine, such as that raised in this case, see id. ("some courts have held that a lengthy antecedent deviation will bar recovery"), but chose not to apply this rule.

Instead, this court explained that, because decedent was "performing one of his duties for which he had been hired," id., and HRS § 386-3 stated if "an employee suffers personal injury . . . by accident arising out of and in the course of employment[,]" id. at 244, 473 P.2d at 563 (quoting HRS § 386-3), then the injury was compensable. See id. at 245, 473 P.2d at 563. Corden noted the presumption in HRS § 386-85 "is more than a procedural device that disappears upon the introduction of contrary evidence," id. at 244 n.1, 473 P.2d at 562 n.1 (citation omitted); but this court explained that it was not necessary to rule that the court should have given an instruction to that effect, see id. at 246, 473 P.2d at 563, because it had ruled as a matter of law that the injury was covered. See id.

Corden is relevant to the case at hand, insofar as it addresses similar facts and the actions of an employee.[2] I do

[2] Employer argues that Corden is distinguishable because Claimant was turning around at the time Claimant was injured in order to determine whether his girlfriend was following him on his way to work. As I believe we should remand this case to the Board, I do not address this issue. The Employer of course would have to submit "substantial evidence" that the (continued...)

not believe this case may be distinguished on the ground that "[Claimant] had no discretion as to when he could return the vehicle[,]" majority opinion at 10, and "was not authorized to take the [Employer's] vehicle halfway across the island[.]" Id. at 11. While such discretion was considered a factor in the Corden decision, this court focused primarily on the fact that the claimant was "performing one of his duties." Corden, 52 Haw. at 245, 473 P.2d at 563.

It is undisputed that Claimant's "job responsibilit[y] . . .[was] to return the [Employer's] vehicle to the Honolulu base yard each day[,]" and at the time of the accident, he claimed to be completing that duty. As this court has previously stated, "if there is reasonable doubt as to whether an injury is work-connected, the humanitarian nature of the statute demands that doubt be resolved in favor of the claimant." Akamine, 53 Haw. at 409, 495 P.2d at 1164. See also Nakamura v. State, 98 Hawai'i 263, 272, 47 P.3d 730, 739 (2002) (Acoba, J. concurring in part and dissenting in part, joined by Ramil, J.) (noting that, "where there is a reasonable doubt as to whether an injury is work-connected, it must be resolved in favor of the claimant" (quotation marks omitted)); Igawa v. Koa House Rest., 97 Hawai'i 402, 411, 38 P.3d 570, 579 (2001) (Acoba, J., concurring in part and dissenting in part) ("'if' a reasonable doubt exists as to the work-connected nature of the injury, it was mandated, i.e.,

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[2](...continued)
Claimant's detour under the facts was not related to the work activity of returning the vehicle.

'demand[ed]' by the statute that the issue 'be resolved in favor of the claimant'" (citation omitted)).

II.

The majority adopts a categorical rule which states that, "when an employee departs from his normal job duties on a personal errand that serves no purpose of the employer, there is no longer a work connection and any injury sustained during that deviation will not be compensable." Majority opinion at 6. In that regard, Larson does note that the "deviation problem . . . has produced some split of opinion[.]" Larson's, Workers' Compensation Law § 17.03[3] (2002).

A number of the cases cited for the proposition of a "substantial deviation" rule are distinguishable insofar as they do not involve a statutory presumption in favor of an employee. See Ogren v. Bitterroot Motors, Inc., 723 P.2d 944, 946 (Mont. 1986) (stating the Montana "general standard[,]" but not indicating any presumption); Carter v. Burn Constr. Co. Inc., 508 P.2d 1324 (N.M. 1973) (holding there was a deviation, but making no reference to a presumption); Hebrank v. Parsons, Brinckerhoff, Hall & MacDonald, 212 A.2d 579, 582 (N.J. Super. 1965) (citing the majority rule which states that, "[g]enerally, an accidental injury sustained by an employee while going to or returning from his place of employment is deemed not to have arisen out of or been in the course of employment" (emphasis added) (citations omitted)).

Commentators have referred to a variation of the deviation rule called the doctrine of re-entry, seemingly at odds with the one adopted by the majority. See Modern Worker's Compensation § 111:20 at 32 (1993) ("resuming a course reasonably related to the employer's business has been judicially interpreted to mean . . . returning an employer-provided vehicle to the place where it customarily belongs" (footnotes omitted)); Folse v. American Well Control, 536 So.2d 686, 689 (La. Ct. App. 1989) ("The doctrine of re-entry or temporary deviation . . . accepted by . . . this State . . . mean[s] . . . after [the employee] has completed his private mission and has begun to return to his next duty, or, after such completion, has begun to return the vehicle to the place where it belongs." (Emphasis added.) (Quotation marks omitted.)).

In Kodak Oilfield Haulers v. Adams, 77 P.2d 1145, 1149 (Alaska 1985), the Alaska Supreme Court applied a "substantial deviation" rule, but also held that the statutory presumption applied to "medical causation" as well. Id. at 1150 (citing Rogers Elec. Co. v. Kouba, 603 P.2d 909, 911 (Alaska 1979)). However, the court noted that the failure to apply the presumption was a harmless error, as the employer had already presented substantial evidence to rebut the presumption. See id.

III.

With all due respect, I believe a substantial deviation rule undercuts the statutory presumptions laid out in Hawaii's

worker compensation laws. The unitary test, as it was adopted, does not incorporate any specific doctrine. See Chung generally. Under the plain language of HRS § 386-85, a presumption of work connectedness applies until the employer rebuts it with "substantial evidence." Indeed in Korsak v. Hawai'i Permanente Med. Group, 94 Hawai'i 297, 12 P.3d 1238 (2000), this court expressly confirmed that the presumption of coverage applies "at the outset" and controls unless rebutted; any reasonable doubt favoring the claimant.

> 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*, . . . as the legislature has determined that, where there is a reasonable doubt as to whether an injury is work-connected, it must be resolved in favor of the claimant.

Id. at 306, 12 P.3d at 1247 (quoting Akamine, 53 Haw. at 409, 495 P.2d at 1166) (italicized emphasis in original) (brackets omitted) (underscored emphasis added). This court has already recognized that Hawaii's statutory presumption "places a heavy burden on the employer" that is different from most other jurisdictions. See id. at 307, 12 P.3d at 1248 (explaining that "[i]n most other jurisdictions, the burden is placed on the employee" (citing Larson's Worker's Comp. Law § 80.33(a) (2000)). Our legislature has deliberately chosen to "cast a heavy burden on the employer in work[ers'] compensation cases" because "work injuries are among the costs of production which industry is required to bear[.]" Id. (quoting Akamine, 53 Haw. at 409, 495 P.2d at 1166). As I believe the "substantial deviation" rule

disregards the statutory presumption of work connectedness and the "reasonable doubt" rule, I must disagree with its adoption. Consistent with HRS § 386-85, Chung, and Corden, the presumption should be applied. If the employer is able to produce substantial evidence to rebut the presumption, then the claim would be denied, unless reasonable doubt as to coverage exists.

IV.

For the reasons stated, I would remand this case to the Board to apply the statutory presumption of work coverage in HRS § 386-85.