CONCURRING OPINION BY ACOBA, J.;
WITH WHOM NAKAYAMA, J., JOINS

I concur but note the following.

I.

Hawai'i Revised Statutes (HRS) § 386-25 (1993) was in effect at the time of the July 8, 1992 accident of Petitioner/Claimant-Appellant Lani Capua (Petitioner), and of the July 14, 1992 filing of the WC-1 Employer's Report of Industrial Injury (WC-1) by Respondent/Employer-Appellee Weyerhaeuser Company (Weyerhaeuser). The statute stated that the Department of Labor and Industrial Relations (DLIR) director (director) "shall" refer employees for rehabilitative services that in the director's opinion, are able to be rehabilitated. In that regard, HRS § 386-25(b) and (h) read as follows:

> (b) The director shall 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 [(VR)] 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. . . .
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> (h) [VR] services for the purpose of developing a [VR] plan shall be approved by the director and the director shall periodically review progress in each case.[1]

(Emphases added.) The majority states that "by its plain reading, HRS § 386-25(b) mandated the director to refer an

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[1] Read in conjunction with the other subsections of HRS § 386-25, subsection (h) appears to require that upon deciding to refer an employee for such VR services as are feasible, the director must approve VR services such that a VR plan can be developed and the director must periodically review the employee's progress.

employee who had been injured during the course and scope of employment and who either may suffer or has suffered permanent impairment of any physical (or mental) function to VR services 'as are feasible.'" Majority opinion at 16 (emphasis added).

However, the wording of HRS § 386-25 suggests that although the term "shall" is ordinarily viewed as mandating an act, the director had discretion with regard to referring employees for VR depending on the director's opinion of whether the employees could be rehabilitated. Weyerhaeuser and Amicus Curiae the Attorney General of the State of Hawai'i (Attorney General) also make this argument. The language of the statute thus suggests that the Director was not mandated to refer any employee sustaining permanent impairment of function for VR services except those who in his opinion, could be rehabilitated.

The statute was amended in 1998 to substitute the word "may" for "shall." 1998 Haw. Sess. L. Act 256, § 1, at 873. This change resulted in the language of HRS § 386-25(b) that is in effect today and provides that "[t]he 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 vocationally rehabilitated . . . for [VR] services that are feasible." (Emphasis added.)

Like the previous version, the 1998 version of the statute indicates that the director has discretion in determining whether an employee "can be vocationally rehabilitated."

However, the revised language seemingly goes further in granting discretion to the director because even if the director determines that an employee can be vocationally rehabilitated, the revised statute's language indicates that the director has further discretion as to whether to refer such an employee for VR.

Weyerhaeuser cites the 1998 amended version of the statute to support its argument that "[Petitioner] has no statutory 'right' to [VR] benefits" because "[b]y statute, the [director] has the discretion to determine when to refer injured workers to [VR]." Similarly, the Attorney General cites the 1998 version of the statute to support its position that "there is no presumption in the law that every injured employee is entitled to VR in addition to the required disability compensation benefits." Petitioner also cites this revised version of the statute containing the word "may." However, the parties' citation to this amended version is not persuasive for the purposes of this case because the version of the statute in effect at the time of Petitioner's July 8, 1992 accident contained the word "shall" instead of "may."

As the majority states, "'the general rule in workers' compensation cases is that the date of disability determines what year's version of the workers' compensation law is applicable.'" Majority opinion at 14 n.11 (quoting Tam v. Kaiser Permanente, 94 Hawaii 487, 495, 17 P.3d 219, 227 (2001) (citation omitted))

(brackets omitted). Thus, insofar as Petitioner's date of disability appears to be July 8, 1992, and the date of Petitioner's disability is not raised as an issue by the parties, July 8, 1992 is the relevant date for determining the version of the workers' compensation statutes that are applicable here. Accordingly, the statute in effect at that time, containing the word "shall," is applicable to the instant case.

Despite the parties' incorrect citation to the 1998 amended version of HRS § 386-25, Weyerhaeuser and the Attorney General are arguably correct in contending that the director had discretion in referring Petitioner for VR benefits insofar as the director had discretion under the previous version of HRS § 386-25 to refer an employee depending upon his view of the employee's prospects for rehabilitation. Thus, in my view, the abuse of discretion standard applies. See HRS § 91-14(g) (1993) (stating that the court may affirm, reverse, or modify the agency decision or remand the case with instructions for further proceedings "if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are . . . arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion").

Applying that standard, I believe both the director and the Labor and Industrial Relations Appeals Board (LIRAB) abused their discretion in denying VR services to Petitioner. The

director based his decision to deny Petitioner VR benefits on the ground that under Hawai'i Administrative Rules (HAR) § 12-14-36, Petitioner had waived her right to VR services upon issuance of the permanent partial disability (PPD) award. Likewise, the LIRAB also based its decision to deny Petitioner VR benefits on the fact that Petitioner "was awarded PPD by the [d]irector" and therefore under HAR § 12-14-36, Petitioner "is not entitled to VR services." The sole reason cited by the Director and the LIRAB for denying VR services to Petitioner was that the issuance of a PPD award to Petitioner allegedly precluded an award of VR services under HAR § 12-14-36.

As discussed by the majority, that rule cannot be relied on as a basis for denying VR benefits "inasmuch as HAR § 12-14-36 exceeds the scope of HRS § 386-25" and therefore is "'invalid[.]'" Majority opinion at 18, 19 (quoting Haole v. State, 111 Hawai'i 144, 152, 140 P.3d 377, 385 (2006)). See also Capua v. Weyerhaeuser Co., No. 26369, slip op. at 4 (App. Sept. 27, 2007) (SDO) (Foley, J., dissenting) (stating that nothing in HRS § 386-25 suggests that receipt of PPD precludes the employee's eligibility for VR services). Furthermore, although HAR § 12-14-36 states that an employee issued a PPD award "is determined to have waived the right to rehabilitation[,]" there is no similar provision in the HRS statutes governing PPD that mentions a "waiver" of VR services. Moreover, nothing in the statutes remotely evinces notice to an employee that receipt of

PPD benefits will preclude the receipt of VR benefits. Thus, respectfully, the argument by Weyerhaeuser and the Attorney General that Petitioner waived her right to VR by receiving PPD benefits is an unfounded gloss upon the statutes.

The decision by the Director and the LIRAB to deny Petitioner VR benefits was also an abuse of discretion because substantial evidence in the record supports Petitioner's position that she was entitled to VR benefits. The record shows that Weyerhaeuser believed Petitioner to be eligible for VR services as evidenced by its July 9, 1999 letter to Petitioner informing Petitioner that the company could not provide her with indefinite light work, that VR services would help her secure alternate employment elsewhere, and that Petitioner should contact Laurie Hamano (Hamano), a VR counselor. Weyerhaeuser reminded Petitioner in a letter dated August 9, 2000, to follow up with VR counselor Hamano regarding VR services. Moreover, Weyerhaeuser's human resource manager, Alan Maeda, met with Petitioner on October 13, 2000, and informed her that she needed to make a decision about whether to accept VR services soon. In addition, Dr. Gary Okamoto (Dr. Okamoto), Petitioner's examining physician, repeatedly recommended that Petitioner receive VR services in written confirmation on May 25, 1999, and in interim reports dated November 1, 2000 and December 1, 2000.

Furthermore, the DLIR Disability Compensation Division (DCD)[2] determined on November 21, 2000, that Petitioner was eligible for VR services. The DCD stated in this determination that it reviewed Petitioner's pertinent records as well as "[Weyerhaeuser's] challenge of eligibility for [VR] services dated November 1, 2000." Even after considering Weyerhaeuser's objection to Petitioner's receipt of VR services, the DCD determined that Petitioner should receive VR services. Thus, it appears that Petitioner was eligible for VR services and would have received those services but for the argument raised by Weyerhaeuser that Petitioner's receipt of PPD barred her receipt of VR benefits under HAR § 12-14-36.

The foregoing facts demonstrate that Weyerhaeuser agreed to provide Petitioner with VR services and actively encouraged Petitioner to obtain those services, that Petitioner's examining physician recommended VR services for Petitioner, and that the DCD supported Petitioner's receipt of VR services even over the later objection by Weyerhaeuser. This constituted substantial evidence that Petitioner was entitled to VR benefits. The director and the LIRAB therefore abused their discretion in denying Petitioner's claim for VR benefits because they relied on an invalid rule in justifying the denial. Independent of that

[2] The DCD is an office within the DLIR, responsible for administering workers' compensation law. All reports required to be filed under HRS chapter 386 must be filed with the DCD. HAR § 12-10-61(a). The DCD, inter alia, makes determinations regarding eligibility for VR services. Requests for reconsiderations of the determinations of the DCD may be made in writing within ten days of the determination pursuant to HAR § 12-14-48.

error, there is substantial evidence in the record that the VR benefits should have been provided. Hence, under either the prior version of HRS § 386-25 containing the term "shall," or the revised version of that statute containing the term "may" as advanced by Weyerhaeuser and the Attorney General, Petitioner should have been granted VR benefits.

II.

Weyerhaeuser, citing Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 389, 944 P.2d 1279, 1332 (1997), argues that "compensation for [PPD] compensates the worker for loss of bodily integrity rather than for loss of earnings" and is therefore "an indemnity payment[,] . . . not compensation to replace current loss of wages." (Some brackets omitted and some brackets added). Thus, Weyerhaeuser argues that a rule like HAR § 12-14-36 that limits VR benefits "to only those employees who have had an impairment in their earning capacity (i.e., those employees on [temporary total disability] and [those] who are permanently and totally disabled)," while denying VR benefits to PPD awardees who "have had no legal impairment in their earning capacity," is appropriate given that the "purpose[] of [VR is] to restore employees' earning capacity."

I respectfully disagree with this argument. Tabieros quotes Cuarisma v. Urban Painters, Ltd., 59 Haw. 409, 583 P.2d 321 (1978), which in turn, quoted a legislative committee report relating to a 1969 amendment to the workers' compensation statute

dealing with partial disability. The report stated that "'[PPD] compensation is an indemnity payment for the loss or impairment of a physical function and . . . is not compensation to replace current loss of wages.'" Tabieros, 85 Hawaii at 389, 944 P.2d at 1332 (quoting Cuarisma, 59 Haw. at 419-20, 583 P.2d at 326-27 (quoting Hse. Stand. Comm. Rep. No. 193, in 1969 House Journal, at 702)) (emphasis omitted) (ellipsis points in original)). In Cuarisma, the appellee was awarded a lump-sum disfigurement benefit and total disablity benefits at a weekly rate of $112.50. 59 Haw. at 410, 583 P.2d at 321-22. The appellants contended that an award for disfigurement could not be made in addition to an award for permanent total disability in excess of a specified limit on the aggregate liability of the employer because the awards provided overlapping compensation. Id.

Cuarisma held that the awards could "stand together" because the award for disfigurement, which is included in the category of PPD, could be "regarded as compensation for impairment" and the award of permanent total disability [(PTD)] could be "regarded as compensation for loss of earning capacity[.]" Id. at 421, 583 P.2d at 327. However, Cuarisma did not hold that PPD awards do not provide compensation for loss of earning capacity. Indeed, the committee report cited by Cuarisma states only that PPD "'is not compensation to replace current loss of wages'" and therefore, according to the committee report's hypothetical example, an employee receiving temporary

total disability benefits for an arm injury would not be precluded from later receiving PPD for that same injury. Id. at 420, 583 P.2d at 327 (quoting Hse. Stand. Comm. Rep. No. 193, in 1969 House Journal, at 702) (emphasis added). Thus, the committee report does not indicate that PPD does not compensate an employee for loss of earning capacity, but instead states that PPD does not compensate the employee for loss of immediate earning capacity.

Furthermore, the holding in Cuarisma that the disfigurement award was for impairment cannot be expanded to apply to all PPD awards. The Cuarisma court held that the disfigurement award that was granted in that case was for physical impairment rather than disability because (1) the appellee's disfigurement consisted of surgical scars on his back and neck "with nothing to suggest that any loss of function is attributable to them," id. at 412, 583 P.2d at 323, and (2) the appellee was awarded a PTD benefit for PTD resulting from the injury to his back, id. at 412, 413, 583 P.2d at 323. In contrast, in the instant case, Petitioner's injury was related to a loss of function. "As a result of [Petitioner's] low back injury, [Dr. Okamoto] imposed permanent lifting restrictions that prevented [Petitioner] from returning to her usual and customary position" at Weyerhaeuser. Although Weyerhaeuser provided Petitioner with light duty work, Weyerhaeuser informed Petitioner that it would not provide her with such work indefinitely. Thus,

because Petitioner's injury caused her to be unable to return to her prior employment position and because Weyerhaeuser was unable to provide her with a permanent position performing light duty work, it cannot be concluded that Petitioner's injury did not result in disability that jeopardized her earning capacity. Also, in contrast to the appellee in Cuarisma, Petitioner was not awarded any total disability benefits for her injury. Furthermore, this court also expressly limited its decision in Cuarisma, stating that "[b]ecause of the possible distinguishing characteristics of other forms of [PPD], we do not intend to imply that the conclusions we have reached with respect to disfigurement awards are necessarily applicable with respect to awards for other forms of [PPD]." Id. at 413, 583 P.2d at 323-24.

Therefore, there is no authority for the propositions advanced by Weyerhaeuser that PPD benefits are "not compensation to replace loss of wages[,]" that PPD recipients have "no legal impairment in their earning capacity," and that denying VR benefits to PPD recipients is "consistent with the purposes of [VR which is] to restore employees' earning capacity."

III.

As the majority notes, HRS § 386-25(g) expressly states that an employee's receipt of VR services "shall in no way" affect the employee's eligibility for "other benefits" under HRS chapter 386. HRS § 386-25(g) (1993). Correlatively, this

provision can be interpreted to mean that receipt of other benefits such as PPD, should not affect an employee's eligibility for VR services. To hold otherwise would produce a legally absurd result. For instance, if as Weyerhaeuser and the Attorney General contend, receipt of PPD benefits constituted a waiver of VR benefits, then an employee receiving PPD benefits could not receive a subsequent award of VR services. However, under a plain reading of HRS § 386-25(g), an employee could first receive VR services and then receive a subsequent award of PPD because that subsection makes clear that a receipt of VR benefits does not affect an employee's eligibility for other benefits. This result would be illogical and would unfairly penalize injured employees, like Petitioner, who happen to receive PPD benefits prior to any VR benefits. Thus, the only reasonable way to interpret HRS § 386-25(g) is to hold that VR services do not affect an employee's eligibility for other benefits and, conversely, receipt of other benefits does not affect eligibility for VR services.