DISSENTING OPINION BY FOLEY, PRESIDING JUDGE

I respectfully dissent.

Hawaii Revised Statutes (HRS) Chapter 386 charges the Department of Labor and Industrial Relations (DLIR) with responsibility for the chapter's administration and grants the Director of the DLIR "all powers necessary to facilitate or promote the efficient execution" of the chapter. HRS § 386-71 (1993).[1/] This includes the power to promulgate rules "not inconsistent with this chapter, which the director deems necessary for or conducive to its proper application and enforcement." HRS § 386-72 (1993) (emphasis added).[2/] These statutes grant the DLIR relatively broad regulatory authority, permitting it to adopt rules implementing the entire body of workers' compensation law. That authority is limited, however, to the promulgation of rules that are consistent with the legislative purpose of workers' compensation. Id.

[1/] Hawaii Revised Statutes (HRS) § 386-71 (1993) provides, in relevant part, as follows:

> **§386-71 Duties and powers of the director in general.** The director of labor and industrial relations shall be in charge of all matters of administration pertaining to the operation and application of this chapter. The director shall have and exercise all powers necessary to facilitate or promote the efficient execution of this chapter and, in particular, shall supervise, and take all measures necessary for, the prompt and proper payment of compensation.

[2/] When the Department of Labor and Industrial Relations (DLIR) amended Hawaii Administrative Rules (HAR) § 12-14-36 in 1993, HRS § 386-72 (1993) read as follows:

> **§386-72 Rulemaking powers.** In conformity with and subject to chapter 91, the director of labor and industrial relations shall make rules, not inconsistent with this chapter, which the director deems necessary for or conducive to its proper application and enforcement.

Hawai'i Administrative Rules (HAR) § 12-14-36 provides as follows:

> **§ 12-14-36. Termination of right to vocational rehabilitation.** (a) An employee who has been issued a permanent partial disability award by the director or an employee who has stipulated away the right to vocational rehabilitation with the approval of the director is determined to have waived the right to rehabilitation.
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> (b) The right to rehabilitation is preserved for any employee on temporary total disability and any employee who has been adjudged permanently and totally disabled by the director.

(Emphases added.) This regulation implements HRS § 386-25, which provided in 1993:

> **§386-25 Vocational rehabilitation.** (a) The purposes of vocational rehabilitation are to restore an injured worker's earning capacity as nearly as possible to that level which the worker was earning at the time of injury and to return the injured worker to suitable work in the active labor force as quickly as possible in a cost-effective manner.
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> (b) The director may refer employees who may have or have suffered permanent disability as a result of work injuries and who in the director's opinion can be physically or vocationally rehabilitated to the department of human services or to private providers of rehabilitation services for such physical and vocational rehabilitation services as are feasible. A referral shall be made upon recommendation of the rehabilitation unit established under section 386-71.5 and after the employee has been deemed physically able to participate in rehabilitation by the employee's attending physician. The unit shall include appropriate professional staff and shall have the following duties and responsibilities:
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> (1) To foster, review, and approve rehabilitation plans developed by certified providers of rehabilitation services, whether they be private or public;
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> (2) To adopt rules consistent with this section which shall expedite and facilitate the identification, notification, and referral of industrially injured employees to rehabilitation services, and establish minimum standards for providers providing rehabilitation services under this section;
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> (3) To certify private and public providers of rehabilitation services in accordance with the minimum standards established; and

> (4) To coordinate and enforce the implementation of rehabilitation plans.
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> (c) Enrollment in a rehabilitation plan or program shall not be mandatory and the approval of a proposed rehabilitation plan or program by the injured employee shall be required. After securing such approval the director shall select a certified provider of rehabilitation services for the injured employee after consultation with the employee and the employer.
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> (d) An injured employee's enrollment in a rehabilitation plan or program shall not affect the employee's entitlement to temporary total disability compensation if the employee earns no wages during the period of enrollment. If the employee receives wages for work performed under the plan or program, the employee shall be entitled to temporary total disability compensation in an amount equal to the difference between the employee's average weekly wages at the time of injury and the wages received under the plan or program, subject to the limitations on weekly benefit rates prescribed in section 386-31(a). The employee shall not be entitled to such compensation for any week during this period where the wages equal or exceed the average weekly wages at the time of injury.
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> (e) The director shall adopt rules for additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training.
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> (f) If the rehabilitation unit determines that physical and vocational rehabilitation are not possible or feasible, it shall certify such determination to the director.
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> (g) The eligibility of any injured employee to receive other benefits under this chapter shall in no way be affected by the employee's entrance upon a course of physical or vocational rehabilitation as herein provided.
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> (h) Vocational rehabilitation services for the purpose of developing a vocational rehabilitation plan shall be approved by the director and the director shall periodically review progress in each case.

(Emphases added.) Subsection (b)(2) establishes parameters for the administration of vocational rehabilitation benefits, but leaves the bulk of the details pertaining to the statute's

implementation up to the DLIR.[3/] Nothing in the statute indicates that an employee's receipt of a permanent partial disability (PPD) award bars the employee from consideration for vocational rehabilitation services.[4/] While, in HRS § 386-25(b), the legislature left the determination of eligibility criteria up to the Director of the DLIR (Director) and commissioned the DLIR to adopt rules facilitating the identification and referral of employees to rehabilitation, the distinction adopted by the DLIR does not appear to be consistent with the articulated purposes set forth in HRS § 386-25(a) of restoring an injured worker's earning capacity and returning him or her to the labor force.

Under the Hawai'i workers' compensation scheme, partial disability awards compensate an injured worker for physiological impairment rather than wage loss, while total disability awards compensate the worker for resulting lost earning capacity. Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 388-89, 944 P.2d 1279, 1331-32 (1997); Cuarisma v. Urban Painters, Ltd., 59 Haw. 409, 420, 583 P.2d 321, 327 (1978). A permanently-injured worker should not be denied the chance to restore his or her earning capacity and return to the active labor force simply because the Director has made a determination that the worker has suffered some degree of permanent physiological impairment. In its attempt to save this regulation, Appellee Weyerhauser Company

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[3/] Although inapplicable to the case sub judice, the legislature amended HRS § 386-25 in 1998 and 2005. In the wake of these more recent changes, the statute elaborates, in much greater detail, the procedures and requirements governing the provision of vocational rehabilitation benefits to injured workers (§ 386-25(b), (d), (e), and (p) (Supp. 2006)), while simultaneously providing the Director of the DLIR with substantial discretion to refer employees to vocational rehabilitation services (§ 386-25(b) (Supp. 2006)), approve rehabilitation plans (§ 386-25(f) and (h) (Supp. 2006)) and periodically review individual cases (§ 386-25 (q) (Supp. 2006)).

[4/] In fact, subsection (g) states that "[t]he eligibility of any injured employee to receive other benefits under this chapter shall in no way be affected by the employee's entrance upon a course of physical or vocational rehabilitation[.]" HRS § 386-25(g) (1993).

(Weyerhauser) argues that since PPD awards are not linked directly to earning capacity, a permanently partially-disabled worker does not suffer a reduction in earning capacity. The case of Appellant Lani Capua (Capua), of course, gives lie to this assertion since she is no longer able to earn wages from Weyerhauser in her permanently partially-disabled condition. In fact, it would seem that workers like Capua, who have suffered an industrial injury preventing them from continuing to work in their current field but who have not been adjudged unable to work at all, would obtain the greatest benefit from the opportunity afforded by vocational rehabilitation.

The following example emphasizes the unreasonable nature of this rule. The statute governing partial disability, HRS § 386-32, establishes a schedule linking specific bodily injuries with a fixed amount of monetary compensation. Pursuant to this schedule, the loss of an index finger in an industrial accident automatically entitles a worker to a PPD award quantified in the statute. While an attorney might endure little professional setback in the wake of losing her index finger, a stenographer suffering such a loss could very well be rendered incompetent in his or her chosen field. With appropriate guidance, however, the stenographer might be capable of functioning effectively in some other occupation. It strikes us as clearly inconsistent with HRS § 386-25(a) (purposes of vocational rehabilitation) that, under HAR § 12-14-36(a), once the stenographer accepts a PPD award as recompense for being "less than a whole [person]," Cuarisma, 59 Haw. at 419, 583 P.2d at 327 (quoting 1963 Senate Journal, at 791), he or she would be prohibited from receiving the necessary training and assistance to make a career transition.

While I find HAR § 12-14-36 to be inconsistent with the express purposes contained in the language of HRS § 386-25(a), I

also note that HRS § 386-25(a) legislative history confirms my view. Coon v. City and County of Honolulu, 98 Hawai'i 233, 248, 47 P.3d 348, 363. Section § 386-25 was first adopted in 1963 and has subsequently been amended six times.[5/] The statute has grown in length and specificity with each subsequent amendment, but the committee reports associated with these changes indicate an unwavering legislative commitment that was best expressed during the most recent amendment process:

> The legislative intent [of vocational rehabilitation services] was to reduce the hardship generally on society by keeping an employee in gainful employment balanced against time and cost efficiency concerns. If an employee sustains a substantial loss in earning capacity and has significant financial obligations as a result of an industrial injury, it was the legislative intent that the employee receive the services necessary to allow that employee to continue to meet those financial obligations and remain productive in society.

Hse. Stand. Comm. Rep. No. 1527, in 2005 House Journal, at 1635.[6/]

Section 386-25 does not distinguish between physiological impairments that make a worker eligible for a PPD

[5/] Our analysis is not impacted by the fact that the legislature has amended HRS § 386-25 four times since the DLIR promulgated HAR § 12-14-36 on December 22, 1980, without amending the statute to override the rule. As this court previously noted in Jacober v. Sunn, 6 Haw. App. 160, 715 P.2d 813 (1986), "the failure of a subsequent legislature to enact amendments abrogating" the substance of the regulation "does not validate [an] invalid rule[]." Id. at 168 n.4, 715 P.2d at 819 n.4.

The legislature's last attempt, during the 2007 regular session, to amend HRS § 386-25, and other provisions of HRS Chapter 386, S.B. No. 1060, S.D.1, H.D.2, C.D.1, was vetoed by the Governor; see Governor's Message No. 625, 7/10/2007.

[6/] This report was not part of the legislative history of Chapter 386 as of December 30, 2003, the date of the decision by the Labor and Industrial Relations Appeals Board in this case, but the language of the report is useful in that it attempts to summarize the legislative intent behind HRS § 386-25 as it evolved during the preceding decades. See Cuarisma v. Urban Painters, Ltd., 59 Haw. 409, 420, 583 P.2d 321, 326 (1978) (referring to language in a committee report not yet "part of the legislative history of Chapter 386" as of the date with which the court was concerned and deeming this reference "appropriate . . . as an interpretation of the statute made contemporaneously with the date of the accident" in the case before it).

award and work injuries that rise to such a level as to merit wage replacement benefits in the form of a Permanent Total Disability (PTD) award.[7/] Instead, the statute expressly reserves vocational rehabilitation benefits only to those workers who are permanently disabled in industrial accidents, presumably meaning those employees whose conditions have stabilized and are not expected to improve. The legislative history associated with the 1980 amendment process reflects this sentiment as well. E.g., Sen. Stand. Comm. Rep. No. 324-80, in 1980 Senate Journal, at 1162 ("The purpose of this bill is to . . . provide greater rehabilitation opportunities to an injured worker by requiring the employer to provide . . . these rehabilitation services . . . to an employee who suffers work-related permanent disability.") (emphasis added).

The DLIR's "authority is limited to enacting rules and regulations which are reasonably related to carrying into effect the purposes" of Chapter 386, and as such, the DLIR "may not enact rules and regulations which enlarge, alter, or restrict the provisions" contained therein. Jacober v. Sunn, 6 Haw. App. 160, 167, 715 P.2d 813, 819 (1986). As evinced by the text of HRS § 386-25 and its legislative history, HAR § 12-14-36 bears no reasonable relation" to the vocational rehabilitation statute. Haole v. State, 111 Hawai'i 144, 156, 140 P.3d 377, 389 (2006). Therefore, I conclude that the DLIR exceeded its statutory authority when it promulgated this rule, which I find to be inconsistent with the purposes of vocational rehabilitation.

[7/] The only reference in the statute to total -- as opposed to partial -- disability is contained in HRS § 386-25(d), quoted supra, which addresses the relationship between Temporary Total Disability (TTD) compensation and enrollment in a vocational rehabilitation program. The legislative history makes clear, however, that this subsection was inserted to provide TTD recipients with the incentive to engage in vocational rehabilitation services and thereby reduce costs imposed on society by workers who are temporarily incapacitated. Sen. Stand. Comm. Rep. No. 540-80, in 1980 Senate Journal, at 1249.

Inasmuch as the Board relied on an invalid rule to deny Capua's petition for vocational rehabilitation benefits, I would vacate and remand.