*****NOT FOR PUBLICATION*****

NO. 26594

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

THOMAS M. HORNER, Appellant-Appellant

vs.

EMPLOYEES' RETIREMENT SYSTEM,
STATE OF HAWAI'I, Appellee-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2311)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,
and Circuit Judge Marks, in Place of Duffy, J., Recused)

Appellant-Appellant Thomas M. Horner (Appellant) appeals from the May 21, 2004 order of the circuit court of the first circuit[1] (the court) affirming denial of his application for service-connected disability retirement benefits by Appellee-Appellee Employees' Retirement System (ERS), State of Hawai'i (Appellee) pursuant to Hawai'i Revised Statutes (HRS) § 88-79(a) (Supp. 2003).[2]

---

[1] The Honorable Eden Elizabeth Hifo presided.

[2] HRS § 88-77(a) was repealed in 1998 and replaced with HRS § 88-79(a). 1998 Haw. Sess. L. Act 151 § 13. "The current provision, HRS § 88-79(a), is identical in all relevant respects." HRS § 88-79(a) (Supp. 2003). HRS § 88-77(a) is the applicable statute for the July 2, 1990 incident that is the subject of this appeal. HRS § 88-77(a) provided:

> (a) Upon application of a member, or the person appointed by the family court as guardian of an incapacitated member, any member who has been permanently incapacitated as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, or as the cumulative result of some occupational hazard, through no wilful negligence on the member's part, may be retired by the board of trustees

(continued...)

Beginning in 1981, Appellant was employed by the Child Support Enforcement Agency (CSEA) as an investigator. In that job, Appellant's duties included "locating non-custodial parents who owed child support, and interpreting federal regulations regarding child support collection." Appellant testified that his job was "consistently stressful," partly because his office was "perpetually understaffed" and his job responsibilities kept increasing over the years.

From 1984 or 1985 until 1990, Alan Zach (Zach) was Appellant's supervisor. During this time, Appellant expressed frustration at Zach for being an ineffectual supervisor and at many of his other colleagues for their poor work ethic. Another significant source of stress for Appellant was a pending lawsuit against him for gender discrimination brought by a female

---

[2](...continued)
for service-connected total disability provided that:

(1) In the case of an accident occurring after July 1, 1963, the employer shall file with the board a copy of the employer's report of the accident submitted to the director of labor and industrial relations;

(2) An application for retirement is filed with the board within two years of the date of the accident, or the date upon which workers' compensation benefits cease, whichever is later;

(3) Certification is made by the head of the agency in which the member is employed, stating the time, place and conditions of the service performed by the member resulting in the member's disability and that the disability was not the result of willful negligence on the part of the member; and

(4) The medical board certifies that the member is incapacitated for the further performance of duty and that the member's incapacity is likely to be permanent.

(Emphasis added.)

employee. Despite these matters, Appellant was promoted to Investigative Supervisor in 1989. This position required that he supervise no more than twenty people.

In early 1990, a second female employee filed suit against Zach for sexual assault and against Appellant for failing to provide a safe work environment. Appellant was eventually dismissed from this suit. However, Zach was placed on probation and left CSEA to work at the Medicaid Fraud Unit of the Attorney General's Office.

During his absence, Paul Clifford (Clifford) replaced Zach as Appellant's supervisor. Appellant enjoyed working with Clifford who, according to Appellant, was a more effective and efficient supervisor. However, Clifford soon thereafter retired and Appellant replaced him as acting Branch Supervisor until Zach's return.

Between 1989 and 1990, Appellant was the subject of two separate lawsuits and an investigation for the distribution of illegal cable television descramblers. In June 1990, Appellant was further distressed by the return of Albert Itsudani, a supposed "problem employee" with whom Appellant had a history of interpersonal conflict. Also in June 1990, Zach exercised his civil service return rights to CSEA. Appellant was notified of Zach's return and prior to his return date Zach visited with Appellant at CSEA.

On July 2, 1990, Zach returned to CSEA, replacing Appellant as branch supervisor. On that day, Appellant arrived at work at 6:00 a.m., his usual time, booted up the computers, checked the paper supply, and made coffee. At about 7:00 a.m., Appellant was in his office with the door slightly ajar when Zach arrived. He knocked on Appellant's door, walked in, "bid him good morning, winked, and said, "We are going to have a meeting this morning." Appellant testified at his ERS hearing that his reaction was as follows:

> And when I heard those words, it just brought back everything that had happened when he was there with all these meetings. We would all get together everything would be discussed, "What are we going to do," and nothing ever got done. And I think that was the most frustrating part because if it was going to get done, I had to do it.
>
> And so that day, when he opened that door and made the knock and said, "Good morning, Tom," gave me that look in his eye, "We are going to have a meeting" - it all came apart. I couldn't hold it together anymore.

Appellant testified that he felt "at a complete loss" after his brief interaction with Zach. He became disoriented and did not know what was happening. Appellant's wife picked him up and he never returned to his position after that day. He was officially terminated on October 31, 1991.

On October 28, 1998, the hearing officer for the ERS Medical Board found that although Appellant was permanently incapacitated as a result of a "panic disorder and depression," Appellant's application should be denied. The Medical Board's recommendation to the ERS Board of Trustees (ERS Board) to deny Appellant's application was based on its determination that Appellant's incapacity was not naturally and proximately caused

by an "accident" "at some definite time and place" as is required by HRS § 88-79(a).[3]

On January 12, 2003, the ERS Board issued its Proposed Decision accepting the hearing officer's Recommended Decision. The relevant findings of fact by the ERS Board are as follows:

> (5) Immediately following his encounter with Mr. Zach, Appellant "felt overwhelmed by feelings of fearfulness, difficulties in concentrating, and felt that he could no longer work." (The "Injury").
>
> (6) Moreover, prior to the Injury, Appellant suffered from a complexity of life-long personality, emotional, and health issues ("Pre-Injury Afflictions").
>
> (7) Furthermore, immediately prior to the Injury, Appellant was the target of a criminal investigation that involved the purchase and sale of illegal cable television descramblers, and he was a witness to at least one criminal investigation and another civil lawsuit between coworkers.
>
> (8) Work-related stressors as an Investigator IV, coupled with an ongoing criminal investigation targeted at Appellant, the criminal investigation involving Appellant as a witness, and Appellant's role as a witness in a separate criminal investigation and civil lawsuit, exacerbated Appellant's Pre-Injury Afflictions.

The relevant conclusions of law by the ERS Board are as follows:

> (1) Appellant's Injury was not the natural and proximate result of an accident occurring while in the performance of actual duty at some definite time and place.
>
> . . . .
>
> (4) Therefore, Appellant is not entitled to service-connected disability retirement benefits pursuant to HRS § 88-79.

On January 31, 2003, Appellant timely filed exceptions to the Proposed Decision. On October 13, 2003, the ERS Board issued its Final Decision affirming its Proposed Decision denying Appellant's claim. The ERS Board affirmed the hearing officer's report on the grounds that Appellant's injury was not

---

[3] The ERS Board refers to HRS § 88-79(a) in its findings of fact and conclusions of law, however, the applicable statute for the July 2, 1990 incident is HRS § 88-77(a). See supra note 2. HRS § 88-77(a) was repealed in 1998 and replaced with HRS § 88-79(a). 1998 Haw. Sess. L. Act 151 § 13.

the natural and proximate result of an "accident" as defined as "an unexpected event or unforeseen [sic] occurrence."

On November 19, 2003, Appellant filed an appeal to the court. On May, 12, 2004, the court heard oral arguments, and on May 21, 2004, affirmed the ERS Board's decision and entered judgment in favor of Appellee. On May 27, 2004, Appellant filed a notice of appeal to this court.

On appeal, Appellant contends that (1) the court erred as a matter of law when it affirmed the ERS Board's Final Decision which affirmed and adopted the hearing officer's Recommended Decision of December 2, 2002; (2) the court erred in affirming the ERS Board's and hearing officer's conclusion that "Appellant's injury was not the natural and proximate result of an accident occurring while in the performance of duty at some definite time and place"; (3) the court, ERS Board, and hearing officer erred as a matter of law in reaching "1" and "2" above inasmuch as (a) the Recommended Decision was based on a misreading of Lopez v. Bd. of Trustees, 66 Haw. 127, 657 P.2d 1040 (1983), because Lopez contains nothing to support a distinction between a "triggering event" and "injury" in determining whether an "accident" occurred, (b) the Recommended Decision ascribed a theory of causation by cumulative pressures of employment to Appellant that Appellant never advocated, (c) existing Hawai'i decisions support Appellant's contention that he suffered an "accident" within the meaning of HRS chapter

88, and (d) as a matter of policy, adoption of Appellee's definition of an "accident" will lead to absurd and unintended results.

Assuming, arguendo, that the July 2, 1990 incident was an "accident," Appellee argues that Appellant's injury was not proximately caused by the "accident." The issue of whether the July 2, 1990 incident constitutes an "accident" under HRS § 88-77(a) need not be decided because there is substantial evidence supporting the ERS Board's decision that Appellant's injury is not the "natural and proximate result" of the incident.

According to Hawai'i Administrative Rules § 6-22-2, the words "natural and proximate result" are defined as "the result that would naturally follow from the accident, unbroken by any independent cause." "[W]hether the accident . . . was the proximate cause of [Appellant's] incapacitation involves a factual determination." Myers v. Bd. of Trustees of Employees' Ret. Sys., 68 Haw. 94, 97, 704 P.2d 902, 904 (1985). If a finding was made by the agency that Appellant's incapacity was not the proximate cause of an accident, then this court must "make a legal conclusion that that finding was clearly erroneous in order to overturn it." Id. at 97, 704 P.2d at 905. Hence, the ERS Board's decision on the question of proximate cause is a question of fact that this court will review under the "clearly

erroneous" standard as governed by HRS § 91-14(g).[4] Id.

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with the definite and firm conviction that a mistake has been made. Feliciano v. Bd. of Trustees of Employees' Ret. Sys., 4 Haw. App. 26, 31, 659 P.2d 77, 81 (1983). This court has defined "substantial evidence" as "credible evidence of sufficient quantity and probative value to justify a reasonable person in reaching a conclusion that supports a finding of fact." Sifagaloa v. Bd. of Trustees of Employees' Ret. Sys., 74 Haw. 181, 194, 840 P.2d 367, 373 (1992). There is substantial evidence that supports the ERS Board's finding that Appellant's current incapacity was not "the result that would naturally follow from" the event of July 2, 1990.

---

[4] HRS § 91-14(g) (1993) provides:

> 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 of the administrative findings, conclusions, decisions, or orders are:
>
> (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.

Dr. Kwong Yen Lum, who conducted an independent evaluation of Appellant on behalf of the State Workers' Compensation Division in 1991, stated that Appellant "d[id] not appear to have had a diagnosable pre-existing psychiatric impairment prior to July 2, 1990." This indicates that the event of July 2, 1990 was significant in the psychological incapacitation of Appellant. However, the same report identifies four other sources of stress that caused Appellant's "depression, anxiety, [and] headaches." One was the "settled [sex discrimination] lawsuit from three years ago," another was from being a "witness in a [second] lawsuit" (the sexual harassment suit involving Zach), a third source was from the "probable return of [a] former problem employee to the division," and last was the "feeling of helplessness, [and inability] to accomplish goals set by [the] management/federal government." Some of the work difficulties involved "the actual work itself, and the increasing demands of [Appellant's] job with [an] inadequate number of personnel." These uncontested sources of stress support Appellee's argument that "although [Appellant's] symptoms became visible on July 2, 1990," Zach's return and Appellant's resulting panic attack was not the "sole" cause of Appellant's injury.

Furthermore, Appellant's medical reports indicate that personal problems that predated and antedated his July 2, 1990 incident contributed to his condition. Dr. George Bussey c

onducted an independent evaluation of Appellant on behalf of the State Workers' Compensation Division. He noted in his 1992 evaluation that "if it were not for this ongoing criminal procedure and its recent resolution, [Appellant] would not be in need of acute psychiatric or psychological intervention at this time," and further observed that "his underlying difficulties with alcohol, as well as his pre-existing personality disorder might in and of themselves necessitate ongoing treatment." Dr. Bussey opined that "these treatment interventions are not related to the alleged incident of July 2, 1990." This evaluation supports the ERS Board's findings that Appellant's psychological incapacity did not "naturally follow" from the July 2, 1990 incident, "unbroken by any independent cause."

Appellant's treating psychologist, Dr. Joseph Rogers, also expressly stated in his August 1990 evaluation that "[Appellant] described several sources of stress at work as being cumulative in nature and increasing over the last three to four years." Dr. Rogers described the events of July 2, 1990 as "the last straw in a cumulative series of events that had been building up for years[.]" Dr. Rogers' evaluation in 1997 further noted that "causation from a medical probability perspective is that [Appellant's] current disability and much of his impairment are related to work issues" and that "[h]is [criminal] indictment and extracurricular legal problems became added difficulty[.]"

Dr. Robert Marvit's evaluation in 1998 also stated that "it is my opinion, with reasonable medical probability that . . . [Appellant's] impairment is . . . a result of his mental state . . . [which] was generated by the cumulative and specific stressors on his job." The evaluations of Dr. Rogers, Dr. Bussey, and Dr. Marvit, coupled with Appellant's own testimony, support the ERS Board's finding that the incident of July 2, 1990 and ensuing incapacity was caused by cumulative pressures from his personal and professional life. Taking into account all the evidence, it cannot be said, as a matter of law, that the ERS Board's findings were clearly erroneous. The ERS Board's findings of fact and conclusions of law are supported by "credible evidence of sufficient quantity and probative value to justify a reasonable person in reaching [its] conclusion." Sifagaloa, 74 Haw. at 194, 840 P.2d at 373. Inasmuch as there is substantial evidence that the July 2, 1990 incident was not the proximate cause of Appellant's resulting condition, the question of whether another cause independently led to his condition need not be considered. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's Judgment filed on May 21, 2004, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, July 21, 2005.

On the briefs:

Lowell K.Y. Chun-Hoon
(King, Nakamura & Chin-Hoon)
for Appellant-Appellant.

Dorothy D. Sellers and
Deirdre Marie-Iha, Deputy
Attorneys General, for
Appellee-Appellee.