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NO. 27204

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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STATE OF HAWAII

MARSHALL G. LUDWIG, Claimant-Appellant,
v.
VERIZON HAWAII, INC., and SPECIALTY RISK SERVICES,
Employer/Insurance Carrier-Appellees

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2003-440 (2-02-14365))

SUMMARY DISPOSITION ORDER
(By: Recktenwald, Chief Judge, Foley, and Nakamura, JJ.)

Claimant-Appellant Marshall G. Ludwig (Ludwig) was employed in a job that required heavy lifting every day. He complained of cramping in his left leg, then of low back pain that radiated to his left leg. Ludwig eventually was diagnosed with a herniated lumbar disc and had surgery to repair the injury. He was unable to attribute his low back injury to any specific incident or event at work.

Ludwig's claim for workers' compensation benefits for his low back injury was denied by the Director of the Department of Labor and Industrial Relations (the Director), and the Director's decision was affirmed by the Labor and Industrial Relations Appeals Board (LIRAB). Both the LIRAB and the Director determined that Ludwig was not entitled to the statutory presumption of compensability[1] because he could not identify an

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[1] Hawai'i's Workers' Compensation Law, Hawaii Revised Statutes (HRS) Chapter 386, contains a presumption of compensability. HRS § 386-85 (1993) provides in relevant part as follows:

> **§ 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) <u>That the claim is for a covered work injury</u>[.]

(Emphasis added.)

incident or event at work that caused his low back injury. They denied Ludwig's claim on the ground that he had not shown that his low back injury was work-related.

Ludwig appeals from the LIRAB's Decision and Order, filed on March 8, 2005, that denied his claim for compensation. On appeal, Ludwig argues: 1) the LIRAB erred by failing to apply the statutory presumption of compensability to his claim; and 2) his employer failed to meet its burden of rebutting the presumption. We agree with Ludwig on both points and therefore vacate the LIRAB's Decision and Order and remand the case for further proceedings.

I.

Ludwig began working for Employer-Appellee Verizon Hawai'i Inc. (Verizon) in 1981. During the seven years prior to his claimed back injury, Ludwig worked as a material distributor. Ludwig's work required him to lift items weighing over 100 pounds on a daily basis and involved his delivery of things such as office furniture, safes, paper, and telephone poles. He had to bend, squat, lift, and turn while loading and unloading these items from his truck.

In May 2002, Ludwig noticed cramping in his left leg. He did not relate the cramping to his work because he did not recall injuring his leg at work. Ludwig believed the cramping would clear up and he continued to work. By June, the pain became unbearable and Ludwig went to see a doctor. He complained of low back pain that radiated to his left leg, and he was prescribed medication for sciatica. The pain, however, persisted and Ludwig's treating physician, Dr. Mitchell Motooka, ordered an MRI, which was completed on September 24, 2002. The MRI revealed a lumbar disc herniation at L5-S1 and mild disc bulges at L3-4 and L4-5.

Prior to the MRI results, Ludwig had not attributed the pain in his left leg and low back to any work activity. However, after discussing his back condition and the MRI results with Dr. Motooka, Ludwig concluded that his back problems had been caused

by the heavy lifting and carrying he did at work. Ludwig could not think of any other way that he could have injured his back. He denied injuring his back in any activities outside of work.

On October 21, 2002, Ludwig filed a claim for workers' compensation benefits for an injury to his low back, which he described as occurring after "[l]ifting heavy equipment and cabinets over many years." In connection with Ludwig's claim, his counsel wrote to the Department of Labor and Industrial Relations (DLIR) advising it of Ludwig's position that he "sustained a cumulative injury after years of lifting extremely heavy equipment." Ludwig's counsel identified the date of injury as July 3, 2002, but explained that this was an arbitrary date that was selected because it was the date that Ludwig's physician first issued a disability certificate regarding Ludwig's injury. At a subsequent hearing before the DLIR, Ludwig's counsel acknowledged that Ludwig could not point to any specific incident or trauma at work that caused his back injury.

On January 31, 2003, Ludwig had surgery, a lumbar laminectomy, to his low back. He subsequently returned to work and was on light duty as of August 2003.

In denying Ludwig's claim, the Director noted that Dr. Motooka's clinical notes on July 3, 2002, did not document an incident at work on that date which caused a back injury or an aggravation of a preexisting back condition. The Director determined that because there was no record of a specific incident at work that caused Ludwig's back injury or aggravated a preexisting back condition, Ludwig had not shown that he suffered an injury or an aggravation of a preexisting condition at work. The Director concluded that without such a showing, the presumption of compensability did not apply and the Director had no basis to find in Ludwig's favor.

The LIRAB affirmed the Director's decision. The LIRAB concluded:

> In this case, the record clearly indicates that there was no incident or event at work on or about July 3, 2002, that caused Claimant's lumbar disc herniation symptoms or aggravated a pre-

> existing low back condition. Claimant had been experiencing a cramping-like pain in his left leg since May 2002, for which he first sought treatment in June 2002, and was then diagnosed with a lumbar disc herniation. Claimant, however, has not identified a specific incident or event at work that caused him to develop his lumbar disc herniation symptoms.
>
> . . . .
>
> Since Claimant has not shown that there was an incident or event at work on or about July 3, 2002, that resulted in any injury, he has not established that an injury to his low back occurred due to his work activities on or about July 3, 2002.
>
> Accordingly, because no injury occurred on or about July 3, 2002, Claimant cannot avail himself of the statutory presumption of compensability, which applies only to the work-connectedness of an injury.

II.

A.

We conclude that the LIRAB erred in failing to apply the presumption of compensability set forth in HRS § 386-85(1) (1993) to Ludwig's claim. The LIRAB reasoned that the presumption did not apply because Ludwig could not show that there was a specific incident or event at work on or about June 3, 2002, in which he injured his back. In effect, the LIRAB required that Ludwig demonstrate that his injury was work-related before it would apply the statutory presumption that his injury was work-related. The LIRAB's analysis would nullify the statutory presumption and is contrary to long-standing precedent of the Hawai'i Supreme Court.

In Chung v. Animal Clinic, Inc., 63 Haw. 642, 636 P.2d 721 (1981), the court described the presumption of compensability as follows:

> HRS § 386-85(1) creates a presumption in favor of the claimant that the subject injury is causally related to the employment activity. . . . [T]his presumption imposes upon the employer both the heavy burden of persuasion and the burden of going forward with the evidence. The claimant must prevail if the employer fails to adduce substantial evidence that the injury is unrelated to employment. . . .
>
> The statute nowhere requires . . . some preliminary showing that the injury occurred "in the course of employment" before the presumption will be triggered. Rather, HRS § 386-85 clearly dictates that coverage will be presumed at the outset, subject to being rebutted by substantial evidence to the contrary. This is so in all claims proceedings, regardless of the existence of

> conflicting evidence, as the legislature has determined that where there is a reasonable doubt as to whether an injury is work-connected, it must be resolved in favor of the claimant.

Id. at 650-51, 636 P.2d at 726-27 (citations and footnote omitted and emphases added).

It is true that generally, an accidental injury (as distinguished from an occupational disease) "results from a discrete event -- the time and place of which can be fixed[.]" Flor v. Holguin, 94 Hawai'i 70, 78, 9 P.3d 382, 390 (2000). But the workers' compensation law does not condition an employee's right to compensation on his or her ability to point to a specific incident at work that caused the injury. See HRS § 386-3 (Supp. 2007). Rather it provides that an employee is entitled to compensation for work-related injuries.

Ludwig unquestionably sustained an injury to his low back, a herniated lumbar disc, which he underwent surgery to repair. He eventually attributed his low back injury to the cumulative effect of the repetitive heavy lifting he did at work. Ludwig's inability to point to a specific incident at work in which he injured his back did not extinguish the statutory presumption. Indeed, the presumption is triggered without any need for a preliminary showing that the injury occurred in the course of employment. Chung, 63 Haw. at 650, 636 P.2d at 727. Accordingly, Ludwig was entitled to the presumption of compensability regarding his claim, and the LIRAB erred in failing to apply the presumption.

II.

Because the presumption of compensability applied to Ludwig's back injury, Verizon and Insurance Carrier-Appellee Specialty Risk Services (collectively referred to as "Employer") had the burden of rebutting the presumption by producing substantial evidence that Ludwig's injury was not work-related. Id. at 650-51, 636 P.2d at 726-27. The term "substantial evidence," as used in this context, "signifies a high quantum of evidence which, at the minimum, must be '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.'" Id. at 650, 636 P.2d at 727. "[G]eneralized medical opinions do not constitute substantial evidence." Korsak v. Hawaii Permanente Medical Group, Inc. 94 Hawai'i 297, 308, 12 P.3d 1238, 1249 (2000).

We conclude that Employer failed to adduce substantial evidence to rebut the presumption of compensability. Employer only provided "generalized medical opinions" that were insufficient to satisfy its burden of showing that Ludwig's back injury was not work-related. See id. Employer's experts relied on the observation that most disc herniations are caused by the degenerative process rather than large forces acting upon a healthy disc in opining that Ludwig's back injury was not work-related. Their reports either failed to address or adequately explain why Ludwig's heavy lifting at work did not cause or

aggravate his back condition.[2] Because Employer failed to rebut the presumption of compensability, we hold that the LIRAB erred in concluding that Ludwig did not sustain a compensable low back injury.

II.

We vacate the March 8, 2005, Decision and Order of the LIRAB, and we remand the case for determination of the amount of workers' compensation benefits to award to Ludwig for his low back injury.

DATED: Honolulu, Hawai'i, April 25, 2008.

On the briefs:

Herbert J. Leider
for Claimant-Appellant

Stanford M. J. Manuia
for Employer/Insurance Carrier-Appellee

Chief Judge

Associate Judge

Associate Judge

[2] Ludwig's treating physician, Dr. Motooka, noted that the types of activities Ludwig was required to perform at work have been associated with lumbar disc injuries. Dr. Motooka opined that "even if Mr. Ludwig's disc herniation condition was the result of a degenerative process," it was "probable that the aggravating factor leading to his need for surgery was an injury due to the heavy lifting he was required to perform in his job."