NOT FOR PUBLICATION



NO. 25692

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

BONNIE FIGUEROA, Claimant-Appellant, v.
OAHU TRANSIT SERVICES, INC., and
JOHN MULLEN AND COMPANY, Employer/Insurance Adjuster-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2001-018 (29512752))

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim, and Nakamura, JJ.)

In this workers' compensation case, Claimant-Appellant Bonnie Figueroa (Figueroa or Claimant) appeals from the "Order Adopting Proposed Decision and Order" filed on January 2, 2003, by the Labor and Industrial Relations Appeals Board (the Board) and the "Order Denying Request for Reconsideration of Decision and Order" filed on February 13, 2003, by the Board.[1] The Board determined that Figueroa suffered a 13 percent permanent partial disability (PPD) as a result of her June, 25, 1995, work injury.

On appeal, Figueroa challenges the Board's 13 percent PPD award as being too low. The crux of Figueroa's appeal is that the Board was wrong in determining that she injured only her sacroiliac joint and not both her sacroiliac joint and her low back in the June 25, 1995, work accident. She argues that the Board erred in that it: 1) ignored the statutory presumption set

[1] The notice of appeal filed by Claimant-Appellant Bonnie Figueroa (Figueroa or Claimant) also lists the "Proposed Decision and Order" filed on November 2, 2002, by Hearings Officer Jean Tanaka as one of the orders being appealed.

forth in Hawaii Revised Statutes (HRS) § 386-85(1) (1993)[2] and addressed an issue not preserved in the appeal to the Board; 2) made inconsistent findings of fact and conclusions of law and ignored the application of HRS § 386-33 (Supp. 2005);[3] and 3) found that Figueroa did not suffer a low back injury as a result of the June 25, 1995, work accident. After careful review and consideration of the record and the briefs submitted by the parties, we hold as follows:

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[2] Hawaii Revised Statutes (HRS) § 386-85(1) (1993) provides:

> **§ 386-85 Presumptions.** In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:
>
> (1) That the claim is for a covered work injury[.]

[3] HRS § 386-33 (Supp. 2005) provides in relevant part:

> **§386-33 Subsequent injuries that would increase disability.** (a) Where prior to any injury an employee suffers from a previous permanent partial disability already existing prior to the injury for which compensation is claimed, and the disability resulting from the injury combines with the previous disability, whether the previous permanent partial disability was incurred during past or present periods of employment, to result in a greater permanent partial disability or in permanent total disability or in death, then weekly benefits shall be paid as follows:
>
> (1) In cases where the disability resulting from the injury combines with the previous disability to result in greater permanent partial disability the employer shall pay the employee compensation for the employee's actual permanent partial disability but for not more than one hundred four weeks; the balance if any of compensation payable to the employee for the employee's actual permanent partial disability shall thereafter be paid out of the special compensation fund; provided that in successive injury cases where the claimant's entire permanent partial disability is due to more than one compensable injury, the amount of the award for the subsequent injury shall be offset by the amount awarded for the prior compensable injury[.]

I.

Figueroa claims that she injured both her sacroiliac joint and her low back in her 1995 work accident. Figueroa contends that in failing to find that she injured her low back in addition to her sacroiliac joint, the Board ignored the statutory presumption set forth HRS § 386-85(1), which creates a presumption "[t]hat the claim is for a covered work injury." Employer-Appellee Oahu Transit Services, Inc. and Insurance Adjuster-Appellee John Mullen & Co. Inc. (collectively referred to as Employer/Adjuster) counter that the HRS § 386-85(1) presumption is not applicable because Employer/Adjuster did not dispute the work-relatedness of Figueroa's injury, but only the nature of the injury and the extent of any PPD resulting from the injury.

We need not resolve whether the HRS § 386-85(1) presumption applies in the circumstances of this case because we conclude that there was substantial evidence to overcome any presumption that Figueroa suffered a separate injury to her low back. Dr. John Henrickson's evaluation, which the Board credited, concluded that Figueroa had suffered only a sacroiliac joint injury and not a low back injury as a result of the 1995 accident. Dr. Henrickson found that Figueroa's low back pain was merely a symptom of her sacroiliac joint injury, not a separate injury, and that the 1995 accident had not aggravated Figueroa's preexisting low back condition. Dr. Henrickson's evaluation constituted substantial evidence to rebut any applicable HRS §

386-85(1) presumption and to support the Board's findings regarding the nature of Figueroa's injury and the extent of her PPD. See Nakamura v. State, 98 Hawai'i 263, 267-68, 47 P.3d 730, 734-35 (2002).

The Director of the Department of Labor and Industrial Relations (the Director) found that the location of Figueroa's injury was "low back." We disagree with Figueroa's argument that the issues stated in the Board's Pretrial Order were not broad enough to preserve the Employer/Adjuster's ability to challenge this finding of the Director. The Board reviews the Director's decision *de novo*. HRS § 386-87(b) (1993). The issues stated in the Board's Pretrial Order included "the extent of permanent disability, if any, resulting from the work injury of June 25, 1995." The issues stated were broad enough to encompass the Board's determination of whether Figueroa had sustained an injury to her low back that was separate from her sacroiliac joint injury.

II.

Among the Board's findings of fact (FOF) were: 1) FOF 5 which stated that "[o]n June 25, 1995, Claimant injured her low back while securing a wheelchair on the bus[;]" and 2) FOF 7 which described Dr. Morris Mitsunaga's evaluation and disability rating of Figueroa, including Dr. Mitsunaga's opinion that "the 1995 injury permanently aggravated Claimant's preexisting low back condition." We reject Figueroa's argument that these findings were inconsistent with the Board's ultimate

determination that Figueroa only injured her sacroiliac joint. The Board's generic reference to Figueroa's having injured her "low back" in FOF 5 was not inconsistent with its more specific determination that her actual injury was a sacroiliac joint injury whose symptoms included pain in the low back. In FOF 7, the Board simply described Dr. Mitsunaga's evaluation; the Board did not adopt Dr. Mitsunaga's evaluation as being correct. It therefore was not inconsistent for the Board to reject Dr. Mitsunaga's evaluation and credit Dr. Henrickson's evaluation.

Figueroa's claim that the Board erred in ignoring the application of HRS § 386-33 is based on her argument that the Board should have credited the disability rating of Dr. Mitsunaga, who concluded that the 1995 accident had aggravated Figueroa's preexisting low back condition. The Board, however, credited the evaluation of Dr. Henrickson, who concluded that the 1995 accident did not aggravate Figueroa's preexisting low back condition. As Dr. Henrickson's evaluation provided substantial evidence to support the Board's decision, we reject Figueroa's claim that the Board erred in ignoring the application of HRS § 386-33.

III.

Figueroa argues that the record as a whole does not support the Board's determination that she did not suffer a separate low back injury as a result of the June 25, 1995, work accident. We disagree. The written evaluations and trial testimony of Dr. Henrickson provided substantial evidence to

support the Board's findings and decision. See Nakamura, 98 Hawai'i at 267-68, 47 P.3d at 734-35; Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 23 (2001). We also reject Figueroa's contention that the Board based certain findings of fact on Dr. Henrickson's August 20, 2001, report which was stricken due to its untimely submission. Dr. Henrickson's trial testimony expressed the same opinions contained in the stricken report. The Board did not err in basing certain of its findings on Dr. Henrickson's trial testimony.

Therefore,

IT IS HEREBY ORDERED that the Labor and Industrial Relations Appeals Board's January 2, 2003, "Order Adopting Proposed Decision and Order" and its February 13, 2003, "Order Denying Request for Reconsideration of Decision and Order" are affirmed.

DATED: Honolulu, Hawai'i, June 14, 2006.

On the briefs:

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James L. Burns
Chief Judge

Associate Judge

Craig H. Nakamura
Associate Judge