NOT FOR PUBLICATION

NO. 24093

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

GLENN A. VAUGHN, Claimant-Appellee, v.
RFD PUBLICATIONS, INC., Employer-Appellant, and
THE HARTFORD, Insurance Carrier-Appellant

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 98-553 (2-88-25458))

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

In this workers' compensation case, Employer-Appellant RFD Publications, Inc. (RFD) and Insurance Carrier-Appellant The Hartford (Hartford) (collectively, Employer) appeal the Labor and Industrial Relations Appeals Board's (the Board) February 5, 2001 amended decision and order and the Board's November 6, 2000 decision and order. The two decisions and orders[1] affirmed in part, modified in part and reversed in part an October 15, 1998 decision of the Director of Labor and Industrial Relations (the Director). We affirm.

[1] The February 5, 2001 amended decision and order of the Labor and Industrial Relations Appeals Board (the Board) amended the Board's November 6, 2000 decision and order in only a single respect -- by specifying an August 21, 1997 "commencement date" for Claimant-Appellee Glenn A. Vaughn's (Vaughn) permanent total disability benefits.

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I. Background.

The Board's November 6, 2000 decision and order read, in pertinent part, as follows:

FINDINGS OF FACT

> 1. On September 2, 1988, [Claimant-Appellee Glenn A. Vaughn (Vaughn)], who was employed as a press operator by Employer, [RFD], injured his left shoulder, while turning a roll of newsprint weighing between 900 and 1,200 pounds.[2]
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> While undergoing physical therapy in January 1992 for his left shoulder, [Vaughn] developed low back pain that radiated into his left leg. [RFD/original insurer Pacific Insurance Co., Ltd.] accepted compensability of [Vaughn's] low back problems. In a settlement agreement approved by the Director on June 13, 1994, [Vaughn's] September 2, 1988 work injury was described as involving the "left shoulder with latter low back/left leg pain."
>
> 2. Between 1989 and 1996, [Vaughn] underwent five surgeries to his left shoulder. On September 26, 1989, Dr. Gerard Dericks performed an excision of the distal clavicle, partial acromioplasty with excision of the coracoacromial ligament, bursectomy and debridement. On July 23, 1991, [Vaughn] had a rotator cuff repair and repeat acromioplasty done by Dr. Richard Cobden. Dr. Cobden performed surgery again on October 15, 1991, for excision of a synovial fistula and closure of wound, and on March 31, 1993, for arthroscopy and excision of the glenoid labrum. On April 1, 1996, [Vaughn] had a Mumford procedure and acromioplasty by Dr. Frank Minor.
>
> 3. In 1995 and 1996, [Vaughn] worked as a press operator for just over a year among three jobs in California. During an independent medical evaluation with Elvert Nelson, M.D., on July 19, 1996, [Vaughn] reported that he returned to work for a company in Fremont in January 1995. He worked there for six months, but quit in July 1995. In July 1995, he worked for First Western Graphics Company in San Leandro. He worked at the second job until November 1995. At trial, [Vaughn] explained that he left the Fremont job, because they wanted him to work 80 hours a week. At the San Leandro job, [Vaughn] was working 12-hour

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[2] On September 16, 1988, Employer-Appellant RFD Publications, Inc. filed a Form WC-1, Employer's Report of Industrial Injury, that accepted liability for Vaughn's September 2, 1988 industrial injury. The WC-1 identified a "shoulder strain" injury, and attributed it thus: "Employee was turning a roll of newsprint[.]" On October 13, 1989, Vaughn filed a Form WC-5, Employee's Claim for Workers' Compensation Benefits, for the same industrial injury, in order to "assert[] statutory rights[.]" Hawaii Revised Statutes (HRS) § 386-3 (1993) provided, in relevant 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 hereinafter provided."

shifts. He quit that job after they wanted him to work six days a week. His third job was in Sacramento, but he quit after two weeks, when they wanted him to move printing paper, the same activity that caused his work injury. Since his fifth surgery in 1996, [Vaughn] has not engaged in any employment.

4. [Vaughn] has chronic left shoulder and low back pain. In 1996, [Vaughn] was referred to Corby Kessler, M.D., a physical medicine and rehabilitative specialist, for his left shoulder and low back symptoms. In an October 25, 1996 report, Dr. Kessler noted that previous treatment included the previous surgeries, multiple physical therapy for the left shoulder, and trials of a variety of medications, including nonsteroidals and narcotics. Dr. Kessler recommended medication for [Vaughn's] chronic pain and a physical therapy lumbar stabilization program.

5. After several months of treatment with no progress in [Vaughn's] condition, [Vaughn] was referred to the Auburn Pain Rehabilitation Medical Clinic (APRMC) in April or May 1997. From June 30, 1997 to July 30, 1997, [Vaughn] participated in APRMC's chronic pain management program. He then underwent a functional capacity evaluation (FCE) on August 1, 1997. According to the August 1, 1997 FCE report, [Vaughn] was considered permanent and stationary. The report also noted that [Vaughn] had considerable limitations from his work injuries, with his left shoulder as the most limiting factor in his functional abilities.

6. At [Hartford's] request, Donald Seymour, M.D., of the Orthopedic Evaluation Center, evaluated [Vaughn] on August 26, 1997, for his left shoulder and low back conditions, and prepared a report dated September 26, 1997. Dr. Seymour opined that [Vaughn] had reached maximum medical improvement.

7. [Vaughn] was seen for regular follow-up at APRMC. Because of renewed left shoulder complaints in September 1998, Jeffrey Reinking, M.D., medical director at APRMC, referred [Vaughn] for an orthopedic consultation with Stephen Weber, M.D., on May 12, 1999.

8. In his May 12, 1999 report, Dr. Weber provided his recommendation regarding further treatment. Dr. Weber noted that the causes of [Vaughn's] pain were obvious, with infection and complete loss of the anterior half of his deltoid, and that there were ample reasons for his pain, based on the physical exam performed on that date.

9. In a report dated June 21, 1999, Dr. Reinking noted that for some time, [Vaughn's] shoulder pain had been worsening to the point where the range of motion in his left shoulder had diminished and, consequently, his left upper extremity was, from a functional standpoint, of no utility. Dr. Reinking noted that [Vaughn] was unable to even grab a plate and reach out to put it on the table with his left hand.

10. In a records review report dated October 4, 1999, Sydney Smith, M.D., a sports medicine specialist, noted that [Vaughn] has five previous shoulder operations that had not improved his condition and had been ineffective at reducing his pain and restriction of motion. [Vaughn] also had two major surgical complications in the form of a synovial fistula and wound infection, as well as, the more disastrous complication of avulsion of the deltoid from the acromion.

Dr. Smith explained that [Vaughn's] chronic avulsion of the anterior deltoid from the acromion was quite debilitating and at this chronic stage, was not surgically treatable. According to Dr. Smith,

this problem could account for much of [Vaughn's] weakness and decreased active range of motion and a significant amount of his pain.

11. At trial, [Vaughn] testified that he cannot use his left arm above the shoulder. His left shoulder will occasionally "lock." His low back and left leg pain preclude him from walking more than a few blocks, standing more than 15 to 20 minutes, or sitting for more than 30 minutes. [Vaughn] considers his left arm to be "dead." [Vaughn] requires assistance with activities of daily living, including dressing himself and washing his hair. [Vaughn] cannot do household chores anymore.

[Vaughn] must take four MS Contin daily to control his pain. The medication, however, impairs his concentration and causes drowsiness and confusion.

12. Under the June 13, 1994 settlement agreement, [Vaughn] received [temporary total disability (TTD)] for the periods September 24, 1988 through April 7, 1989; September 26, 1989 through September 27, 1989; and October 8, 1989 through October 20, 1993, 30% [permanent partial disability (PPD)] of the left upper extremity, 7% PPD of the whole person for the low back, 1% PPD of the left lower extremity, and $650.00 for a disfiguring 5.25 [inch] surgical scar as well as multiple arthroscopic portal scars in the left shoulder area.

13. In the Director's October 15, 1998 decision, [Vaughn] was awarded additional TTD from January 1, 1996 through July 15, 1996, and September 10, 1996 through August 20, 1997, an additional 23% PPD of the left arm, 5% PPD of the whole person for his back, and 5% PPD of the left leg, and an additional $2,500.00, for disfigurement. Further TTD after August 20, 1997, was denied. [Vaughn's] request [for permanent total disability (PTD)] as a result of the work injury was also denied.

14. Based on the August 1, 1997 FCE report and Dr. Seymour's September 26, 1997 report, we find that [Vaughn's] work-related medical conditions were stable and stationary as of August 20, 1997.

15. [Vaughn] has work-related permanent disability of at least 30% PPD of the left arm, 7% PPD of the whole person for the low back, and 1% PPD of the left leg. As the physicians have noted, [Vaughn] has a serious defect in his left shoulder that can account for his pain and restricted motion. [Vaughn] has chronic left shoulder and low back pain, for which he requires medication. The pain medication reduces [Vaughn's] ability to think clearly and to concentrate. His work-related conditions have adversely impacted upon his daily functioning. Based on the foregoing, we find that [Vaughn] is unable to perform work on a regular basis in the normal labor market, as a result of his September 2, 1988 work injury.

16. We find that [Vaughn's] employment in 1995 and 1996, demonstrated not only his motivation to work, but also that the physical demands of that type of work preclude his return to employment in the field of printing.

The fact that [Vaughn] has not worked ever since his 1996 surgery also confirms his inability to be competitive in the labor market.

While [Vaughn] has a small nursery attached to his home, we are not persuaded that this fact shows that [Vaughn] is capable of performing work on a regular basis in the normal labor market.

17. As a result of his work injury, [Vaughn] has a 5.25 [inch] surgical scar and multiple arthroscopic portal scars in the left shoulder area, a depression in the left shoulder due to the loss of the deltoid muscle, and a left shoulder droop. [Vaughn] was previously

awarded a total of $3,150.00, for disfigurement.

CONCLUSIONS OF LAW

1. We conclude that [Vaughn] is not entitled to TTD after August 20, 1997, because his work-related condition was stable and permanent as of August 20, 1997.

2. We conclude that [Vaughn] is PTD, because the effects of his work injury render him unable to perform work on a regular basis in the normal labor market. Our conclusion that [Vaughn] is PTD is not based upon the odd-lot doctrine.

3. We conclude that [Vaughn] is entitled to $6,000.00 for disfigurement, which is inclusive of the previously awarded $3,150.00. If [RFD/Hartford] has already paid [Vaughn] the amount of $3,150.00, then [RFD/Hartford] shall pay [Vaughn] $2,850.00 ($6,000.00 less $3,150.00).

(Original footnotes omitted.)

II. Standards of Review.

Our review of the Board's decisions and orders is governed by Hawaii Revised Statutes (HRS) § 91-14(g) (1993):

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of 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.

See also Korsak v. Hawaii Permanente Medical Group, Inc., 94 Hawai'i 297, 302, 12 P.3d 1238, 1243 (2000). "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, internal quotation marks and block quote format omitted).

The Hawai'i Supreme Court has explained the standard of review, as follows:

> Appeals taken from findings set forth in decisions of the Board are reviewed under the clearly erroneous standard. Thus, this court considers whether such findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The clearly erroneous standard requires this court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made.
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> A conclusion of law is not binding on an appellate court and is freely reviewable for its correctness. Thus, this court reviews conclusions of law *de novo*, under the right/wrong standard.

Diaz v. Oahu Sugar Co., 77 Hawai'i 152, 155, 883 P.2d 73, 76 (1994) (brackets, citation and internal block quote format omitted). Further, "[t]o the extent that the Board's decisions involve mixed questions of fact and law, they are reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." Nakamura v. State, 98 Hawai'i 263, 267, 47 P.3d 730, 734 (2002) (internal quotation marks and citation omitted). "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." Igawa v. Koa House Restaurant, 97 Hawai'i 402, 406, 38 P.3d 570, 574 (2001) (brackets, citations, internal quotation marks and block quote format

omitted). In addition,

> 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 410, 38 P.3d at 578 (citation and internal block quote format omitted). "Moreover, a conclusion of law will not be overturned if supported by the trial court's findings of fact and by the application of the correct rule of law." Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 93, 34 P.3d 16, 23 (2001) (citation omitted).

III. Discussion.

On appeal, Employer aims its points of error solely at the Board's determination that Vaughn is permanently, totally disabled (PTD).

A. Finding of Fact 15.

Employer targets finding of fact (FOF, or plural, FsOF) 15, in which the Board cited various reasons for its finding that Vaughn "is unable to perform work on a regular basis in the normal labor market, as a result of his September 2, 1988 work injury." Employer argues that the Board therein "relied solely upon [Vaughn's] testimony at trial that the effects of the pain medication causes [(sic)] confusion and drowsiness, and also impairs [(sic)] his ability to concentrate." Opening Brief at 19 (citations to the record omitted; emphasis supplied).

First, and to be clear, the Board relied upon much more than Vaughn's testimonial complaints about the side effects of his pain medication. FOF 15 clearly demonstrates the Board's reliance upon many and multifarious other factors in finding Vaughn PTD. And our independent review of the whole record reveals ample evidence to justify the Board's reliance, evidence that is "reliable, probative, and substantial evidence[,]" Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal block quote format omitted), the Board's evaluation of which we decline to pass upon. Iqawa, 97 Hawai'i at 410, 38 P.3d at 578. In particular but without limitation, the Board's ultimate PTD conclusion was supported by the evidence detailed in FsOF 1 through 14, evidence that was likewise "reliable, probative, and substantial evidence[.]" Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal block quote format omitted). Furthermore, because Employer fails to challenge these FsOF, they are binding on appeal. See, e.g., Poe v. Hawai'i Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (Citing Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999) ("Findings of fact that are unchallenged on appeal are the operative facts of a case." (Citing Crosby v. State Dept. of Budget & Fin., 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994), cert. denied, 513 U.S. 1081, 115 S.Ct. 731, 130

L.Ed.2d 635 (1995))))). Hence, as to the Board's ultimate conclusion that Vaughn is PTD, we are not "left with a firm and definite conviction that a mistake has been made." Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal block quote format omitted).

Nevertheless, Employer argues that Vaughn's "purely subjective complaints" regarding the side effects of his pain medication should not have been considered by the Board:

> The [Board] did not cite any expert medical, psychological or vocational rehabilitation opinion to support its conclusion. Furthermore, the [Board] did not rely upon any pharmacological treatises to show that the pain medication prescribed to [Vaughn] caused the side effects he was experiencing.

Opening Brief at 19-20. In support of this argument, Employer relies on Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 837 P.2d 1273 (1992); and Franco v. Fujimoto, 47 Haw. 408, 390 P.2d 740 (1964), rev'd in part on other grounds, Barretto v. Akau, 51 Haw. 383, 463 P.2d 917 (1969). These cases are, however, inapposite. In Larsen, the supreme court reiterated the "Franco rule":

> Under the Franco rule, expert testimony is not necessary where an injury is objective in nature and it is plainly apparent from the injury itself that the harm is permanent or that the injured person will necessarily undergo pain and suffering in the future. Expert testimony is necessary under Franco only where an injury is subjective in character and of such nature a layperson cannot with reasonable certainty know whether there will be future pain and suffering. [Franco, 47 Haw.] at 433, 390 P.2d at 754.

Larsen, 74 Haw. at 44-45, 837 P.2d at 1295. In Franco, the only objective sequela of the plaintiff's auto accident remaining at the time of trial was a scar, and no medical testimony was

offered to substantiate the permanency of injuries the plaintiff had suffered in the accident. Franco, 47 Haw. at 432, 390 P.2d at 754. In Larsen, the plaintiff's evidence regarding a remaining blood clot was similarly silent as to permanence and future effect. Larsen, 74 Haw. at 45, 837 P.2d at 1295. In both cases, it was held that the absence of pertinent expert testimony barred recovery for future pain and suffering. Id.; Franco, 47 Haw. at 434, 390 P.2d at 755.

We do not believe that the Larsen and Franco holdings have relevance here, where the record reveals objective medical findings of severe physical injury and pain, along with prescriptions of increasing amounts of narcotic pain medication, and where Vaughn testified that taking the medication brings on side effects such as confusion, drowsiness and an inability to concentrate, all of which can last up to two hours at a time.[3] Rather, the relevant inquiry here is whether there was "reliable, probative, and substantial evidence" to support the Board's FOF 15, Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and

[3] We also observe that "[t]he rules of evidence governing administrative hearings are much less formal than those governing judicial proceedings." Loui v. Board of Medical Examiners, 78 Hawai'i 21, 31, 889 P.2d 705, 715 (1995) (citation omitted). Hawai'i Administrative Rules § 12-47-41 provides that "[t]he [B]oard shall not be bound by statutory and common law rules relating to the admission or rejection of evidence. The [B]oard may exercise its own discretion in these matters, limited only by considerations of relevancy, materiality, and repetition, by the rules of privilege recognized by law, and with a view to securing a just, speedy, and inexpensive determination of the proceedings."

internal block quote format omitted), and there was. Besides, we

> 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.

Igawa, 97 Hawai'i at 410, 38 P.3d at 578 (citation and internal block quote format omitted). See also Nakamura, 98 Hawai'i at 268, 47 P.3d at 735; Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22.

B. Finding of Fact 16.

Employer also challenges the Board's FOF 16, and does so in three respects.

1. Vaughn's 1995-96 Work History.

First, Employer claims that the Board clearly erred in finding that the three jobs in the printing industry Vaughn held in 1995 and 1996 "demonstrat[ed] his inability to return to the printing industry[.]" Opening Brief at 21 (emphasis and capitalization omitted). As detailed in FOF 3, Vaughn quit the first two jobs because the employers wanted him to work overtime. Vaughn left the third because the employer wanted him to perform the same task that had generated his industrial injuries. Employer seizes upon the former reason to argue that Vaughn's 1995-96 work history

> is totally contrary to the [Board's] finding that [Vaughn's] employment in 1995 and 1996 "demonstrated" that the physical demands of that type of work precluded his return to employment as a pressman. His work

> history from 1995 to 1996 made it abundantly clear that [Vaughn] could maintain employment in the regular job market in occupations, despite the disability of his left arm.

Opening Brief at 22.

It appears that Employer simply misapprehends FOF 16. The Board found that "[Vaughn's] employment in 1995 and 1996, demonstrated not only his motivation to work, but also that the physical demands of that type of work preclude his return to employment in the field of printing." That Vaughn undertook all three jobs fairly demonstrates the former; his experience with the third job fairly demonstrates the latter. Hence, Employer's argument in this respect is unavailing.

2. Vaughn's Unemployment Since 1996.

Second, Employer contends the Board clearly erred in finding that, "[t]he fact that [Vaughn] has not worked ever since his 1996 surgery also confirms his inability to be competitive in the labor market." As a logical proposition, this finding is unexceptionable. Employer's point in this respect seems to be that "[Vaughn] presented absolutely no evidence to show that since 1996, he has no reasonable prospect of finding regular employment of any kind in the normal labor market." Opening Brief at 23. To the contrary, our previous discussion concluded that there was "reliable, probative, and substantial evidence" to that effect, Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal block quote format omitted), and that we do not

presume to review the Board's evaluation of that evidence. Igawa, 97 Hawai'i at 410, 38 P.3d at 578; Nakamura, 98 Hawai'i at 268, 47 P.3d at 735; Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22. This second argument is also devoid of merit.

3. The Nursery.

Third, Employer complains that the Board clearly erred when it found that, "[w]hile [Vaughn] has a small nursery attached to his home, we are not persuaded that this fact shows that [Vaughn] is capable of performing work on a regular basis in the normal labor market." Employer's argument in this respect is essentially a discussion of the relevant evidence and why the Board should have been so persuaded. This argument must also fail. At the hearing before the Board, Vaughn testified about the nursery:

> Q. Now the records seem to indicate that you and your wife had a business, a nursery of some sort. Now, why don't you tell us what you really have?
> A. Okay. To tell you the truth, one of the things they ask was they want people to have some kind of goal to shoot for and I was kind of hoping to start a nursery some day. And with the problems getting worse on the shoulder, I never could have achieved or done any of that. And my wife tinkers around with probably getting some plants and try to sell them at some of the yard sales in the summer time.
> Q. Now how big is this nursery? Does it occupy an acre?
> A. No.
> Q. Or how big is the block?
> A. If you were to probably put everything together, I believe it would fit all in this room.
> Q. Within this confined area?
> A. Yeah.
> Q. About the size of, let's say, 16 -- or 20 by 20?
> A. Yeah.
> Q. How many plant [(sic)] are you talking about?
> A. Some of them are a little small, probably some of them are in gallon pots.
> Q. So what do you do in terms of caring for these plants? Do you just

water the plants once in a while?
A. I try to get out and water them sometimes.
Q. Do you and your wife make any substantial income of more than, let's say, a few hundred dollars a month or every few months?
A. No. Maybe $200 a month, maybe.
Q. That's not much at all?
A. No.

Later, Vaughn testified that he is no longer able to sell plants at garage sales because his neighborhood is "not zoned for that[.]" Apparently, the Board found Vaughn's testimony credible, and we decline to review its determination in this respect. Igawa, 97 Hawai'i at 410, 38 P.3d at 578; Nakamura, 98 Hawai'i at 268, 47 P.3d at 735; Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22.

C. Conclusion of Law 2.

Employer attacks the Board's conclusion of law (COL, or plural, CsOL) 2, arguing that the Board committed reversible error by misstating therein the correct legal definition of "total disability." Employer's challenge is based on the discrepancy between the statutory definition of total disability -- "disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market[,]" HRS 386-1 (1993) -- and that stated by the Board in its COL 2 -- "unable to perform work on a regular basis in the normal labor market[.]" In particular, Employer is bothered by the absence of the word "any": "Noticeably absent from the [Board's COL 2] that [Vaughn] is

permanently and totally disabled is the word 'any' which should have modified 'work.'" Opening Brief at 29.[4] This argument is tenuous at best.

Apart from its citation to the statutory definition, Employer provides no legal authority for this point of error. Nor does Employer explain what genuine conceptual difference the syntactical difference portends. Employer merely points out the discrepancy, then segues into the conclusion that it "should result in reversal of the Decision and Order." Opening Brief at 30. We cannot join in that conclusion without good reason, and Employer offers us none. It would appear that this is not really an independent point of error, but rather a rhetorical point calculated to highlight Employer's following point:

> While it is clear that [Vaughn] believed that his shoulder condition precluded him from working in the commercial printing industry, it is not clear that [Vaughn] is 'unable to perform any work on a regular basis in the normal labor market" as required by Section 386-1, HRS.

Opening Brief at 30 (emphasis in the original). On this point as well, we disagree. We have already determined that the evidence supporting the Board's conclusion that Vaughn is "unable to perform work on a regular basis in the normal labor market" is "reliable, probative, and substantial evidence" to that effect, Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal

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[4] Employer's alleges the same defect in the Board's finding of fact 15, which found, in pertinent part, that "[Vaughn] is unable to perform work on a regular basis in the normal labor market, as a result of his September 2, 1988 work injury."

block quote format omitted), and have declined to pass upon the Board's determination in that respect. Igawa, 97 Hawai'i at 410, 38 P.3d at 578; Nakamura, 98 Hawai'i at 268, 47 P.3d at 735; Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22. And that evidence encompasses not only work in the commercial printing industry, but work in any industry.[5]

D. The Vocational Rehabilitation Issue.

As part of its general assault on the Board's conclusion that Vaughn is PTD, Employer makes reference here and there to Vaughn's alleged refusal of vocational rehabilitation services "since 1991." Opening Brief at 24. Employer argues that "[t]he [Board's] Decision is in error because [Vaughn] 'refused' [vocational rehabilitation], when it was a critical,

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[5] Cf. Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001), in which the supreme court stated:

> "'Total disability' means disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market." HRS § 386-1 (1993). By administrative rule, an employee is "totally disabled" if he or she is "unable to complete a regular daily work shift on account of a work injury." Workers' Compensation Related Administrative Rules § 12-10-21 (2000). Thus, if an employee is "capable of performing work in an occupation for which the worker has received previous training or for which the worker had demonstrated aptitude," he or she is not totally disabled. Workers' Compensation Related Administrative Rules § 12-10-1 (2000).

(Footnote omitted; emphasis supplied.) Hence, the supreme court held that the Board did not err in concluding that Tamashiro was not temporarily and totally disabled for work for a specific period of time, "because he was able to resume work in his usual and customary employment as an electrician." Id. (internal quotation marks omitted; emphasis supplied).

objective means of determining whether [Vaughn] could maintain a job despite his disability." Opening Brief at 27-28.

If Employer is arguing that the Board erred because it did not expressly deal with the vocational rehabilitation issue in its FsOF and CsOL, we observe that there was, in any event, "reliable, probative, and substantial evidence on the whole record" to support the Board's findings and conclusions. Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation and internal block quote format omitted).

Employer nevertheless seems to imply that Vaughn's alleged refusal to participate in vocational rehabilitation *ipso facto* disqualified him from PTD benefits, based on the supreme court's decision in Atchley v. Bank of Hawai'i, 80 Hawai'i 239, 909 P.2d 567 (1996). Employer's reliance is misplaced. The supreme court cited Atchley's lack of interest in pursuing vocational rehabilitation as only one factor in affirming the Board's termination of vocational rehabilitation services, id. at 242-243, 909 P.2d at 570-571, and as only one factor in affirming the Board's termination of temporary total disability benefits. Id. at 244, 909 P.2d at 572. As we have reiterated numerous times, supra, the Board's conclusion that Vaughn is PTD was supported by "reliable, probative, and substantial evidence" to that effect, Diaz, 77 Hawai'i at 155, 883 P.2d at 76 (citation

and internal block quote format omitted), and in its evaluation of that evidence, the Board is entitled to deference. Igawa, 97 Hawai‘i at 410, 38 P.3d at 578; Nakamura, 98 Hawai‘i at 268, 47 P.3d at 735; Tamashiro, 97 Hawai‘i at 92, 34 P.3d at 22.

IV. Conclusion.

Accordingly, we affirm the Board's February 5, 2001 amended decision and order, and the Board's November 6, 2000 decision and order.

DATED: Honolulu, Hawaii, March 20, 2003.

On the briefs:

Edie A. Feldman,
for employer-appellant and
insurance carrier-appellant.

Chief Judge

Dennis W. Chang,
for claimant-appellee.

Associate Judge

Associate Judge