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NO. 27085

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ARTHUR F. FREEDLE, Claimant-Appellant, v.
CITY AND COUNTY OF HONOLULU, FINANCE DEPARTMENT, Employer-Appellee, Self-Insured

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2003-222 (2-95-22861))

MEMORANDUM OPINION
(By: Recktenwald, C.J., Foley and Nakamura, JJ.)

Arthur F. Freedle (Freedle or claimant) appeals: (1) the November 30, 2004 decision by the Hawai'i Labor and Industrial Relations Appeals Board (LIRAB) affirming the May 15, 2003 decision of the Director of the Hawai'i Department of Labor and Industrial Relations (Director), finding that Freedle suffered no permanent disability as a result of a work accident that occurred on November 24, 1995 and that Freedle "shall reimburse employer for any payment of weekly benefits after [December 1, 2001,]" and (2) the LIRAB's December 30, 2004 order denying Freedle's Request for Reconsideration and Extension. For the reasons set forth below, we affirm.

BACKGROUND

On November 24, 1995, while employed by the City and County of Honolulu (Employer or City and County) as a motor vehicle control inspector, Freedle was involved in an automobile accident arising out of and in the course of his employment. As a result of the accident, Freedle sustained injuries to his neck, shoulders, back, arm and knees.

The City and County accepted liability for this work accident and paid temporary total disability benefits for various periods beginning November 27, 1995.

On August 9, 1996, at the request of the City and County, Freedle was examined by Dr. Joan Redden, a clinical psychologist, who opined that Freedle was "stable and ratable[,]"

that his current psychological impairment pre-existed his work injury from the accident, and that there was no permanent psychological impairment related to Freedle's work injuries after 1979.[1]

At the City and County's request, Freedle was examined on May 28, 1996 by Dr. Lorne Direnfeld, a neurologist who performed an independent medical examination and a permanent partial impairment rating. Dr. Direnfeld opined that Freedle's condition was stable for rating purposes, and that there was no "impairment attributable to the work accident of November 24, 1995."

On March 3, 1998, also at the request of the City and County, Freedle was examined by Dr. John Endicott, an occupational medicine specialist, who also opined that Freedle was medically stable, and that there was "no objective, medical reason [Freedle] could not return to work as a motor vehicle inspector."

However, Freedle's primary physician, psychiatrist Dr. Robert Marvit, stated that the November 24, 1995 accident "in combination" with prior work injuries left Freedle permanently and totally disabled (PTD). Additionally, on June 15, 2000, Freedle was examined, at employer's request, by a neurosurgeon for an impairment rating of Freedle's neck and back. Though the neurosurgeon found that Freedle's range of motion impairment rating was lower than previous assessments (meaning Freedle had less impairment than he was previously rated for), relying on Dr. Marvit's assessment, he opined that Freedle was PTD. Finally, Peggy Thiessen, a vocational rehabilitation counselor, concluded that Freedle's deficits "would preclude him from returning to regular, full time employment."

Relying on Ms. Thiessen's assessment, the City and

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[1] In 1979, while employed as a Honolulu police officer, Arthur F. Freedle (Freedle) was involved in the fatal shooting of a young man. The incident caused Freedle to suffer various psychological conditions. As a result, Freedle received workers compensation benefits and was determined to be fifteen percent permanently partially disabled.

County sent Freedle's attorney a letter, dated December 13, 2000, stating that Freedle "will most likely be found permanently and totally disabled." The letter stated that "[b]ecause [Freedle's] condition is now permanent and stationary, [the City and County] will be terminating his temporary total disability payments effective November 30, 2000." The letter also stated that the City and County would be requesting a hearing before the Disability Compensation Division (DCD) to determine the extent of permanent disability, and that the City and County would be "enclosing a copy of this vocational rehabilitation evaluation for the Special Compensation Fund [(SCF)], who have already been placed on notice regarding their liability in this claim under [Hawaii Revised Statutes (HRS) § 386-33 (Supp. 2006)]."[2]

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[2] This statute was applicable because Freedle was injured in two prior automobile accidents (one on August 26, 1985, and one on May 1, 1986) while "in the course of his employment" and received a 15% permanent partial disability payment for the injuries suffered from the 1985 accident which, like the November 24, 1995 accident, resulted in injuries to Freedle's back.

Hawaii Revised Statutes (HRS) § 386-33 (Supp. 2006) entitled "Subsequent injuries that would increase disability," provides in pertinent part that:

> (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:
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> (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;
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> (2) In cases where the disability resulting from the injury combines with the previous disability to result in permanent total disability, the employer

On November 5, 2001, at the request of the SCF, Freedle was examined by a psychiatrist, Dr. Kwong Yen Lum. After reviewing Freedle's medical records, assessments, and evaluations from the previous exams, Dr. Lum found that Freedle's condition was stable, and that Freedle did not "currently suffer from a ratable psychiatric impairment greater than 15% of a whole person." Thus, Dr. Lum determined that Freedle did not suffer from any permanent psychological impairment greater than the percentage that he had already incurred from the 1979 shooting incident.[3]

On March 25, 2003, the DCD held a hearing to evaluate Freedle's disfigurement, permanent disability, temporary disability period, and other issues. At the hearing Freedle, relying on Drs. Henrickson and Marvit's opinions, and Vocational Counselor Thiessen's report, claimed that he was PTD because he was unable to return to work. The City and County agreed with Freedle and requested contribution from the SCF toward payment of Freedle's PTD benefits. However, the SCF disagreed and argued

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> shall pay the employee for one hundred four weeks and thereafter compensation for permanent total disability shall be paid out of the special compensation fund; and
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> (3) In cases where the disability resulting from the injury combines with the previous disability to result in death the employer shall pay weekly benefits in accordance with sections 386-41 and 386-43 but for not more than one hundred four weeks; the balance of compensation payable under those sections shall thereafter be paid out of the special compensation fund.
>
> (b) Notwithstanding subsection (a), where the director or the appellate board determines that the previous permanent partial disability amounted to less than that necessary to support an award of thirty-two weeks of compensation for permanent partial disability, there shall be no liability on the special compensation fund and the employer shall pay the employee or the employee's dependents full compensation for the employee's permanent partial or total disability or death.

[3] Dr. Kwong Yen Lum submitted his assessment of Freedle on December 1, 2001. As discussed below, because Freedle was "stable," and the Hearings Officer of the Disability Compensation Division, the Director of the Department of Labor and Industrial Relations, and the Labor and Industrial Relations Appeals Board (LIRAB) credited Dr. Lum's assessment, this is the date that was used to determine the period of reimbursement Freedle would be required to pay.

that Freedle was not PTD because he suffered no orthopedic or psychiatric aggravation from the November 24, 1995 accident. Additionally, the SCF argued that "Dr. Marvit's opinion should not be credited because his opinion takes in conditions that arose after the date of [the] accident."

The DCD Hearings Officer agreed with the SCF and, relying on Drs. Direnfeld, Redden, Endicott, and Henrickson's assessments, found that Freedle "suffered no permanent disability from [the November 24, 1995] accident." Furthermore, the Hearings Officer stated:

> I am unable to credit Dr. Marvit's opinion. Dr. Marvit opined claimant was PTD from a cumulation of physical and psychiatric problems. However, Dr. Marvit took in physical conditions that arose after the date of accident. Employer and the SCF are not responsible for payment of permanent disability benefits for conditions that arose after the date of accident. I am also unable to credit Dr. Henrickson's comments on PTD becasue they were based on Dr. Marvit's opinion. Based on Dr. Lum's opinion that claimant was medically stable, I find claimant's temporary total disability benefits shall terminate on 12/01/2001. Claimant shall reimburse employer for any payment of weekly benefits after 12/01/2001.

The Director's Decision filed on May 15, 2003, adopted the Hearings Officer's recommendations, and found that Freedle was not permanently disabled or disfigured from the November 24, 1995 motor vehicle accident. Additionally, the Director found that "[p]ursuant to [HRS § 386-52 (1993)], claimant shall reimburse employer for any payment of weekly benefits after 12/1/2001."[4]

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[4] HRS § 386-52 (1993) entitled "Credit for voluntary payments and supplies in kind" states:

> (a) Any payments made by the employer to the injured employee during the employee's disability or to the employee's dependents which by the terms of this chapter were not payable when made, shall be deducted from the amount payable as compensation subject to the approval of the director; provided that:
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> (1) The employer notifies the injured employee and the director in writing of any such credit request stating the reasons for such credit and informing the injured employee that the employee has the right to file a written request for a hearing to

On May 20, 2003, Freedle appealed the Director's Decision to the LIRAB, and filed his "Non-Hearing Motion For Order To Stay Payments And For Order To Remand." In his motion, Freedle asserted that the Director's May 15, 2003 decision should be stayed and the case remanded for a determination on the "agreement" between the City and County and Freedle that he was permanently and totally disabled.

The LIRAB set the date of an initial conference on Freedle's appeal for July 10, 2003. On July 15, 2003 the LIRAB issued an order which granted Freedle's motion for a stay of the Director's Decision, but denied Freedle's motion for remand. Additionally, the LIRAB identified the issues to be determined on Freedle's appeal as:

> a) Whether the Director erred in failing to recognize and acknowledge the stipulation reached between Claimant and Employer that Claimant was permanently and totally disabled as of December 1, 2000.
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> b) Whether Employer is entitled to reimbursement for indemnity benefits paid beyond December 1, 2001, pursuant to §386-52, HRS.

In a letter to the LIRAB, dated May 27, 2004, Freedle's

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submit any evidence to dispute such a credit;

(2) The deduction shall be made by shortening the period during which the compensation must be paid, or by reducing the total amount for which the employer is liable and not the amount of weekly benefits;

(3) If overpayment cannot be credited, the director shall order the claimant to reimburse the employer. Failure to reimburse the employer shall entitle the employer to file for enforcement of such a decision in accordance with section 386-91.

(b) If the employer continues to furnish to the injured employee, during the employee's disability, or to the employee's dependents, during their entitlement to weekly benefits, board, lodging, fuel, and other advantages the value of which has been included in the calculation of wages as provided in section 386-1, the furnishing of such advantages may be considered as payment in kind of that portion of the compensation which is based on such remuneration in kind; but if at any time during the compensation period the employer ceases to furnish such advantages, no further deduction of the value of such advantages as payment in kind from the compensation shall be permissible.

attorney, Larry Scott (Scott), stated that, "There is no reason to continue . . . Claimant's appeal relating to whether Claimant is permanently and totally disabled from work. Claimant returned to full duty with the same Employer on August 22, 2003." Additionally, the letter stated that "Claimant would have no problem with the Board's dismissal of this appeal with prejudice as the issue is now moot." However, in a letter dated June 1, 2004, Scott withdrew his request to drop Freedle's appeal because the issue of reimbursement to the City and County for temporary disability payments was still outstanding, and stated that "unless the Employer is willing to give up this request for reimbursement, the appeal must go forward."

On June 8, 2004, the LIRAB issued its "First Amended Pretrial Order" stating that the sole issue for Freedle's appeal would be "whether Employer is entitled to reimbursement for indemnity benefits paid beyond December 1, 2001, pursuant to §386-52, HRS."[5]

In a letter dated July 19, 2004, to the LIRAB, Scott stated that Freedle "has no objection to the dismissal of the Special Compensation Fund . . . since the issue of permanent and total disability is now moot."[6] The letter also stated that Freedle would not object to a decision on the record alone. Thus, the only issue before the LIRAB was whether Freedle would be required to reimburse the City and County for disability payments beyond December 1, 2001.

In his memorandum to the LIRAB, Freedle's attorney asserted that the Director erred in requiring reimbursement "[s]ince the Employer had no intention of asking Claimant to reimburse the Employer, Section 386-52 is inapplicable in [Freedle's] situation." He also asserted that even if HRS § 386-

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[5] As the LIRAB found (Finding of Fact 10), the record shows that Freedle's temporary total disability payments were terminated on November 30, 2000, and that the weekly payments Freedle received after that date were designated as permanent total disability payments.

[6] All parties stipulated to the dismissal of the Special Compensation Fund.

52 was applicable, the City and County failed to comply with that section's notice requirement. See HRS § 386-52(a)(1).

On November 30, 2004, the LIRAB affirmed the Director's Decision. The LIRAB stated that the City and County was "entitled to reimbursement for indemnity benefits paid beyond December 1, 2001, pursuant to HRS §386-52, because Employer's payments of indemnity benefits after December 1, 2001, were made voluntarily and were not payable when made." With regard to Freedle's claim that the case must be remanded because the City and County failed to provide the proper notice required by HRS § 386-52(a)(1), the LIRAB held that while,

> [the City and County's] letter of December 13, 2000, did not conform entirely to the [notice] requirements . . . in that the letter did not inform Claimant of his right to file a written request for a hearing, . . . such notification was not necessary, where, as here, the letter notified Claimant of Employer's intent to offset, Claimant was represented by legal counsel who could have requested a hearing, and the matter was adjudicated and decided at a hearing before the DCD.

On December 29, 2004 Freedle filed, *pro se*, his Request for Reconsideration and Extension with the LIRAB. On December 30, 2004, the LIRAB denied Freedle's request. On January 26, 2005, Freedle filed this appeal, representing himself *pro se*.

POINTS ON APPEAL

In his opening brief, Freedle raises the following points:

(1) Freedle asserts that the City and County failed to provide him with copies of relevant medical reports, and further failed to provide copies of those reports to the DCD. Specifically, Freedle states that he was "not afforded the opportunity for discovery as relates to Section 12-10-65 (a) [sic] of the Hawaii Administrative Rules, because Employer failed to comply with the provisions of HRS Section 386-96 Reports of Doctors, Surgeons and Hospitals especially paragraphs (C) [sic] and (d)." Freedle contends that the "Director of the [Department of Labor and Industrial Relations] failed to enforce rules that would have aided Claimant in his endeavor."

(2) Additionally, Freedle asserts that an examination of him, conducted by Dr. Jeffrey Lee on March 24, 2006, suggests that the LIRAB decision is incorrect.[7]

(3) Although not clearly articulated in Freedle's opening brief, Freedle appears to challenge the LIRAB's determination that Freedle was required to reimburse the City and County for PTD payments made after December 1, 2001.

STANDARD OF REVIEW

Administrative Agency Appeals - From LIRAB

> Ordinarily, deference will be given to decisions of administrative agencies acting within the realm of their expertise. The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation.

Coon v. City & County of Honolulu, 98 Hawaiʻi 233, 245, 47 P.3d 348, 360 (2002) (internal quotation marks, citations, and brackets omitted).

Appellate review of a LIRAB decision is governed by HRS § 91-14(g) (1993), which states that:

> 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
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedure; or
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> (4) Affected by other error of law; or
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> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole

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[7] Freedle also requested this court to hold a hearing at which "certain evidence" would be presented; however, we conclude that Freedle has failed to establish a basis for us to hold such a hearing, and accordingly we deny the request.

record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Hawai'i Supreme Court has previously stated:

> [Findings of Fact] are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record.
>
> [Conclusions of Law] are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law.
>
> 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.

Igawa v. Koa House Rest., 97 Hawai'i 402, 406, 38 P.3d 570, 574 (2001) (internal quotation marks, citations, and brackets in original omitted) (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000)).

> [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 the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In re Water Use Permit Applications, 94 Hawai'i at 119, 9 P.3d at 431 (internal quotation marks and citations omitted).

DISCUSSION

A. Failure of the Opening Brief to Conform to Hawai'i Rules of Appellate Procedure Rule 28

Freedle's opening brief does not conform with Hawai'i Rules of Appellate Procedure Rule 28(b) as it does not contain:

a subject index or table of authorities, in violation of Rule 28(b)(1); a statement of the case or references to the record, in violation of Rule 28(b)(3); points of error set forth in separate paragraphs, in violation of Rule 28(b)(4); a standard of review section, in violation of Rule 28(b)(5); relevant parts of statutes and administrative rules, in violation of Rule 28(b)(8); or a statement of related cases, in violation of Rule 28(b)(11). Although "such noncompliance offers sufficient grounds for the dismissal of the appeal," it is the policy of Hawaiʻi appellate courts to afford "litigants the opportunity to have their cases heard on the merits, where possible." See, e.g., Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawaiʻi 81, 85-86, 979 P.2d 1107, 1111-12 (1999). Accordingly, we will address the merits of his arguments, to the extent we can discern them.

B. Freedle Waived His Discovery-Related Issues by Failing to Raise Them Before the LIRAB

In his opening brief, Freedle seeks to raise issues related to the alleged failure of the City and County to disclose medical reports to Freedle and the DCD, as well as the alleged failure of the Director to enforce rules relating to discovery. However, he did not raise these issues before the LIRAB. As we noted above, the only issue which Freedle brought before the LIRAB was whether the Director failed to acknowledge the agreement between Freedle and the City and County, and improperly ordered reimbursement to the City and County for disability payments which were not owed to Freedle.

The Hawaiʻi Supreme Court has stated that courts "will not consider issues for the first time which were not presented to the [Hawaiʻi Labor and Industrial Relations] Appeals Board." Kalapodes v. E.E. Black, Ltd., 66 Haw. 561, 565, 669 P.2d 635, 637 (1983). Thus, by failing to assert the grounds he now relies upon for relief in this appeal to the LIRAB, Freedle waived those claims.

In any event, Freedle has failed to demonstrate that a discovery violation occurred. For example, he has not provided

this court with any fact or circumstance which demonstrates that the City and County was in control of the medical reports which he alleges were not disclosed as part of the discovery process.

C. Freedle's Claim That There Is New Evidence Which Shows the LIRAB and the Director Erred Is Meritless

Freedle's suggestion that his re-examination by Dr. Jeffrey Lee on March 24, 2006 should be used in evaluating his claim is without merit. According to Freedle's opening brief, the results of that re-examination were similar to those of a 1997 examination conducted by Dr. Lee. The results of that 1997 examination are in the record, and were therefore before the LIRAB when it ruled on Freedle's appeal. See HRS § 386-87(b) (1993); Mitchell v. BWK Joint Venture, 57 Haw. 535, 544, 560 P.2d 1292, 1297 (1977) ("[T]here is a presumption that public officers performing their duties have complied with the applicable procedural requirements; it is for the appellants to overcome this presumption."). Thus, Freedle has failed to establish how the March 24, 2006 report is material, or that it constitutes newly discovered evidence. HRS § 386-88 (Supp. 2006); see also HRS § 91-14 (1993).

D. The LIRAB Did Not Err in Finding That Freedle Was Obligated to Reimburse the City and County

As we noted above, the one issue presented to the LIRAB was whether the Director had properly ordered Freedle to reimburse the City and County for payments for PTD under HRS § 386-52(a)(3); the LIRAB ruled that the order of reimbursement was appropriate. The LIRAB did not err in making that ruling.

Though the City and County agreed that Freedle was permanently and totally disabled, the SCF did not. The record shows that the City and County requested a hearing before the Disability Compensation Division because it was going to request contribution from the SCF, per HRS § 386-33. As a result of the City and County's contribution request, the SCF became a party to Freedle's workers compensation case, and the dispute as to

whether or not Freedle was permanently and totally disabled was properly before the DCD.

After a review of various medical and occupational evaluations, including ones stating that Freedle was permanently disabled, the LIRAB credited the SCF's and the City and County's evaluators over Freedle's, and found that Freedle was not permanently disabled as a result of the November 24, 1995 accident. The Hawai'i Supreme Court has stated that "[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." Igawa, 97 Hawai'i at 409-10, 38 P.3d at 577-78 (reviewing the reports submitted to the LIRAB in a workers compensation appeal) (internal citations and block quotation format omitted).

In its decision, the LIRAB chose to credit assessments by Dr. Lum and other doctors that Freedle was stable, and not permanently disabled from the November 24, 1995 accident. As the LIRAB's decision clearly weighed the credibility of the experts who submitted their assessments, the LIRAB's decision regarding Freedle's disability status was not clearly erroneous. See HRS § 91-14(g) (discussed above).

Because Freedle was determined not to be permanently disabled, yet he was receiving permanent disability payments from the City and County, see supra, the City and County's payments were "by the terms of [HRS Chapter 386] . . . not payable when made," and so the City and County was entitled to recoup them. HRS § 386-52. The fact that the City and County believed that Freedle was PTD does not change this analysis. HRS § 386-52(a)(3) states that "[i]f overpayment cannot be credited, the director *shall order* the claimant to reimburse the employer." (Emphasis added.) In interpreting statutes, "[w]here the statutory language is plain and unambiguous our only duty is to

give effect to the statute's plain and obvious meaning." Bumanglag v. Oahu Sugar Co., Ltd., 78 Hawai'i 275, 280, 892 P.2d 468, 473 (1995). Freedle failed to demonstrate the existence of any circumstance here which would justify deviating from the plain language of the statute. As discussed above, because Freedle was determined not to be permanently disabled from the November 24, 1995 accident, and was no longer eligible for disability benefits -- so there was nothing for the employer to "credit" -- the LIRAB correctly ordered Freedle to reimburse the City and County for payments after December 1, 2001.

CONCLUSION

Accordingly, we hereby affirm (1) the LIRAB's November 30, 2004 decision affirming the May 15, 2003 decision by the Director of the Hawai'i Department of Labor and Industrial Relations, and (2) the LIRAB's December 30, 2004 order denying Freedle's Request for Reconsideration and Extension.

DATED: Honolulu, Hawai'i, October 25, 2007.

On the briefs:

Arthur F. Freedle,
Claimant-Appellant,
pro se.

Paul K.W. Au,
Deputy Corporation Counsel,
City and County of Honolulu,
for Employer-Appellee,
Self-Insured.

Chief Judge

Associate Judge

Associate Judge