

NO. 24031

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KATHLEEN G. CARLYLE, Claimant-Appellant,
v.
THE QUEEN'S MEDICAL CENTER, Employer-Appellee, Self-Insured

APPEAL FROM THE LABOR AND INDUSTRIAL
RELATIONS APPEALS BOARD
(CASE NO. AB- 98-078 (2-96-21277))

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

In this workers' compensation case, Claimant-Appellant Kathleen G. Carlyle (Claimant) appeals the December 19, 2000 decision and order of the Labor and Industrial Relations Appeals Board of the State of Hawaii (the Board). The Board's decision and order affirmed the January 16, 1998 decision of the Director of Labor and Industrial Relations (the Director) that denied the claim for compensation Claimant filed on February 7, 1997, pursuant to Hawaii Revised Statutes (HRS) § 386-3 (1993),¹ after she was stuck by a needle on August 22, 1996 while scrubbed in as a surgical nurse for Employer-Appellee The Queen's Medical Center (Employer), and a day later tested positive for hepatitis C

¹ Hawaii Revised Statutes (HRS) § 386-3 (1993) provides, in pertinent part, that "[i]f an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter."

antibodies. We affirm.

I. Background.

At a pre-hearing conference held on April 9, 1998, which was attended by counsel for both parties, the sole issue for the April 13, 1999 hearing before the Board was identified as, "whether Claimant sustained a personal injury on August 22, 1996, arising out of and in the course of employment." An April 13, 1998 pretrial order was issued to that effect and served upon both counsel, and neither lawyer objected to the issue so framed and written. However, in a hearing memorandum submitted to the Board the day of the hearing, Claimant maintained she had never asserted her injury was sustained on the day she suffered the needle prick, August 22, 1996.² Instead, Claimant took the following position:

[Claimant] had been exposed during the 11 years she worked for [Employer]. On August 22, 1996 [(sic)], she was tested and found hepatitis C positive. Claimant argued that her condition came from the scrapes, scratches and cuts from working in the operating room from May 1996 to August 1997.³

(Footnote supplied.)

² On February 7, 1997, Claimant-Appellant Kathleen G. Carlyle (Claimant) filed a WC-5 form, "Employee's Claim for Workers' Compensation Benefits," that referenced the date her disability began as August 21, 1996, and explained, "I was stuck with a needle during surgery. I was tested and found positive for Hepatitis C. The injury occurred prior to that day to allow time for antibodies to build up." At the April 13, 1999 hearing before the Labor and Industrial Relations Appeals Board, Claimant acknowledged that she should have filled in August 22, 1996 as the date her disability began.

³ Claimant worked as a nurse for Employer-Appellant The Queen's Medical Center (Employer) from October 1986 until August 1997. She began working in the operating room on May 1, 1996 and continued working there until she left Employer in August 1997.

At the beginning of the April 13, 1999 hearing before the Board, Claimant's counsel entered an "objection to the Board's decision to focus on the [August 22, 1996] date." The Board ruled that the objection was "improper[,]" due to the apparent acquiescence of Claimant's counsel in the Board's April 13, 1998 pretrial order. A bit later in the hearing, however, Employer's counsel objected to questioning by Claimant's counsel relating to possible causes of hepatitis C infection predating August 22, 1996, but the Board overruled the objection and allowed Employer's counsel a "continuing line of objection on these questions." For the balance of the hearing, Claimant thus had free rein to present such evidence. We consider this appeal on the basis of the issue framed and actually heard as Claimant would have it -- "whether [Claimant] sustained an injury that arose out of and in the course of her employment [with Employer]."

In its December 19, 2000 decision and order, the Board found as follows:

FINDINGS OF FACT

1. Claimant was employed by [Employer] from October of 1986 to August of 1997. On August 22, 1996, Claimant was working for Employer as an operating room nurse.
2. On August 22, 1996, Claimant was accidentally stuck with a needle while working in the operating room.
3. On August 23, 1996, Claimant took a blood test.
4. The test results showed that Claimant had antibodies for hepatitis C in her blood, which meant that she was exposed to the hepatitis C virus some time prior to August 22, 1996.

5. The medical evidence is clear and Claimant does not dispute that the needle stick on August 22, 1996 was not the source of her exposure to the hepatitis C virus.⁴

6. Further laboratory testing, including normal liver function tests and the negative hepatitis C PCR test, showed that Claimant does not currently have active acute or chronic hepatitis C infection.

7. Claimant does not currently have any symptoms associated with the liver disease or hepatitis C infection.

8. Claimant continued to work after August 22, 1996. Based on Claimant's testimony at trial, we found no evidence that Claimant's ability to work as a nurse was affected by her positive hepatitis C test. Claimant was not disabled from work as a nurse as result of her exposure to the hepatitis C virus.

9. Claimant does not currently require and is not undergoing any treatment for liver disease or for any physical symptoms or problems associated with active acute or chronic hepatitis C infection.

10. The presence of antibodies for a virus, whether it is the virus that causes measles, chicken pox, or hepatitis C, does not mean that an infection or disease is present as a result of the exposure to that virus.

11. Claimant may have a chronic hepatitis C status, which means that she contracted the hepatitis C virus, but her chronic hepatitis C status should not be confused with and is not the same as a chronic hepatitis C infection. Claimant is disease-free and does not have a hepatitis C infection at the present time.

12. Dr. Alfred Gima [(Dr. Gima)], Dr. Naoky Tsai [(Dr. Tsai)], Dr. Clyde Miyaki [(Dr. Miyaki)], and Dr. Herbert Lim [(Dr. Lim)], opined that Claimant may well be within the 15% of those who have been exposed to the hepatitis C virus that go on to clear themselves of the virus and to never develop the disease of hepatitis C infection. Dr. Gima, Dr. Tsai, and Dr. Lim considered Claimant's hepatitis C exposure to be resolved. But because the doctors could not guarantee that Claimant is cured of the hepatitis C virus, some of them supported periodic testing for signs or symptoms of liver disease or active hepatitis C infection.

13. Claimant acknowledged that she is currently healthy and not suffering from any symptoms related to hepatitis C infection. Claimant also acknowledged that she has not been disabled from work after

⁴ It was impossible for Claimant to test positive for hepatitis C antibodies as a result of the August 22, 1996 needle stick, because the interval of time between the needle stick and the testing the next day was too short for the development of a detectable number of antibodies. No one involved in this case, including Claimant, asserted or asserts otherwise.

contracting the hepatitis C virus. Claimant indicated at trial that she filed a WC-5 claim on February 7, 1997, to establish Employer's liability for medical benefits, because of the possibility that she may need treatment and perhaps a liver transplant in the future should she develop liver disease from hepatitis C infection.

14. Claimant has not been diagnosed with any disease or medical condition. The medical records show that she at most had a positive hepatitis C antibodies test.

(Footnote supplied.) The Board concluded thereon:

CONCLUSIONS OF LAW

We conclude that Claimant did not sustain a personal injury on August 22, 1996, arising out of and in the course of employment.

In Miyake v. Welders, Inc., 71 Haw. 269 (1990), Mr. Miyake, a former welder, was exposed to asbestos fibers at work. As a result, he developed calcium deposits in the lungs. Despite the condition, Mr. Miyake did not experience any impairment of lung function or symptoms, such as breathing difficulties. Although he saw his physician for annual chest x-rays and breathing tests to determine if he were developing any long term results of asbestos exposure, Mr. Miyake did not receive any treatment for the lung condition. The Hawaii Supreme Court held that a condition causing no loss of function and no treatment should not be considered an injury that begins the running of the statute of limitations for filing a workers' compensation claim.

Similarly, in this case, Claimant's contraction of the hepatitis C virus resulted in no loss of function, no disability from work, and no treatment for hepatitis C infection or liver disease.

Since under Miyake, the right to compensation does not accrue until the injured employee requires medical treatment or experiences some loss of function, we conclude that Claimant, in this case, has not shown that she has sustained an injury for which compensation is payable under Chapter 386.

Our conclusion is also supported by Flor v. Holquin, et. al, No. 22641, slip op. (Hawaii May 30, 2000). In that case, the Hawaii Supreme Court determined that the contracting of a virus does not, in and of itself, constitute a compensable injury, especially in the case of hepatitis C where the virus can remain asymptomatic for decades and may never manifest itself. Id. at 25.

Accordingly, based on the foregoing, we conclude that Claimant's claim for workers' compensation benefits, filed on February 7, 1997, must be denied.

II. Discussion.

On appeal, Claimant first argues that the Board "did not properly apply and interpret the Flor and Miyake decision[s]⁵. . . . The primary focus there was the disability for the determination of the limitation of action and/or date of injury." (Footnote supplied.) Claimant continues: "It is clear that Claimant's injury, caused by a disease, falls within the definition of [HRS §] 386-3 and is further supported by the Flor decision." We disagree.

Here, whether the Board's reliance on the Flor and Miyake cases was misplaced is immaterial. Cf. Federal Electric Corp. v. Fasi, 56 Haw. 57, 64, 527 P.2d 1284, 1289-90 (1974) ("we have repeatedly held that where the trial court has reached a correct conclusion, its decision will not be disturbed on the ground that the reasons it gave for its action were erroneous"

⁵ In Flor v. Holquin, 94 Hawai'i 70, 83, 9 P.3d 382, 395 (2000), the Hawai'i Supreme Court held that

a claimant in a case arising under the "injury-by-disease" prong of HRS § 386-3 may rely upon the . . . "date of disability," which typically is the last day of employment but, . . . may also be the date of diagnosis of the disabling condition, in order to identify the "date of injury" required by the [Department of Labor and Industrial Relations] in connection with the filing of a workers' compensation claim.

In Flor, it was undisputed that Flor suffered from a chronic, disabling hepatitis C infection. Id. at 74, 9 P.3d at 386. In Miyake v. Welders, Inc., 71 Haw. 269, 272, 788 P.2d 170, 172 (1990), the supreme court held that "a condition causing no loss of function and having no treatment should not be considered an injury that begins the timing period which limits recovery under the workers' compensation act." (Footnote omitted. Miyake had been diagnosed with "asbestos pleural disease in both lungs." Id. at 270, 788 P.2d at 170.

(citation omitted)). In hepatitis C cases, workers' compensation is afforded "[i]f an employee suffers personal injury . . . by disease proximately caused by or resulting from the nature of the employment[.]" HRS § 386-3. See Flor v. Holguin, 94 Hawai'i 70, 84, 9 P.3d 382, 396 (2000) ("a workers' compensation claim premised on a disease such as hepatitis C, should, in general, be deemed an 'injury-by-disease' claim"). The Board found that, "Claimant has not been diagnosed with any disease or medical condition. The medical records show that she at most had a positive hepatitis C antibodies test." The Board also found that, "Claimant does not currently have any symptoms associated with the liver disease or hepatitis C infection[.]" and that "Claimant does not currently require and is not undergoing any treatment for liver disease or for any physical symptoms or problems associated with active acute or chronic hepatitis C infection." The Board credited Claimant's acknowledgments at the hearing that she "is currently healthy and not suffering from any symptoms related to hepatitis C infection[.]" and that "she has not been disabled from work after contracting the hepatitis C virus." These findings support the Board's conclusion that, "Claimant's contraction of the hepatitis C virus resulted in no loss of function, no disability from work, and no treatment for hepatitis C infection or liver disease[.]" and its ultimate conclusion that, "Claimant, in this case, has not shown that she

has sustained an injury for which compensation is payable under [HRS] Chapter 386.”

The Board, in effect, heard Claimant’s appeal on her own terms -- “whether [Claimant] sustained an injury that arose out of and in the course of her employment [with Employer].” The Board’s findings and conclusions answered that query in the negative. Hence, the Board found and concluded that Claimant did not “suffer[] personal injury . . . by disease proximately caused by or resulting from the nature of the employment[.]” HRS § 386-3; Flor, 94 Hawai’i at 84, 9 P.3d at 396.

The Board’s decision and order was supported by “substantial evidence”; in other words, “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.” Igawa v. Koa House Restaurant, 97 Hawai’i 402, 407, 38 P.3d 570, 575 (2001) (citation and internal quotation marks omitted) (holding that the employer must introduce substantial evidence to rebut an employee’s claim that an injury is work-related).

Dr. Gima testified on behalf of Employer at the hearing before the Board. He opined that Claimant has “no hepatitis C infection that need[s] treatment,” and that “she has no disease from hepatitis C.” Dr. Gima explained that while Claimant’s two tests for hepatitis C antibodies were positive, indicating a “previous infection[,]” her test for an active hepatitis C viral

infection, a "very accurate technique[,] " was negative. Dr. Gima also opined that Claimant could have been exposed to the hepatitis C virus as long as fifteen years before the August 22, 1996 needle stick incident.

Claimant testified at the hearing that, before her employment with Employer, she had "been in the health-care field with regular exposure to blood and percutaneous exposures to blood" from 1974 to 1986. She acknowledged that, "To this day, unless I knew it, unless I had been stuck by that needle and had these tests, I would have no clue that I have [(sic)] hepatitis C." "I mean I really viewed myself as somebody who had gone unscathed through the medical system[.]" Claimant explained that she filed her workers' compensation claim because of her apprehension that her hepatitis C virus test, while negative, may have nevertheless failed to detect the virus in her body. She was concerned with the possibility that the virus could lay dormant in her but become active in the future and engender symptoms, in which case she would need workers' compensation.

Claimant drew support for her concerns from consultations she had sought with Dr. Miyaki, a doctor who had worked with her before at another hospital. Although Dr. Miyaki acknowledged in his deposition that Claimant is "not suffering from hepatitis C now" and "probably did not have an active disease[,] " and would opine only that "she's been exposed to hepatitis C[,] " he reported the following in a May 22, 1998

letter in the record before the Board:

At the present time, I informed [Claimant] that we have no serological markers to show that she is "immune" to the hepatitis C virus. The hepatitis C virus at the present time could be in a dormant state in the liver and could be activated at any time, since we have no serological markers, such as [we do with] hepatitis B to show permanent immunity. I therefore recommended to her that she should probably have periodic liver function tests every 6 months to a year and if they should become abnormal, have her [undergo a hepatitis C virus test] at that time to see if there is any evidence of replicating viral particles which may be causing the abnormal liver function test. At the present time, we cannot assure her that she is "cured" of the hepatitis C virus until we acquire the technology to check for the antibody that shows that a person is immune to the hepatitis C virus. We can only assume and hope that she is cured, but we cannot guarantee her this.

Claimant also drew support from Dr. Tsai's November 23, 1998 opinion of Dr. Miyaki's recommendations for further testing:

You asked me if I am in agreement with Dr. Miyaki in that periodic liver function tests should be continued in the future. I believe with current knowledge about Hepatitis C infection, it is reasonable to perform periodic liver function tests including a [virus] test in the future to verify the original [virus] test. There are times when a patient could be chronically infected with Hepatitis C but a [virus test] cannot pick up the signals of this virus in serum and they would reappear at a later time. Because of this observation, I am in agreement with Dr. Miyaki that periodic liver enzyme studies and a repeat [virus] test with a more sensitive qualitative test for Hepatitis C virus would be useful. The time interval for periodic liver enzyme studies should be around 6 months to a year. And, if there is any doubt whether this patient has chronic Hepatitis C infection, then a liver biopsy would be needed to make that determination.

It remains my opinion that [Claimant's] Hepatitis C condition was not caused by the alleged exposure while working for [Employer].

And, in fact, such further testing was the only concrete medical treatment or procedure that Claimant could specify and request at the time of the hearing before the Board.

Claimant remembered that, after she was told that her hepatitis C antibodies tests were positive, she consulted her personal physician, who referred her to Dr. Lim. Dr. Lim's June 19, 1997 letter to Employer's counsel was in the record before the Board. Dr. Lim reported:

It has come to my attention that [Claimant] has filed a workman's compensation claim for her hepatitis C. As you may already know, I evaluated her on November 13, 1996 for hepatitis C and at that time her blood work indicated that she had a previous exposure to hepatitis C with a resolved infection. Documentation in my medical records has demonstrated that she has had experimentation with IV drug abuse as a teenager but she states that she did not share needles at that time. If you review my letter dated November 13th she has had other risk factors for hepatitis C including a motor vehicle accident in the 1970's and also needle stick injuries as a nurse. Whether these needle stick injuries occurred [while working for Employer] or at other institutions is not clear, however, I would like to stress the fact that [Claimant] has multiple risk factors for hepatitis C including needle stick injuries during her long career as a nurse.

Also in the record before the Board was a records review by Dr. Tsai, in which the doctor opined that "[b]ased on the facts that her [antibodies tests] were positive and [virus test] was negative, [Claimant] is most likely infected in the past but recovered from the infection. Therefore, she is not suffering from Hepatitis C now." Dr. Tsai also believed that "[Claimant's] previous history of I.V. drug usage is the cause of her [hepatitis C] infection. However, she is probably one of those lucky persons who are able to clear the [hepatitis C] infection by themselves which occurs in only 10 to 15% of those infected."

The evidence before the Board was substantial evidence supporting the Board's assessment that, while Claimant had tested positive for hepatitis C antibodies, and thus had been exposed to the hepatitis C virus at some point before August 22, 1996, she did not have a hepatitis C infection. Further, Claimant admitted that she had never suffered from any symptoms of or any disability from a hepatitis C infection and, in fact, "would have no clue that I have [(sic)] hepatitis C" were it not for being tested after the August 22, 1996 needle stick. Claimant admitted that she eventually stopped working in the operating room for personal, and not clinical, reasons. In addition, the Board had before it Dr. Tsai's expert medical opinion that "[Claimant's] previous history of I.V. drug usage is the cause of her [hepatitis C] infection. However, she is probably one of those lucky persons who are able to clear the [hepatitis C] infection by themselves which occurs in only 10 to 15% of those infected." Thus, the Board did not err in concluding that Claimant did not "suffer[] personal injury . . . by disease proximately caused by or resulting from the nature of the employment[.]" HRS § 386-3; Flor, 94 Hawai'i at 84, 9 P.3d at 396.

Claimant also argues that the Board erred because the HRS § 386-85 (1993) presumption⁶ in her favor dictated that she

⁶ HRS § 386-85(1) (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: That the claim is for a covered work injury[.]" (Enumeration omitted.)

be afforded workers' compensation coverage. We disagree. The presumption applies "in the absence of substantial evidence to the contrary[.]" HRS 386-85(1). See also Flor, 94 Hawai'i at 79, 9 P.3d at 391 ("The claimant must prevail if the employer fails to adduce substantial evidence that the injury is unrelated to employment." (Citations and internal block quote format omitted.)). Here, as we have discussed, Employer adduced "substantial evidence to the contrary[.]" HRS 386-85(1). In much the same vein, Claimant asserts that the "broad humanitarian purpose of the workers' compensation statute read as a whole requires that all reasonable doubts be resolved in favor of [Claimant.]" (Citation and internal quotation marks omitted.) However, the humanitarian purpose of our workers' compensation law, along with its determination that the claimant be given the benefit of the doubt, finds its expression in the HRS § 386-85(1) presumption, Korsak v. Hawaii Permanente Medical Group, 94 Hawai'i 297, 307, 12 P.3d 1238, 1248 (2000) ("It is the legislature's prerogative to give the employee the benefit of the doubt in *any* workers' compensation claim. HRS § 386-85 does just that." (Emphasis in the original.)), and that presumption is rebutted where, as here, the employer presents substantial contrary evidence. Id. at 308-9, 12 P.3d at 1249-50.

Claimant maintains that the Flor decision mandates coverage in this case. In Flor, the Hawai'i Supreme Court held,

in a hepatitis C workers' compensation case, that

an employee's injury caused by a disease is compensable as an "injury by disease," pursuant to HRS § 386-3, when the disease (1) is caused by conditions that are characteristic of or peculiar to the particular trade, occupation, or employment, (2) results from the employee's actual exposure to such working conditions, and (3) is due to causes in excess of the ordinary hazards of employment in general.

Flor, 94 Hawai'i at 81, 9 P.3d at 393 (citations omitted).

However, in Flor, it was a given that Flor had suffered from a chronic, disabling hepatitis C infection. Id. at 74, 9 P.3d at 386. In this case, Claimant admitted that she had never suffered from any symptoms of hepatitis C, and that she had never been disabled in any way by the disease. There was thus before the Board substantial evidence that Claimant had not suffered any ascertainable injury that would render applicable the "injury by disease" analysis in Flor:

Obviously, the contracting of a virus does not, in and of itself, constitute a compensable injury. A compensable injury -- i.e., a disability from work -- typically occurs well after the virus has first entered the claimant's bloodstream. This is especially true in the case of a virus, such as hepatitis C, that remains asymptomatic for decades and, indeed, may never manifest itself.

Id. at 84, 9 P.3d at 396.

Finally, Claimant presents, but does not argue, two additional points of error. Claimant contends "[t]he [Board] myopically focused on the date of injury and the non-expert testimony of [Dr. Gima]."

With respect to the former point, we conclude that if, *arguendo*, there was indeed error in the Board's pretrial

specification of August 22, 1996 as the date of injury, see id. ("whether Flor contracted the virus on the precise date of her claimed injury is not dispositive of the compensability of her claim"), the error was harmless. From the beginning of the hearing before the Board, whether Claimant suffered injury on the date of the needle stick was never an issue. Despite the objection of Employer's counsel, and at the insistence of Claimant, the hearing was conducted on the issue framed by Claimant -- "whether [Claimant] sustained an injury that arose out of and in the course of her employment [with Employer]." As discussed, substantial evidence was adduced at the hearing to the contrary, and the Board did not err in concluding the contrary.

As to the latter point, Claimant complains, in a specification inexplicably directed to error on the part of the Director, that "Dr. Gima . . . is not a qualified hepatologist and an employee of [Employer]." This point lacks merit. Dr. Gima was adequately qualified, through both direct examination and cross-examination, as an appropriate medical expert at the hearing before the Board, and issues relating to his qualifications and any bias resulting from his employment were for the Board and not for us on appeal:

Finally, having concluded that [the employer] adduced substantial evidence which, if true, could rebut the presumption of compensability, we review the Board's decision in light of our deference to its role in assessing the relative credibility and weight of the evidence for and against compensability, mindful that [the employer] bears the burden of persuasion as

to which [the claimant] should be given the benefit
of the doubt.

Nakamura v. State, 98 Hawai'i 263, 270, 47 P.3d 730, 737 (2002).

See also Igawa, 97 Hawai'i at 409-10, 577-78 ("we will not pass
upon the doctors' relative credibility").

III. Conclusion.

For the foregoing reasons, we affirm the Board's
December 19, 2000 decision and order.

DATED: Honolulu, Hawaii, September 20, 2002.

On the briefs:

David J. Mikonczyk,
for claimant-appellant.

Chief Judge

Robert C. Kessner,
Jennifer D.K. Yamashiro,
for employer-appellee,
self-insured.

Associate Judge

Associate Judge