NO. 23600

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MERRILL P. GOERS, nka MERRILL P. WEST, Claimant-Appellant,
v. DIRTY DAN'S HAWAII, INC., and FIRST INSURANCE COMPANY OF HAWAII, LTD., Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB-96-640 (2-94-21567))

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Merrill P. Goers, nka Merrill P. West (Appellant), appeals the June 20, 2000 decision and order of the Labor and Industrial Relations Appeals Board (the Board) that affirmed the October 4, 1996 decision of the Director of Labor and Industrial Relations (the Director). The Director's decision denied the workers' compensation claim filed by Appellant for injuries sustained in a motor vehicle accident fronting Dancers nightclub. We affirm because there is "reliable, probative, and substantial evidence on the whole record"[1] that Appellant's injuries were incurred by Appellant's wilful intention to injure another.

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[1] See Hawaii Revised Statutes (HRS) § 91-14(g)(5) (1993).

I. BACKGROUND.

During the night of October 19, 1992, Appellant sustained multiple, serious injuries arising out of a motor vehicle accident fronting Dancers nightclub, where Appellant was employed as a doorman. Appellant was off duty at the time. An altercation involving Appellant, fellow doormen and several club patrons commenced in the club parking lot and continued onto Sand Island Road, where Appellant and one of the club patrons, Paul Cobb-Adams (Cobb-Adams),[2] were struck by a tow truck.

Two years later, on October 19, 1994, Appellant filed a Form WC-5, an employee's claim for workers' compensation benefits. Employer Dirty Dan's of Hawaii, Inc. dba Dancers and insurance carrier First Insurance Company of Hawaii, Ltd. denied liability. A hearing was held on July 30, 1996 at the Department of Labor and Industrial Relations Disability Compensation Division (DLIR). In an October 4, 1996 decision, the DLIR Director found that, "pursuant to [Hawaii Revised Statutes (HRS) § 386-3 (1993)[3]], this claim is not compensable as [Appellant]

[2/] Paul Cobb-Adams (Cobb-Adams) died as a result of being run over by the tow truck.

[3/] At the time Appellant was injured, HRS § 386-3 (1993) provided:

> 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 hereinafter provided.

(continued...)

wilfully intended to injure another [(Cobb-Adams)] at the time he was injured in the motor vehicle accident." The Director reasoned, also, that "this claim is not compensable as [Appellant's] injury on October 19, 1992 did not occur in the course of his employment."

On October 21, 1996, Appellant filed a timely notice of appeal to the Board of the Director's denial of his claim. The Board held a hearing on January 8, 1998. The sole issue before the Board was "whether [Appellant] sustained a personal injury on or about October 19, 1992, arising out of and in the course of employment." In its June 20, 2000 decision and order, the Board affirmed the decision of the Director, finding, "based on the credible testimonies of [three] by-stander [(sic)] witnesses, that [Appellant's] injuries were incurred by his wilful intention to injure another[,]" and thereon concluding, "[p]ursuant to [HRS § 386-3 (1993)], . . . that Claimant did not sustain a personal injury on October 19, 1992, arising out of and in the course of his employment."

On July 19, 2000, Appellant filed this timely appeal.

[3/](...continued)

> 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.
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> No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another or by the employee's intoxication.

II. RELEVANT EVIDENCE.

A. Description of the Premises.

Dancers nightclub is a strip club, located in an industrial area at 205 Sand Island Access Road. The club features cocktails and adult entertainment from noon to 4:00 a.m. It is located on the ground floor of a warehouse building, next to a drive-in eatery. The club's interior is approximately forty feet by sixty feet. The club's parking lot is approximately 150 feet in length and runs along Sand Island Access Road, a two-way, four-lane road divided by a center median. There is no barrier or sidewalk separating the parking lot from the road, which is located approximately 20 feet from the entrance to the club. The club's patrons are "fairly rough or rugged" types, consisting primarily of construction workers, bikers[4] and military personnel.

B. Appellant's Duties as a Doorman.

As a Dancers doorman, Appellant was responsible for the safety and security of the club's dancers and customers, both inside the club and in its parking lot. He also checked customer identification, collected the cover charge, took inventory, refilled the bar, stocked supplies and served as a parking lot attendant.

[4/] "Bikers" were described as persons belonging to motorcycle clubs.

Dancers does not have a written policy with regard to doormen who are off duty but on the premises. Appellant understood, however, that it was the club's unwritten policy that off-duty doormen were to assist those on duty whenever necessary. According to the general manager of Dancers, Dean Durbin, "[t]o the extent that the on-duty doorman requested and/or accepted the reasonable and prudent assistance of the off-duty doorman, the off-duty doorman was encouraged by Dancers to render such reasonable and prudent assistance."

Appellant estimated that a Dancers doorman intervenes with unruly customers "four times or five times a week," given the nature of the crowd at the club. Appellant described his usual manner of dealing with unruly customers as "polite[.]" A simple, courteous request to conform with the rules of the club, if heeded, would suffice. However, if a customer refused to cooperate, then Appellant would, in his words, "just wrap my arms around him and carry him out, take him outside." Once the customer was outside the club, Appellant was to see to it that he or she left the parking lot. Appellant maintained that the only time he had to resort to the police on the job was the night of the incident.

When asked how much force he was authorized to use in removing a customer from the premises, Appellant testified that it would depend upon the situation, that he would "look for the simplest way to subdue this guy, just make the incident go pau,

because you can't have it carrying on and on and on. People are going to start getting hurt." When asked whether he was "authorized to hit a customer," Appellant first indicated that he was not so authorized. However, Appellant later explained, "The bottom line is my job was to remove this guy off the property, and if that's what it took for me to knock him on his butt and drag him off, then that was my job."

C. Circumstances Giving Rise to Appellant's Injuries.

On October 19, 1992, at around 10:00 p.m., Appellant, who was off duty, arrived with his wife at Dancers nightclub. Appellant noticed several police officers and two of the club's doormen who were on duty that night handling a "situation" in the parking lot. Appellant then walked into the club with his wife, ordered a beer -- "a hanakin [(sic; presumably, a Heineken beer)]" -- at the bar and sat down.[5] A few minutes later, Appellant saw one now known to him as Cobb-Adams run toward the pool table located at the back of the club, strike one of the patrons there in the face and run back outside. Appellant told his wife to remain inside the club and went outside, where he observed "three local boys screaming and swearing at [the on-duty doorman and another doorman who had already gone off duty.]" Appellant did not become involved at this point, but watched the altercation from a distance of about twelve-to-fifteen feet.

[5/] Appellant testified that he ordered a beer but did not consume any of it because "[t]he situation happened."

Matthew A. Chadwick (Chadwick) was the doorman on duty at the time, having begun his shift at approximately 8:00 p.m. Chadwick was standing in the parking lot, near the "back door" to the club, which is located between the front door and the drive-in restaurant and which, like the front door, opens directly onto the parking lot. Standing with Chadwick was Richard Desa (Desa), the doorman whose shift had ended at 8:00 p.m. that night.

From his vantage point, Appellant heard the three patrons, one of whom was Cobb-Adams, threatening and swearing at Chadwick and Desa. Appellant later learned that the same three patrons had earlier caused considerable damage to a truck[6] parked in the club's parking lot. That had been the reason for the presence of the police earlier that evening.

Appellant monitored the altercation for several minutes. Then he went back inside the club and told the bartender to call the police to come back to the club. Appellant went back outside and saw that the situation had become "more heated." The three patrons were making head and arm movements that indicated to Appellant they were preparing to act upon their threats of violence. Appellant also observed several carloads of potential customers stop in front of the club, notice the altercation and then leave.

[6/] The truck belonged to Louis Lei Mamo Imbleau (Imbleau), the supervisor, at their place of employment, of Cobb-Adams and the two other club patrons involved in the altercation. Imbleau was also the patron who was punched by Cobb-Adams inside the club.

At this point, Appellant walked over and stood to Chadwick's immediate left, while Desa stood to Chadwick's immediate right, their backs to the building, facing the street. The three patrons stood facing the doormen with their backs to Sand Island Access Road. About ten to fifteen minutes had passed from the time Cobb-Adams had left the club after punching the patron at the pool table. During this period, Chadwick said, he had asked the three patrons to leave the premises approximately "20 or 30 times[,]" explaining to them that they could neither reenter the club nor remain in the parking lot. The three patrons responded by swearing at the doormen and threatening to return to the club to shoot Chadwick and Appellant and burn down the club.

One of the three patrons, who was wearing a cast on his right hand,[7] either hit or violently pushed Chadwick.[8] At about the same time, Cobb-Adams punched Appellant in the face. It is unclear whether Appellant was struck by Cobb-Adams before or after Chadwick was struck by the patron with the cast. At his July 8, 1996 deposition, Appellant testified that he was punched before Chadwick was struck, but he testified at the Board hearing that Chadwick had been struck first. The parties do not

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[7/] The patron wearing the cast was identified as Averill F. Igafo.

[8/] Doorman Matthew A. Chadwick (Chadwick) testified at his deposition that the patron "hit [me] with the hand with his cast on[.]" Appellant testified at his July 8, 1996 deposition that the patron "threw two hands, . . . into [Chadwick's] chest[.]"

seriously dispute, however, that the first blow was thrown by one of the three patrons and not one of the doormen.[9]

After the first blow was thrown, the altercation atomized. Chadwick and the patron with the cast moved from the initial location "towards the restaurant . . . into Sand Island." Appellant and Cobb-Adams moved at an angle towards the Nimitz Highway end of the parking lot and wound up somewhere in the mauka-bound lanes of Sand Island Access Road, where they were struck by a tow truck, resulting in Cobb-Adams's demise and Appellant's injuries. The autopsy of Cobb-Adams revealed "[a]cute alcohol intoxication (.249%)."

D. Conflicting Eyewitness Testimony.

Accounts of the incident diverge, *a` la* Rashomon,[10] as to what occurred after Cobb-Adams punched Appellant in the parking lot. The Board found the testimony of three eyewitnesses -- Christopher P. Toomey (Toomey), David K. Hethcote (Hethcote)

[9/] Bystander Christopher P. Toomey (Toomey) saw no physical altercation among the men while they were standing in the parking lot. He claimed, however, that Cobb-Adams had already been hit, that "his face was beat up." Witness Richard Martin (Martin) testified that "a fight broke out between two of the, I guess, patrons that were there and two of the other guys[,]" but he did not specify whether it was a patron or a doorman who had initiated physical contact while the group was in the parking lot. According to witness David K. Hethcote (Hethcote), "punches [were] thrown," but he, too, did not specify an initial assailant in the parking lot. According to Kevin D. Mariner (Mariner), the bartender on duty at the time of the incident, the patron with the cast hit Chadwick in the chest "for no reason[,]" then Cobb-Adams "tried to throw a punch" at Appellant.

[10/] Rashomon is a film, directed by Akira Kurosawa, that explores the nature of truth and reality through the skewed prism of several divergent accounts of a rape and murder given by the protagonists.

and Richard Martin (Martin) -- to be more credible than Appellant's account of those events.

1. Appellant's Testimony.

According to Appellant, Cobb-Adams punched him in the face twice. After the first punch, Appellant simply told him, "You know what, you can forget what you just did, jump in your car and go home. Tomorrow is another day. Sleep it off." But Cobb-Adams "started jumping around, swearing, swinging windmill punches[.]" Then Appellant noticed someone walking out of the door, and when he turned to see who it was (it turns out it was Appellant's wife), Cobb-Adams hit him in the face again. This time, in Appellant's words, "I turned around. I told him, 'You sure you want to do this?' I told him go home, sleep it off, it's your last chance, and he kept coming, swinging[.]" Cobb-Adams continued to run towards Appellant and throw a punch, which Appellant would block, and then back off. As Cobb-Adams pressed this hit-and-retreat strategy, Appellant kept on blocking Cobb-Adams' punches as Cobb-Adams charged, and kept on walking towards Cobb-Adams as Cobb-Adams retreated. Appellant explained that he advanced when Cobb-Adams retreated "[b]ecause [Cobb-Adams] wasn't stopping" and because Appellant believed that if he were to turn his back and walk away, Cobb-Adams "would have either assault[ed] me or [gone] back in the club."

Appellant asserted that he did not "chase" Cobb-Adams out into the street, but rather, "I walked in an aggressive

manner, but not run after this guy or -- my speed was just watching the punches swinging, waiting till the time so I can subdue this guy without me getting hurt." Appellant opined that, "To me, 'chase' is when you [are] running at somebody. At no time did I [do] that. I walked towards him until I got close enough to subdue this guy from hurting me or other customers. I [was not] out to hurt this guy."

Appellant admitted that at some point, he probably knocked Cobb-Adams down: "Knowing myself, I probably did. I couldn't swear that I did, but knowing myself and the chances that I gave him, probably I did." Although he was thus rendered supine, Cobb-Adams continued to yell and to flail away with his arms and legs. At about this point, Appellant realized they were in the middle of Sand Island Access Road. Appellant claimed that if he struck Cobb-Adams while Cobb-Adams was down, it was merely to subdue him: "I'm not sure if [I] hit him while he was down, but I probably did to subdue this guy. He was out of control, you know, and then he gave up. Like I guess he had burned out of energy, and that's when I went [to] bend over to grab him by his collar over here." Appellant picked Cobb-Adams up "a quarter ways off the ground[,]" but then he heard someone call his name and, thinking Cobb-Adams's friends were coming up behind him, put Cobb-Adams back down on the road. As Appellant turned around to see who it was, he and Cobb-Adams were struck by the tow truck.

2. Testimony of Christopher P. Toomey.

Toomey was a patron of Dancers nightclub who witnessed certain of the events in question. Toomey and two "buddies" arrived at the club via taxi at approximately 10:00 p.m. They had been drinking beer and playing pool at the "base club"[11] for approximately three hours before their arrival at Dancers. Toomey testified that he and his two companions had consumed two "big" pitchers of beer during the three-hour course.

When the men arrived at Dancers, Toomey remained in the taxi while his two companions went inside the club to withdraw money from the ATM machine, in order to pay the fare. At this time, Toomey saw "three guys beating on this truck"[12] in the parking lot. Toomey went into the club and told a bouncer what he had seen. He believed that bouncer was the person who, along with Cobb-Adams, was later hit by the tow truck. Toomey described him as the "big blonde bouncer."[13] Toomey was sure[14] that the bouncer to whom he had reported the assault on the truck

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[11] Apparently, the "base club" is a drinking spot for Navy personnel, located at Pearl Harbor.

[12] Toomey testified that he saw the men kick the truck in a number of places and take a "pole or like a rake handle out of the back" of the truck and break the driver's-side window.

[13] At the Board hearing, Appellant suggested that the employer's witnesses were incorrect in their statements, inasmuch as Toomey testified that the person who allegedly chased Cobb-Adams into the street had blonde hair. Appellant pointed out that "they said I got blond hair. I no more blond hair. . . . [Chadwick] has long blond hair."

[14] "[U]nless he has a twin brother or something, you know."

and the man he had seen in the street with Cobb-Adams were one and the same.

Inside the club, Toomey sat with his buddies and watched the strippers. He then saw three men, the same men who had damaged the truck, walk into the club and tell a patron at the pool table to "come outside." Toomey testified that there was no altercation among the four men inside the club. His observation was, "They were just leaving." According to Toomey, the patron at the pool table walked out of the club without "being coerced or physically removed" by the three men. As they left, "[t]hey weren't being escorted."[15]

At about 11:00 p.m., Toomey walked out of the club to look for a taxi his friends had called and saw "one of the bouncers," and Cobb-Adams[16] and two of his companions, "screaming and hollering" and "cursing[.]" Toomey testified that he did not see any "physical altercation" among the men,[17] only a "verbal"

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[15] The testimonies of two other witnesses conflict with Toomey's account. Mariner, the bartender, testified that Chadwick escorted Cobb-Adams and two of his companions out of the club because Mariner had seen one of the three men punch the owner of the damaged truck. Appellant testified that he saw Cobb-Adams strike the patron at the pool table, who was the owner of the truck.

[16] Toomey believed that Cobb-Adams was not one of the men who had damaged the truck, but rather that he was the owner of the truck who had remained inside the club. Hence, it appears Toomey believed that Cobb-Adams and the man who was killed by the tow truck were not one and the same person.

[17] On the other hand, Hethcote testified that he watched an argument in the parking lot, during which one man punched another. Mariner testified that he saw the patron with the cast hit Chadwick and Chadwick hit back at the patron. Mariner also saw Cobb-Adams punch or attempt to punch Appellant.

argument. Then, "not a minute later they were out to the street, and that's when the accident happened."

Toomey said that the patron who was later hit by the tow truck was "walking, trying to get away from . . . the bouncer." Toomey described the pursuit as a "chase." His impression was that "[i]t looked like [the patron] was trying to get away because he was scared." It is unclear whether Toomey actually saw the patron move into the street. Toomey first testified that "the bouncer" was "jogging toward him when he was -- because he was in the street already." When asked for clarification, Toomey changed his statement somewhat: "[The patron] was in the process of getting there, and . . . the bouncer tried to catch up with him."

Toomey did not see "the bouncer" punch the decedent while the two were in the street.[18] According to Toomey, "They weren't saying anything. [The bouncer] was just trying to catch up with him and then that's when they got hit. I assume that [the bouncer] was not smiling and trying to bring him flowers."

Toomey wrote a police report after the accident. According to the report, Toomey did see a physical altercation in front of the club: "They went outside[,] had a huge fight whith

[18] In contrast, Hethcote testified that he saw a bigger man punching a smaller man who was lying in the street. Martin testified that he saw one man beating another man who was lying in the middle of the road.

[sic] all four guys. [M]ore of an argument but [blows] were [thrown]."

3. Testimony of David K. Hethcote.

On the evening of October 19, 1992, Hethcote was on his way home from his place of business, which is located behind Dancers nightclub. He witnessed the incident while driving his truck.[19] Hethcote testified that while he was making a right turn in the mauka direction past the club, he saw three or four people arguing outside. He saw "somebody hit one of the guys," and then "another guy chase this other guy" into the street and start hitting him.

After seeing this, Hethcote turned his truck around and began driving back towards the club in the makai-bound lane farthest from the club. From there, he saw Cobb-Adams running into the street. "Somebody was chasing him." Hethcote remembered that the pursuer "punched the other guy and then chased this guy." The two men ended up in the middle of the roadway, and Adams either fell or was knocked to the ground. On his back, Cobb-Adams attempted to block the punches thrown by his pursuer. Hethcote described the altercation as "punches thrown by the big guy with the little guy on the ground." The larger

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[19/] Hethcote was able to watch the incident, while driving his vehicle, in the following fashion: "Well, you glance forward and you look back."

man was "hammering on him."[20] Shortly after the men reached the street, Hethcote saw the tow truck hit them.

4. Testimony of Richard Martin.

Martin witnessed, from the second level of the building that houses Dancers nightclub, certain of the events that occurred on the night in question. Martin heard a commotion taking place in the parking lot below and stepped onto the bumper of a vehicle in order to look over the ledge. From that vantage point, Martin saw three patrons of the club and three other men, at least one of whom he knew was a Dancers doorman, arguing in the parking lot. One of the patrons, Cobb-Adams, was yelling and "looked like he had been drinking a lot[.]" His two friends "were trying to calm him down" and "keep him back." At this point, Martin stepped down from the bumper.

When Martin stepped back up, he saw that the fracas had fragmented into two separate altercations. While Martin was watching the imbroglio to his left, Cobb-Adams and Appellant on his right had already moved into the street. Martin testified that Appellant "chased [Cobb-Adams] out to the street." He admitted, however, that he did not see Appellant chase Cobb-Adams.

Martin then saw Appellant hit Cobb-Adams as Cobb-Adams lay on the road. Martin was unable to state the exact number of

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[20] Appellant testified that he is six feet, two inches in height. He allowed that Cobb-Adams was shorter and thinner.

the punches that were thrown, but testified that Appellant "was bent over just hitting away." Martin next saw the tow truck approaching from his left. As he looked to his right, he saw the men in the road. Appellant "started lifting up, and that's when the tow truck hit."

5. Testimony of Kevin D. Mariner.

Kevin D. Mariner (Mariner) was the Dancers manager on duty the night of October 19, 1992. Mariner recalled that Chadwick escorted Cobb-Adams and two of his friends out of the club after one of the three punched the owner of the damaged truck. Appellant followed Chadwick outside, "to make sure there wasn't going to be any more trouble." When Appellant came back into the club, he told Mariner to call the police because "[Cobb-Adams] and his two friends wouldn't leave, . . . they were just giving them a hard time out there[.]" Mariner gave his cellular phone to someone else to call the police and went outside. There he saw Cobb-Adams and his two friends arguing with Chadwick, Desa and Appellant. Mariner told the three patrons that the police had been called and that they had to leave the premises. Mariner heard both Appellant and Chadwick ask them to leave "at least more than five times[.]" Mariner also heard Cobb-Adams and his friend with the cast threaten "to come down with their brothers, or their family and . . . destroy the club" and "shoot us." At the time the threats were made, the men were standing "within five or ten feet of [the] back door[.]"

Mariner had been standing outside for "maybe five minutes" before he saw the man with the cast hit Chadwick in the chest and Chadwick throw a punch back. The man with the cast then "got in my [(Mariner's)] face" as well. Then Chadwick and Mariner and the man with the cast engaged in a running fight that moved in the makai direction "towards the street near the alleyway[.]"

During all of this, Mariner managed to see Cobb-Adams hit or attempt to hit Appellant. He did not see Cobb-Adams and Appellant move from the parking lot out into the street. He did see the tow truck approaching.

III. THE BOARD'S DECISION.

The Board's June 20, 2000 decision and order found and concluded as follows:

FINDINGS OF FACT

> 1. [Appellant] was employed as a "door man" or bouncer at Employer's club. As a "door man" or bouncer, [Appellant] was responsible for the club's security, refilling the bar with supplies, and taking inventory.
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> 2. Employer's club was located in an industrial area on Sand Island [Access] Road. Immediately fronting the club was the club's parking lot. The parking lot opened onto Sand Island [Access] Road. There was no barrier or sidewalk separating the parking lot from Sand Island [Access] Road. Sand Island [Access] Road is divided into four lanes, two in each direction.
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> 3. The club's patrons included construction workers, military personnel, and bikers. They were described as a "rough" crowd.
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> 4. It was [Appellant's] duty as a bouncer to eject or remove unruly or intoxicated customers from

the club. [Appellant] has on occasions physically removed patrons from the club.

5. Around 10:00 p.m., on the evening of October 19, 1992, [Appellant], who was not on duty, arrived at the club with his wife as a patron. Upon his arrival, [Appellant] observed a disturbance in the club's parking lot. The police and the club's on-duty bouncers were in the parking lot. [Appellant] entered the club and ordered a drink. He did not become involved and decided to let the on-duty bouncers and police handle the situation outside.

6. Shortly thereafter, a man by the name of Paul Cobb-Adams ("Cobb-Adams") entered the club and struck a club patron in the face. After striking the patron, Cobb-Adams left the club and went outside.

7. [Appellant] followed Cobb-Adams outside to the club's parking lot. [Appellant] observed Cobb-Adams and two friends arguing with the club's on-duty bouncer and another off-duty bouncer who also happened to be at the club that night. The police, who were there earlier, had departed the premises. [Appellant], who testified that Employer expected him to help out even if he wasn't on duty, decided to intervene and assist the other bouncers.

8. [Appellant] confronted Cobb-Adams and identified himself as one of the club's bouncers. [Appellant] described Cobb-Adams as belligerent, out-of-control, and under the influence of drugs. [Appellant] asked Cobb-Adams to take his friends and leave the premises. Cobb-Adams continued to yell and scream and did not heed [Appellant's] request. While [Appellant] was not looking, Cobb-Adams struck him in the face with his fist.

9. The evidence conflicts as to what occurred next. [Appellant] testified that Cobb-Adams retreated at first and he told Cobb-Adams at that time to forget it and just leave. But Cobb-Adams refused and started to throw windmill punches at him. [Appellant] testified that Cobb-Adams came at him again, trying to hit him a second time. [Appellant] stated that he then walked towards Cobb-Adam in an "aggressive manner", while Cobb-Adams continued to make threats and throw windmill punches, and waited for the right moment to subdue him. According to [Appellant], the fracas continued from the parking lot to the public roadway until he and Cobb-Adams ended up in the middle of Sand Island [Access] Road. [Appellant] testified that Cobb-Adams was lying on the road, kicking and yelling. [Appellant] admitted that he hit Cobb-Adams while he was on the ground in order to subdue him. When Cobb-Adams finally "gave up," [Appellant] tried to pull Cobb-Adams up. At that instant, a tow truck

traveling on Sand Island [Access] Road struck Cobb-Adams and [Appellant] while both were in the road. Cobb-Adams was killed and [Appellant] sustained serious injuries.

[Appellant] denied chasing Cobb-Adams into the street with the intent to injure him. According to [Appellant], he was attempting to subdue Cobb-Adams and hold him for the police.

10. Deposition testimonies from three neutral by-stander [sic] witnesses gave relatively consistent accounts of what occurred outside the club. Their accounts differed from [Appellant's] description of the events. None of the three witnesses knew the people involved in the scuffle or the owners or employees of the club.

(a) Christopher Toomey: Toomey's deposition was taken six weeks after the incident. Toomey was a Navy seaman who was a patron of the club on the evening of October 19, 1992. At some point during the evening in question, Toomey went outside the club to see if his taxicab had arrived to take him back to base. When he was outside, Toomey observed [Appellant] and Cobb-Adams and other individuals arguing in the parking lot. Toomey did not observe anyone swinging punches or any physical altercation occurring between [Appellant] and Cobb-Adams at that time. Toomey testified that he only saw a heated verbal exchange between [Appellant] and Cobb-Adams. According to Toomey, Cobb-Adams looked as if he had already been "beaten up" or assaulted by someone by the time he came outside. Toomey then observed Cobb-Adams trying to flee from [Appellant] by running away from the club's parking lot and towards the center median of Sand Island [Access] Road. Toomey stated that [Appellant] "chased" or went after a scared-looking Cobb-Adams, who was already in the street. After [Appellant] got to Cobb-Adams, they were both hit by a truck.

(b) David Hethcote: Hethcote was another witness who was on his way home in his truck after finishing his shift at a TV station located behind the club. Hethcote testified at his deposition that he saw people arguing in the parking lot of the club. Hethcote saw [Appellant] and Cobb-Adams running away from the club's parking lot, with [Appellant] "chasing" the other man onto Sand Island [Access] Road. According to Hethcote, when the two men reached the middle of the road, he saw [Appellant] standing over Cobb-Adams, who was on the ground, "hammering" him with at least a couple of punches, before an oncoming tow truck hit the two men.

(c) Richard Martin: Martin, who worked upstairs on the second level of the building that housed the club, testified at his deposition that he heard some commotion outside the club's parking lot. Martin testified that from where he was situated, he overlooked the club's parking area. Martin stated that he boosted himself up to look over a wall from the building's second level to see what was going on. Martin testified that he saw [Appellant], several other men, and a visibly intoxicated Cobb-Adams arguing in the parking lot. Martin then observed [Appellant] "chasing' Cobb-Adams onto the middle of Sand Island [Access] Road. Cobb-Adams somehow fell to the ground. Martin observed [Appellant] standing over Cobb-Adams hitting him. Martin testified that [Appellant] hit Cobb-Adams more than once while the latter was on the ground. Then, while both were in the street, a passing tow truck struck them.

11. We find the testimonies of the three by-stander [sic] witnesses to be more credible than [Appellant's] testimony. We do not believe that [Appellant] was simply performing his duties as a bouncer by trying to subdue an intoxicated and belligerent Cobb-Adams. Based on the witnesses's [sic] testimonies, [Appellant] chased Cobb-Adams off the club's property and into the street. When Cobb-Adams was flat on the ground, [Appellant] stood over Cobb-Adams and punched him more than once. We find that [Appellant's] actions, chasing a drunken and "scared-looking" Cobb-Adams into the street and punching him while he was down, were not consistent with the actions of someone trying to subdue or hold an unruly patron for the police. We find that based on the evidence, [Appellant's] injures were incurred by his wilful intention to injure Cobb-Adams.

CONCLUSIONS OF LAW

The applicable statute in effect at the time of [Appellant's] injuries read as follows:

> **§386-3 Injuries covered.** 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 hereinafter provided.
>
> Accident arising out of and in the course of employment includes the wilful act of a third person directed against an employee because of the employee's employment.

> No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another or by the employee's intoxication.
>
> (emphasis added).
>
> We have found, based on the credible testimonies of the by-stander [sic] witnesses, that [Appellant's] injuries were incurred by his wilful intention to injure another. Pursuant to HRS §386-3 (1993), we conclude that [Appellant] did not sustain a personal injury on October 19, 1992, arising out of and in the course of his employment.
>
> That [Appellant's] injuries were inflicted by a third-party and not from his intended victim does not, in our view, take him out of the applicable statutory provision. Based on our reading of the statute, we conclude that it is sufficient that [Appellant's] injuries were incurred while he was wilfully inflicting injury upon another.

IV. QUESTIONS PRESENTED.

Appellant contends on appeal that the Board erred in concluding (1) that his injuries were incurred by his wilful intention to injure another, and (2) that his injuries did not arise out of and in the course of his employment.

V. STANDARDS OF REVIEW.

Appeals from decisions and orders of the Board are governed by HRS § 91-14(g) (1993), which provides:

> (g) 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:
>
> (1) In violation of constitutional or statutory provisions; or

> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." Potter v. Hawaii Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62 (1999) (citations and internal quotation marks and block quote format omitted).

"[A]ppeals taken from [findings of fact] set forth in decisions of the [Board] are reviewed under the clearly erroneous standard." Korsak v. Hawaii Permanente Medical Group, 94 Hawai'i 297, 302-3, 12 P.3d 1238, 1243-44 (2000) (citations, internal block quote format and original brackets omitted). "[T]his court reviews [conclusions of law] *de novo*, under the right/wrong standard." Tate v. GTE Hawaiian Telephone Co., 77 Hawai'i 100, 103, 881 P.2d 1246, 1249 (1994) (citation omitted). "A [conclusion of law] that presents mixed questions of fact and law

is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. The court should not substitute its own judgment for that of the agency." In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000) (citations, original brackets and internal quotation marks and block quote format omitted).

"[A finding of fact] or a mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support of the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." Id. (citation omitted). "By 'substantial evidence' is meant relevant and credible evidence of a quality and quantity to justify a reasonable man to reach a conclusion." Acoustic, Insulation & Drywall, Inc. v. Labor and Industrial Relations Appeal Board, 51 Haw. 312, 316, 459 P.2d 541, 544 (1969) (citations omitted).

VI. DISCUSSION.

At the time Appellant was injured, HRS § 386-3 (1993) provided, in relevant part, that workers' compensation shall be paid "[i]f an employee suffers personal injury . . . by accident

arising out of and in the course of the employment[.]" In a proviso, however, HRS § 386-3 (1993) specified that "[n]o compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure onself or another or by the employee's intoxication."

We conclude that there is "reliable, probative, and substantial evidence on the whole record[,]" HRS § 91-14(g)(5), to support the Board's conclusion that Appellant's injuries were incurred by Appellant's wilful intention to injure Cobb-Adams, and hence were not compensable regardless of whether it could be otherwise concluded that they arose out of and in the course of his employment.

We commence consideration of the proviso with a recognition of the applicable statutory presumption. HRS § 386-85(4) (1993) provides that "[i]n 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: . . . (4) That the injury was not caused by the wilful intention of the injured employee to injure onself or another."

This presumption "imposes upon the employer both the heavy burden of persuasion and the burden of going forward with the evidence." Chung v. Animal Clinic, Inc., 63 Haw. 642, 650, 636 P.2d 721, 726 (1981) (interpreting the HRS § 386-85(1) presumption "[t]hat the claim is for a covered work injury"). As indicated in HRS § 386-85, however, an employer can rebut this

presumption by introducing "substantial evidence to the contrary." Cf. Igawa v. Koa House Restaurant, No. 22464, slip op. at 12 (Haw. filed August 30, 2001) ("In order to overcome the HRS § 386-85(1) presumption of work-relatedness, the employer must introduce substantial evidence to the contrary."). "Substantial evidence" has been described as "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 man that an injury or death is not work connected." Id. (citation and some internal quotation marks omitted).

Employer in this case certainly adduced substantial evidence that Appellant's injuries were caused by his "wilful intention to injure" Cobb-Adams. HRS § 386-3 (1993). The testimonies of three unrelated and apparently disinterested eyewitnesses -- Toomey, Hethcote and Martin -- were quite emphatically consistent in demonstrating that Appellant chased a drunk, scared and retreating Cobb-Adams onto Sand Island Access Road, knocked him down and proceeded to beat him with multiple blows while he was on his back on the dark road, thereby precipitating the conditions that led to the accident.

"Once the trier of fact determines that the employer has adduced substantial evidence to overcome the presumption, it must weigh the evidence elicited by the employer against the evidence elicited by the claimant." Igawa, slip op. at 18

(citation omitted). This the Board did, and found Appellant's evidence wanting. The Board found as follows:

> We find the testimonies of the three by-stander [sic] witnesses to be more credible than [Appellant's] testimony. We do not believe that [Appellant] was simply performing his duties as a bouncer by trying to subdue an intoxicated and belligerent Cobb-Adams. Based on the witnesses's [sic] testimonies, [Appellant] chased Cobb-Adams off the club's property and into the street. When Cobb-Adams was flat on the ground, [Appellant] stood over Cobb-Adams and punched him more than once. We find that [Appellant's] actions, chasing a drunken and "scared-looking" Cobb-Adams into the street and punching him while he was down, were not consistent with the actions of someone trying to subdue or hold an unruly patron for the police.

At bottom, the gravamen of Appellant's appeal is that the Board was wrong in its assessment of credibility and, consequently, in this factual finding. However, because this factual finding is one supported by substantial evidence, it is one we must accept, because

> [i]t is well established that 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.

Id. at 19 (citation and internal block quote format omitted).

We are left, then, with the factual predicate that Appellant chased a drunk, scared and retreating Cobb-Adams into the dark road, knocked him down and beat him while he was down. We next consider whether this factual predicate amounts to a "wilful intention to injure . . . another[,]" HRS § 386-3, that should, as a matter of law, deny Appellant workers' compensation.

In the absence of legislative history explaining the proviso and Hawai‘i cases construing the proviso, we turn to other sources:

> Most states, the Longshore and Harbor Workers' Compensation Act, and the Federal Employees' Compensation Act expressly exclude injures resulting from wilful intention to injure another. The words "wilful intent to injure" obviously contemplate behavior of greater deliberateness, gravity and culpability than the sort of thing that has sometimes qualified as aggression.
>
> Two factors have figured in the cases interpreting this defense: the factor of seriousness of the claimant's initial assault, and the factor of premeditation as against impulsiveness.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 8.01[5][d], at 8-28 (2001). Larson goes on to note that "Louisiana has had occasion to develop the construction of this defense in more detail than any other jurisdiction, and its analysis of the interplay of the two basic factors is of interest in any jurisdiction having this type of defense." Id.

In what Larson describes as "the leading case[,]" 1 Larson § 8.01[5][d], at 8-29, the Supreme Court of Louisiana parsed a cognate Louisiana statute that bars workers' compensation for "injury caused . . . by the injured employee's wilful intention to injure himself or to injure another." Velotta v. Liberty Mutual Insurance Co., 132 So.2d 51, 52 (La. 1961) (citation, internal quotation marks and original ellipsis omitted). In Velotta, an argument between the claimant and a co-worker in the employee locker room escalated when the claimant struck the co-worker in the face with a pair of trousers. Although this caused no injury, the co-worker punched the

claimant in the jaw, "knocking him headlong," which did cause serious head injuries and resulting disability. Id. at 52-53.

The Velotta court, noting that the statutory proviso cut against the no-fault grain of workers' compensation law, id. at 53, held that compensation was not barred in such a case of "impulsive, emotional misconduct[,]" id. at 54, and in doing so explained the application of the proviso:

> The appellate courts of this State in many instances have heretofore based their decisions interpreting this provision of the Compensation Act on the aggressor doctrine, generally denying recovery to the injured employee who provoked the assault which resulted in his injury. Although the results reached in these cases would not necessarily be erroneous, it would appear that the statutory provision involved does not require a resort to doctrines not there enunciated. The inquiry, under the mandate of the statute, it appears to us, should be limited to whether the employee's injury resulted from the employee's wilful intention to injure himself or another. Impulsive conduct, such as a push, shove, or a fist-blow, does not render the conduct of the employee sufficiently serious or grave, and there is no wilful intention to injure one's self or another under such circumstances. The mere fact that the employee seeking recovery may have been to blame for the fray is not adequate to meet the test -- there must be more. The test should involve an inquiry into the existence of some premeditation and malice on the part of the claimant, coupled with a reasonable expectation of bringing about a real injury to himself or another. If the retaliation which flows from his misconduct is not such as could be reasonably expected, his intention could not be held to envision that result and hence is not within the purview of the quoted provisions of the Act.

Id. at 53-54 (citation and footnotes omitted).

In a following case, the Court of Appeal of Louisiana made it clear that the Velotta court's application of the proviso involved not only an inquiry into the state of mind of the claimant, but also an objective appraisal of the seriousness of

the claimant's conduct and the likelihood that it would produce injury:

> We think the Velotta case holds that wilfulness is not the sole test. . . . This clearly means that wilfulness, as distinguished from impulsiveness, is not the sole test. Every impulsive act is not condoned by the statute. Some acts, even though impulsive, are so serious and so likely to result in real injury, that they must be construed to show a wilful intent to injure.

Relish v. Hobbs, 188 So.2d 479, 482 (La. Ct. App. 1966). In the facts before it, the Relish court recognized the disqualifying "premeditation and malice on the part of the claimant, coupled with a reasonable expectation of bringing about a real injury to himself or another[,]" Velotta, 132 So.2d at 54, contemplated by its supreme court: Relish and his co-worker argued and started cursing one another. Relish grabbed a hammer and threw it at the co-worker, then lunged at him, threw him to the ground and choked him until bystanders separated them. The co-worker grabbed a shovel, Relish grabbed a wrench, and they went at it again. During the melee, the co-worker broke Relish's arm with the shovel. Relish, 188 So.2d at 480.

Our case is clearly more Relish than Velotta. Even if we stretch to characterize Appellant's pursuit and beating of Cobb-Adams on the dark road as merely impulsive, we cannot see our way clear to ignore the seriousness of his conduct and the clear danger of real injury it engendered. We conclude that Appellant's injuries were "incurred . . . by [his] wilful intention to injure . . . another" and are therefore not

compensable. HRS § 386-3 (1993). That the instrumentality of harm was not Cobb-Adams but a third party does not change our conclusion, any more than would be the case if the instrumentality were, for example, a nearby precipice or sharp object. The pertinent inquiry is the reasonable expectation of bringing about real injury to oneself or another inherent in the claimant's conduct, and not the specific instrumentality of that harm. Hence, we agree with the Board's conclusion:

> That [Appellant's] injuries were inflicted by a third-party and not from his intended victim does not, in our view, take him out of the applicable statutory provision. Based on our reading of the statute, we conclude that it is sufficient that [Appellant's] injuries were incurred while he was wilfully inflicting injury upon another.

We are cognizant of the 1995 amendment to HRS § 386-3, 1995 Haw. Sess. L. Act 234, § 6 at 607, that amended the proviso to read:

> 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.

HRS § 386-3 (Supp. 2000) (enumeration omitted). Effective June 29, 1995, 1995 Haw. Sess. L. Act 234, § 26 at 621, the amendment was intended to "[e]xclude[] injuries resulting from unprovoked non-work related physical altercations other than self-defense from compensability." Hse. Conf. Comm. Rep. No. 112, in 1995 House Journal, at 1006 (enumeration omitted). The amendment was part of a larger package of amendments to our

workers' compensation law designed to "improve efficiency and cost-effectiveness in the workers' compensation system." Id. at 1005. See also Sen. Stand. Comm. Rep. No. 829, in 1995 Senate Journal, at 1142; Sen. Stand. Comm. Rep. No. 899, in 1995 Senate Journal, at 1166; Hse. Stand. Comm. Rep. No. 575, in 1995 House Journal, at 1242; Hse. Stand. Comm. Rep. No. 955, in 1995 House Journal, at 1387. In that light, we are reluctant to speculate, as Appellant does, that Appellant's actions here might be considered provoked and work-related, and therefore compensable, under the present incarnation of HRS § 386-3.

VII. CONCLUSION.

In light of the foregoing, we affirm the June 20, 2000 decision and order of the Board.

DATED: Honolulu, Hawaii, February 5, 2002.

On the briefs:

Acting Chief Judge

Richard K. Griffith for
claimant-appellant.

Paul A. Brooke for
employer/insurance
carrier-appellee.

Associate Judge

Associate Judge