DISSENT BY ACOBA, J.

On January 25, 2008, Claimant-Appellee-Appellant-Petitioner Patrick E. Boyle (Petitioner) filed an application for writ of certiorari requesting that this court fully review the October 18, 2007 Summary Disposition Order (SDO) of the Intermediate Court of Appeals (ICA) affirming the May 17, 2005 decision and order of the Labor and Industrial Relations Appeals Board (LIRAB). The questions presented by Petitioner were as follows: 1) whether the ICA's decision that the medical experts' opinions of Employer/Insurance Carrier-Appellants-Appellees-Respondents Maryl Pacific Constructors, Inc. and Hawai'i Insurance Guaranty Association [collectively, Respondent] constituted substantial evidence to rebut the presumption represents a grave error of law or of fact,[1] and 2) whether the ICA's opinion that the LIRAB's decision was not defective for its failure to state the legal standards applied represents a grave

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[1] As to the first question presented, Petitioner maintains that the evidence adduced by Respondent does not constitute substantial evidence because 1) the medical opinion of Dr. Kent Davenport was based on the doctor's erroneous report and testimony that Petitioner "continued working for a 'few days' following the August 10, 2000 accident and did not see his physician for medical attention for 'almost two weeks' following the injury[,]" 2) the testimony of Drs. Davenport and Bruce Hector displayed financial bias and therefore, were not credible and "sufficient to justify a conclusion by a 'reasonable man' that [Petitioner's] knee replacement surgeries were not in part work connected[,]" (emphasis omitted) 3) although Petitioner apparently did not raise this issue before the ICA, Dr. Hector, "a family practitioner, with no speciality in knee orthopedics . . . applied the wrong legal standard" in opining that Petitioner's injury was not caused by the August 10, 2000 fall according to a medical probability, and 4) the Department of Labor and Industrial Relations Disability Compensation Division (DCD) and the LIRAB concluded the Peitioner sustained knee injuries arising out of his employment and found that he was unable to continue working.

error of law or of fact.[2] I would accept the application for writ of certiorari submitted by Petitioner for the reasons that follow and respectfully disagree that the application should be rejected.

I.

Judicial review of an administrative agency decision such as that of the LIRAB decision is governed by HRS § 91-14 (1993). Igawa v. Koa House Restaurant, 97 Hawai'i 402, 405, 38 P.3d 570, 573 (2001); Bugmanglag v. Oahu Sugar Co., 78 Hawai'i 275, 279, 892 P.2d 468, 472 (1995); Diaz v. Oahu Sugar Co., 77 Hawai'i 152, 154, 883 P.2d 73, 75 (1994); Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 102, 881 P.2d 1246, 1248 (1994). Under HRS § 91-14(g) provides in relevant part:

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

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[2] As to the second question presented, Petitioner maintains that (1) Petitioner suffered an immediate disability under Hawaii Revised Statutes (HRS) § 386-31 (1993) and "[o]nly after [Respondent] hired Counsel, did [Respondent's] Counsel refuse to continue to pay for [Petitioner's] disability and medical care[,]" and (2) "[t]he evidence clearly contradicted a pre-existing degenerative knee joint worsened by work-connected cumulative trauma," yet, "neither the ICA or LIRAB stated how it applied the cumulative trauma standard." (Emphases in original.)

"[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." Igawa, 97 Hawai'i at 406, 38 P.3d at 574 (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000) (citations omitted)). "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 nonetheless left with a definite and firm conviction that a mistake has been made." Wilton v. State, 116 Hawai'i 106, 110 n.7, 170 P.3d 357, 361 n.7 (2007) (internal quotation marks and citation omitted).

Conclusions of law are "'not binding on an appellate court and [are] freely reviewable for [their] correctness. Thus, the court reviews [conclusions of law] de novo under the right/wrong standard.'" Nakamura v. State, 98 Hawai'i 263, 267, 47 P.3d 730, 734 (2002) (quoting Korsak v. Hawaii Permanente Med. Group, 94 Hawai'i 297, 302-03, 12 P.3d 1238, 1243-44 (2000)).

II.

First, as to the merits of the claim, there was ample substantial evidence in the record that Petitioner's injury was work-related:

1) On August 10, 2000, Petitioner saw Dr. Aziz Razzuk for a previously scheduled follow-up visit for a

prior back injury. LIRAB Finding of Fact (FOF) 20. At this visit, Petitioner told Dr. Razzuk that he injured his knees earlier that day. Id. In response, Dr. Razzuk told Petitioner that he would have to file a claim for the August 10, 2000 knee injuries before he could evaluate the injuries as a work injury. Id.

2) On August 22, 2000, Petitioner saw Dr. Razzuk for his August 10, 2000 knee injuries. FOF 22. Dr. Razzuk reported that when he had seen Petitioner two weeks earlier on the date of the August 10, 2000 fall, Petitioner's knees were moderately swollen and tender. Id.

3) On September 28, 2000, Petitioner saw Dr. Kerry Hubbs for the first time for an evaluation of his knees. FOF 25. Upon examination, Dr. Hubbs found minimal effusion or swelling in the knees. Id. According to Dr. Hubbs, the MRI findings of September 15, 2000 were suggestive of, or consistent with, a significant bruise of both medial femoral condyles. Id. Dr. Hubbs diagnosed Petitioner with bilateral medial arthritis with acute contusions to both knees due to the August 10, 2000 fall at work. Id.

4) By letter dated October 25, 2001, Dr. Hubbs

retracted his earlier opinion that Petitioner's knee injury and/or knee surgery were unrelated to his August 10, 2000 fall at work. FOF 32. Dr. Hubbs explained that he was trying to expedite payment for surgery and would have said anything to get the treatment Petitioner needed. Id.

5) Dr. Sterling Endicott evaluated Petitioner, submitted a report dated December 5, 2003, and testified at trial. FOF 31. Dr. Endicott opined that the August 10, 2000 fall could have aggravated Petitioner's underlying arthritis by tearing the meniscus or anterior cruciate ligament, or caused a fracture of the hyaline cartilage. Id. Dr. Endicott stated that even assuming that the meniscus tears were not due to the August 10, 2000 fall, and that no fracture of the cartilage occurred on August 10, 2000, the fact that Petitioner was able to work prior to August 10, 2000, and was unable to do so after the injury provided sufficient basis for him to opine that the August 10, 2000 fall aggravated Petitioner's arthritis so as to hasten the need for bilateral knee replacement surgery. Id.

6) Dr. Hubbs testified that Petitioner sustained bone bruises to his knees in his fall on August 10,

2000. FOF 32. Dr. Hubbs based his opinion on the MRI following the August 10, 2000 fall, which showed signals consistent with bone bruises to the medial femoral condyles. Id. Dr. Hubbs stated that such bruises are consistent with a fall injury to the knees. Id. Although Dr. Hubbs acknowledged that Petitioner had preexisting degenerative knee joints before the August 10, 2000 fall, Dr. Hubbs opined that the bruises sustained on August 10, 2000 resulted in additional trauma to the knees and caused Petitioner to decompensate to the point where he could not return to work. Id. Dr. Hubbs believed that Petitioner would have required knee replacement surgery even if he had not fallen on his knees, but that the additional trauma, together with Petitioner's inability to work after August 10, 2000, contributed to Petitioner's need for surgery sooner rather than later. Id.

In addition to the evidence on the record, pursuant to HRS § 386-85(1) (1993), "[i]n any proceeding for the enforcement of a claim for [workers'] compensation . . . it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim is for a covered work injury . . . ." Id. (Emphasis added.) See Nakamura, 98 Hawai'i at 267, 47 P.3d at

734. Such presumption "'applies to the "work-relatedness" of an injury.'" Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 91, 34 P.3d 16, 21 (2001) (quoting Korsak, 94 Hawai'i at 306, 12 P.3d at 1247).

III.

Second, however, there is no indication from the record that the LIRAB applied the presumption of work-connectedness required under HRS § 386-85.[3] The ICA made no mention of the presumption, mandated by HRS § 386-85(1), that a worker's compensation claim is for a covered work injury in the absence of substantial evidence. To the contrary, the ICA cited Nakamura for the proposition that "the LIRAB is not required to reconcile conflicting expert testimony in favor of the claimant." Boyle,

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[3] The LIRAB failed to state in its decision whether it applied the presumption. This runs contrary to the rule that an agency's findings and conclusions must be reasonably clear to allow for meaningful review of the agency's decision. See In re Application of Hawaii Elec. Light Co., 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979) ("The requirement that the Commission set out findings of fact and conclusions of law is no mere technical or perfunctory matter. The purpose of the statutory requirement that the agency set forth separately its findings of fact and conclusions of law is to assure reasoned decision making . . . and enable judicial review of agency decisions." (Internal citations omitted.)); Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988) ("An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.").

The ICA, relying on Iqawa, held that the "[t]he LIRAB's decision was not rendered defective by its failure to state all the legal standards it applied." Boyle v. Maryl Pac. Constructors, Inc., 2007 WL 3044469 at *3 (Haw. App. Oct. 18, 2007) (unpublished) . However, I believed that in Iqawa, and I reiterate here, that without such a statement,

> we cannot discharge our duties of judicial review. While we may defer to the Board's technical expertise in the area assigned to it, there can be no presumption that the Board applied the law correctly. To hold otherwise is an abdication of the power and responsibility allocated to us in the disposition of workers' compensation appeals.

Id. at 412, 38 P.3d at 580 (Acoba, J., concurring in part and dissenting in part).

2007 WL 3044469 at *2 (citing Nakamura, 98 Hawai'i at 270, 47 P.3d at 737). The ICA also cited Tamashiro for the statement that "'credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal.'" Boyle, 2007 WL 3044469, at *2 (quoting Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22).

Nevertheless, based on the analysis following, the ICA did not appear to apply the presumption with respect to the evidence. Inquiry into whether an injury is work-related "must begin with the proposition that 'coverage [is] presumed at the outset[.]'" Igawa, 97 Hawai'i at 411, 38 P.3d at 579 (Acoba, J., concurring in part and dissenting in part) (brackets in original) (quoting Chung v. Animal Clinic, Inc., 63 Haw. 642, 651, 636 P.2d 721, 727 (1981)).

IV.

Against the evidence referred to above and the presumption, the LIRAB stated that it did not credit the opinions of Dr. Hubbs or Dr. Endicott because 1) neither doctor reviewed the Waianae Coast Comprehensive Health Center (WCCHC) records prior to the August 10, 2000 date of injury and were therefore unaware of Petitioner's symptomatic knee condition when they rendered their opinions, 2) neither opined with reasonable "medical basis" that Petitioner's bone bruises contributed in some way to further loss of articular cartilage, which apparently

had already been worn away given the end-stage bone-on-bone arthritic condition seen on the September 28, 2000 standing x-rays, 3) there were no objective findings from diagnostic testing to support Dr. Endicott's opinion that Petitioner's August 10, 2000 fall could have resulted in meniscal tears or fracture, and 4) the LIRAB was not persuaded that Petitioner's inability to work after August 10, 2000 was, by itself, an adequate basis to show that the August 10, 2000 injury had aggravated Petitioner's arthritis to the extent that surgery was required. FOF 33.

But with respect to the first finding listed above, as argued by Petitioner and agreed by the ICA, the LIRAB's finding that Dr. Endicott did not review the WCCHC records and was not aware of Petitioner's symptomatic knee condition, was erroneous. Boyle, 2007 WL 3044469 at *3. That a key finding upon which the LIRAB based its decision to discredit the finding of Petitioner's witness was proven false provides a compelling basis for vacating the decision of the LIRAB. The ICA concluded that notwithstanding this erroneous finding, "the LIRAB's assessment of Dr. Endicott's opinion would have been the same" because the LIRAB identified other reasons for rejecting Dr. Endicott's opinion "including his inability to identify any objective findings from diagnostic testing to show that the August 10, 2000, fall aggravated [Petitioner's] underlying arthritic knee condition." Id. With all due respect, the ICA's conclusion is presumptive and fails to appreciate that the validity of the

LIRAB's decision is undermined by the discredit of a key finding that the LIRAB made.

With respect to the second LIRAB finding, Dr. Hubbs stated his opinion that Petitioner's knees had "indeed been aggravated by some trauma[,]" referring to the August 10, 2000 accident as the source of the trauma. Dr. Hubbs also took the "position that the August 10th, 2000 injury contributed in part to the need for the total knee replacements[.]" Dr. Endicott expressed the same opinion, agreeing that "the August 10th accident was a significant factor in the worsening of the knee condition, requiring both knee replacement surgeries[.]" The LIRAB even acknowledged that Dr. Hubbs opined that the August 10, 2000 "fall contributed to his need for surgery sooner [rather] than later." FOF 32. Thus, as described above, both Dr. Hubbs and Dr. Endicott expressed their belief that the accident was a factor underlying the need for Petitioner's knee replacement surgeries. Accordingly, the validity of the LIRAB's second finding is questionable in light of the fact that both Dr. Hubbs and Dr. Endicott unequivocally opined that the August 10, 2000 injury contributed to Petitioner's need for the knee surgeries.

With respect to the third finding, there is doubt as to the accuracy of this finding as Dr. Endicott noted that he did not know how it would be possible for a radiologist to determine from diagnostic testing whether meniscal tears could be caused by acute trauma such as the August 10, 2000 accident.

With respect to the fourth finding, the LIRAB declined to "credit the opinions of Dr. Hubbs and Dr. Endicott that [Petitioner's] inability to work after August 10, 2000, provided a sufficient basis for their opinions that the injury had aggravated [Petitioner's] arthritis" because "[b]oth doctors were under the wrong impression that [Petitioner] was asymptomatic in the knees and working without problems prior to August 10, 2000." FOF 33. As noted above, the LIRAB's finding that Dr. Endicott believed Petitioner to have an asymptomatic knee prior to the August 10, 2000 accident was erroneous. Because the LIRAB's finding regarding Dr. Endicott was erroneous, it cannot reasonably be relied on as a basis for rejecting his opinion.

V.

Third, there is no indication that Respondent carried its "heavy burden of persuasion," Chung, 63 Hawai'i at 650, 636 P.2d at 726 (citing Akamine v. Hawaiian Packing & Crating Co., 53 Hawai'i 406, 408, 495 P.2d 1164, 1166 (1972)) of overcoming the aforementioned presumption and evidence. "'[HRS § 386-85(1)] is not a mere procedural device that disappears upon the introduction of contrary evidence.'" Korsak, 94 Hawai'i at 307, 12 P.3d at 1248 (quoting Akamine, 53 Hawai'i at 408, 495 P.2d at 1166). In order to overcome the presumption, the employer must introduce substantial evidence that the injury is unrelated to employment. Igawa, 97 Hawai'i at 407, 38 P.3d at 575. "'[S]ubstantial evidence' 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 [person] that an injury . . . is not work connected.'" Nakamura, 98 Hawai'i at 267-68, 47 P.3d at 734-35 (some brackets in original) (quoting Flor v. Holguin, 94 Hawai'i 70, 79, 9 P.3d 382, 391 (2000)).

The LIRAB stated that it credited the opinions of Drs. Davenport and Hector to conclude that the soft tissue injury or bone bruises suffered by Petitioner on August 10, 2000 "did not, in any way, aggravate or accelerate [Petitioner's] total loss of cartilage in the knees." FOF 34. (Emphasis added.) The evidence adduced by Respondent were the medical reports and testimony of Drs. Davenport and Hector. Dr. Davenport evaluated Petitioner and submitted reports dated January 23, 2001 and September 13, 2001. FOF 29. In his report, Dr. Davenport opined:

> I do not believe that the fall of August 10, 2000 contributed in any significant degree to Mr. Boyle's present knee situation. Indeed, Mr. Boyle states that he worked for a few days after the fall of August 10, 2000 and eventually was seen almost two weeks later by [Dr.] Razzuk . . . for knee and back discomfort.

(Emphasis added.) Contrary to Dr. Davenport's report, the evidence in the record indicates that on August 10, 2000, during a follow-up visit for back pain, Petitioner told Dr. Razzuk that he injured his knees that day. FOF 20. Dr. Razzuk told Petitioner that he would have to file a claim for his August 10, 2000 knee injuries before they could be evaluated as a work

injury. This suggests that Dr. Davenport's opinion was based upon erroneous information. Thus, one of Dr. Davenport's reports was of questionable accuracy, indicating that it was not "'credible [and] . . . of a quality . . . sufficient to justify a conclusion by a reasonable [person] that an injury . . . is not work connected.'" Nakamura, 98 Hawai'i at 267-68, 47 P.3d at 734-35 (quoting Flor, 94 Hawai'i at 79, 9 P.3d at 391).

The only other medical opinion adduced by Respondent was that of Dr. Hector, who submitted a report dated July 20, 2003. FOF 30. However, Dr. Hector did not examine Petitioner until 2003, nearly three years after the date of the August 10, 2000 accident in question. The value of any medical diagnoses and opinions that Dr. Hector could form at a point in time so remote from the date of the accident and when he had not examined Petitioner in the period preceding the accident, is doubtful. Furthermore, when Dr. Hector examined Petitioner on July 30, 2003, the evidence suggests that he appeared confused as Dr. Hector admitted that he may have told Petitioner that he did not have any of Petitioner's records and "[wasn't] exactly sure what [he] was supposed to do[.]" Thus, Dr. Hector, inexplicably, examined Petitioner's back in addition to his knees despite the fact that Petitioner's knees were the subject of the claim. Furthermore, Dr. Hector's credibility was called into question as Petitioner's counsel sought to make an offer of proof and requested that judicial notice be taken of a particular case

where a Claimant testified that Dr. Hector's report regarding that Claimant's case contained "many inaccuracies."

In addition, Petitioner elicited testimony from Respondent's experts raising questions concerning the impartiality of their opinions. On cross-examination, Dr. Hector admitted that he performed 100 to 150 independent medical examinations for employers in the last year. Similarly, Dr. Davenport stated that he was unable to calculate his gross annual income from performing independent medical exams, mostly at the request of employers or insurance companies.

The foregoing would not appear to amount to a "high quantum of evidence," Nakamura, 98 Hawai'i at 267-68, 47 P.3d at 734-35 (quoting Flor, 94 Hawai'i at 79, 9 P.3d at 391), necessary to meet a "heavy burden of persuasion," Chung, 63 Hawai'i at 650, 636 P.2d at 726 (citing Akamine, 53 Hawai'i at 408, 495 P.2d at 1166), for overcoming the work connectedness presumption and the substantial evidence favoring compensability in the record.

VI.

The manner in which the LIRAB reached its decision is inconsistent with the presumption of work-connectedness and with the requirement that the employer bears a heavy burden of persuasion in order to overcome the presumption as described supra in Section V. See Nakamura, 98 Hawai'i at 267, 47 P.3d at 734 ("In order to overcome the presumption of work-relatedness, the employer bears the initial burden of 'going forward' with the

evidence and the burden of persuasion."); Chung, 63 Hawai'i at 651, 636 P.2d at 726 (stating that "this presumption imposes upon the employer both the heavy burden of persuasion and the burden of going forward with the evidence" (citing Akamine, 53 Hawai'i at 408, 495 P.2d at 1166)).

Based on the LIRAB's analysis set forth above, the LIRAB seemingly imposed the burden of persuasion on Petitioner, not Respondent, and apparently gave no actual weight to the presumption that Petitioner's claim was for a covered work injury. To reiterate, as discussed in Section III, under HRS § 386-85(1), "coverage [is] presumed at the outset[.]" Korsak, 94 Hawai'i at 306, 12 P.3d at 1247 (emphasis added). Indeed, "[t]he statute nowhere requires . . . some preliminary showing that the injury occurred 'in the course of employment' before the presumption will be triggered." Id. (ellipsis in original). As such, implicit in the LIRAB's analysis is the absence of any real application of the presumption of work-connectedness.

VII.

Fourth, even if the LIRAB found the evidence by Respondent to be "substantial," the "[trier of fact] must then weigh that evidence against the evidence presented by the claimant." Nakamura, 98 Hawai'i at 268, 47 P.3d at 735. In weighing the evidence, "the employer bears the burden of persuasion in which the claimant is given the benefit of the doubt." Id. Here, the record, when properly viewed, reflected

"error of law," HRS § 91-14, in the application of the presumption and the evidence, when properly weighed, should have left the ICA with "a definite and firm conviction that a mistake has been made." Wilton, 116 Hawai'i at 110 n.7, 170 P.3d at 361 n.7 (internal quotation marks and citation omitted). The evidence introduced by Respondent, who bore the burden of persuasion, suggested that Dr. Davenport's medical opinion was in part based upon erroneous information, and the testimony of Respondent's experts indicated a history of appearances for workers' compensation employers and insurance companies.

VIII.

Assuming, arguendo, any doubt exists as to work relatedness as a result of a weighing of the evidence submitted by the claimant and the employer, this court has held that "where there is a reasonable doubt as to whether an injury is work-connected, it must be resolved in favor of the claimant." Chung, 63 Haw. at 651, 636 P.2d at 727 (citing Akamine, 53 Haw. at 409, 495 P.2d at 1166). Therefore, assuming reasonable doubt, the issue of work-connectedness should have been resolved in favor of Petitioner.

IX.

This court grants a writ of certiorari where there are "(1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the ICA with that of the supreme court, federal decisions, or its own decision and the

magnitude of such errors or inconsistencies dictat[es] the need for further appeal." Wemple ex rel. Dang v. Dahman, 103 Hawai'i 385, 392, 83 P.3d 100, 107 (2004). See also HRS § 602-59 (1993). Because grave errors of law and fact appear to have occurred in this case, based on the foregoing reasons, I would accept the application.