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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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DARRELL N. KAPUWAI, Respondent/Claimant-Appellant,

vs.

CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PARKS AND RECREATION, Petitioner/Employer-Appellee, Self-Insured.

NO. 27915

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CASE NO. AB 2004-328 (2-01-13437))

JULY 16, 2009

K. HAMAKADO  
CLERK OF APPELLATE COURTS  
STATE OF HAWAII

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FILED

MOON, C.J., AND CIRCUIT JUDGE KIM, ASSIGNED BY REASON OF VACANCY; ACOBA, J., CONCURRING SEPARATELY, WITH WHOM DUFFY, J. JOINS; AND NAKAYAMA, J., DISSENTING

OPINION BY MOON, C.J., ANNOUNCING THE  
DECISION OF THE COURT

On March 3, 2009, this court accepted a timely application for a writ of certiorari, filed by petitioner/employer-appellee City and County of Honolulu, Department of Parks and Recreation (the City) on January 23, 2009, requesting that this court review the Intermediate Court of Appeals' (ICA) December 8, 2008 judgment on appeal, entered pursuant to its November 12, 2008 published opinion in Kapuwai v. City & County of Honolulu, 119 Hawai'i 304, 196 P.3d 306 (App. 2008). Therein, the ICA vacated the February 6, 2006 decision

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and order of the Labor and Industrial Relations Appeals Board (LIRAB), which, in turn, had modified the decision of the director of the Department of Labor and Industrial Relations (director).

Briefly stated, respondent/employee-appellant Darrell N. Kapuwai -- who was employed by the City as a mason -- sustained a work-related injury to his right great toe. The City eventually accepted liability for Kapuwai's injury, and the director awarded Kapuwai, inter alia, benefits for 96 percent permanent partial disability (PPD) of his right great toe. The City appealed to the LIRAB, and the LIRAB modified the director's decision, concluding that Kapuwai was entitled to 4 percent PPD on the whole person. Additionally, the LIRAB denied Kapuwai's request for attorney's fees and costs, made pursuant to Hawai'i Revised Statutes (HRS) § 386-93(b) (1993), quoted infra. Kapuwai appealed the LIRAB's decision to the ICA, arguing that the LIRAB should have converted the "whole person" rating to a PPD rating of the great toe, pursuant to HRS § 386-32(a) (Supp. 2001), quoted infra, and should have granted his request for attorney's fees and costs. On appeal, the ICA held that Kapuwai was entitled to a PPD award based on the impairment of his great toe as opposed to a whole person rating if the award for the former exceeded the award for the latter; thus, the ICA remanded the case to the LIRAB for such determination. Based upon its remand of the case to the LIRAB,

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the ICA recognized that it could not decide the attorney's fees issue but, nevertheless, provided "guidance" to the LIRAB regarding the application of HRS § 386-93(b) on remand.

On application, the City essentially contends that the ICA erred: (1) by remanding Kapuwai's case to the LIRAB for a "determination of a [PPD] award based on an impairment of [Kapuwai's] great toe"; and (2) in its interpretation of HRS § 386-93(b). We agree with the ICA's rationale and ultimate disposition remanding the case to the LIRAB for a determination of a PPD award based on the impairment of Kapuwai's great toe and, therefore, affirm that portion of the ICA's opinion. However, as discussed more fully infra, we hold that the ICA erred in delving into the interpretation of HRS § 386-93(b) because, based on the ICA's remand of the case to the LIRAB, the issue of attorney's fees and costs was not ripe for decision. Accordingly, we vacate section II of the ICA's opinion relating to attorney's fees and costs.

I. BACKGROUND

A. Factual Background and Procedural History

As aptly summarized by the ICA:

Kapuwai was employed by . . . [the City] as a mason. He developed a bunion and calluses on his right great toe which were aggravated by wearing steel-toed shoes at work. On November 23, 2001, Kapuwai underwent surgery on his right foot that consisted of metatarsal osteotomy and distal phalangeal exostectomy. The surgery was not successful in alleviating the pain and sensitivity Kapuwai experienced in his right great toe. Kapuwai walked with a mild limp, had difficulty going up and down stairs, and had problems with balance. He gave up driving because he experienced twitching under his toe

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when stepping on the accelerator. The surgery left a scar and a flexion deformity of his right great toe.

The City accepted liability for Kapuwai's injury on October 28, 2002, and on December 1, 2002, the [d]irector . . . ordered the City to pay for Kapuwai's necessary medical expenses as well as \$5,421.25 in temporary total disability benefits.

In December 2003, Kapuwai was evaluated by [Wayne K. Nadamoto, M.D. (Dr. Nadamoto)] for permanent impairment. Dr. Nadamoto used the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) in rating Kapuwai's impairment. Dr. Nadamoto applied the gait-derangement method rather than the range-of-motion method for assessing impairment under the Fifth Edition of the AMA Guides.<sup>1</sup> Based on the gait-derangement method, Dr. Nadamoto rated Kapuwai's impairment as a 7 percent PPD of the whole person.

A hearing was held before the [d]irector on the issues of permanent disability and disfigurement. The [d]irector credited Dr. Nadamoto's evaluation that Kapuwai suffered a 7 percent whole person disability. The [d]irector found that "[t]his percentage should properly be converted to an award for the great toe only as that was the site of the injury." The [d]irector used the Third Edition (Revised) of the AMA Guides to convert Dr. Nadamoto's 7 percent whole person disability rating to a 96 percent PPD of the right great toe, resulting in a PPD award of \$19,954.56. The [d]irector also ordered the City to pay Kapuwai \$800.00 for disfigurement, to pay additional temporary total disability benefits, and to reimburse Kapuwai for the cost of Dr. Nadamoto's evaluation.

The City appealed the [d]irector's decision to the LIRAB on July 13, 2004. The LIRAB issued a pretrial order identifying the issues on appeal as:

1. What is the extent of permanent disability resulting from [Kapuwai's] work injury . . . ; [and]
2. What is the extent of disfigurement resulting from [Kapuwai's] work injury. . . .

At the City's request, [S.Y. Tan, M.D. (Dr. Tan)] conducted an independent medical examination of Kapuwai. Dr. Tan prepared a report and testified at the [hearing]

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<sup>1</sup> Specifically, Dr. Nadamoto determined that Kapuwai could not "be rated under the range of motion impairment value since [Kapuwai's injury was] not a degenerative condition and definitely caused a gait abnormality which [did] not strictly fall under Table 17-5 of the AMA Guide to Evaluation of Permanent Impairment 5th Edition since there [was] no document[ed] moderate-advanced arthritic changes to the hip, knee, or ankle."

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held before the LIRAB on the City's appeal. Dr. Tan disagreed with Dr. Nadamoto's use of the gait-derangement method of assessing Kapuwai's impairment because Kapuwai's condition did not fit the criteria for using that method under the Fifth Edition of the AMA Guides. Dr. Tan concluded that the range-of-motion method, which was based on measuring the range of motion of the great toe, was the appropriate method to use.<sup>2</sup> Applying the range-of-motion method, Dr. Tan determined that Kapuwai had sustained a mild toe impairment equivalent to a 1 percent PPD of the whole person.

On February 6, 2006, the LIRAB entered a decision that modified the [d]irector's PPD award and affirmed the [d]irector's disfigurement award. The LIRAB credited Dr. Tan's opinion in finding [(1)] that Kapuwai should be rated under the range-of-motion method and [(2)] that[,] under the Fifth Edition to the AMA Guides, Kapuwai's range of motion measurements corresponded to a 1 percent impairment of the whole person. The LIRAB also credited Kapuwai's testimony on "how his toe condition has interfered with his activities of daily living, such as walking, going up and down stairs, driving, and standing."

The LIRAB concluded:

Based on the foregoing, including Dr. Tan's impairment rating and [Kapuwai's] testimony regarding his pain symptoms and how his toe condition has interfered with his activities of daily living, we conclude that [Kapuwai] is entitled to benefits for 4 [percent] permanent partial disability of the whole person. . . .

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<sup>2</sup> Specifically, Dr. Tan stated in his report:

With all due respect, I believe Dr. Nakamoto [sic] is incorrect in his analysis. Firstly, [r]ange of [m]otion impairment (which incorporates pain) should be the logical choice in this case, and this is specifically covered under Section 17.2f on page 533. The section makes no mention whatsoever regarding the requirement of a "degenerative condition" as stated by Dr. Nakamoto [sic]. Secondly, the use of Table 17-5 to calculate impairment in this case violates the expressed conditions precedent. Section 17.2c (Gait Derangement) on page 529 specifically notes that ". . . the percentages given in Table 17-5 are for full-time gain derangements of persons who are dependent on **assistive devices** (bold font in text). Furthermore, the relevant paragraph (mild severity under a) is applicable only to patients with documented moderate to advanced arthritic changes of hip, knee[,] or ankle. Table 17-5 is inapplicable to the claimant . . . Kapuwai because he neither uses assistance devices, nor does he have arthritic changes in the hip, knee, or elbow.

(Emphasis in original.)

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The LIRAB's decision did not separately determine what Kapuwai's PPD award would have been if based solely on the impairment to his right great toe. The LIRAB agreed with the [d]irector's \$800 disfigurement award.

[On February 16, 2006,] Kapuwai moved for reconsideration on the ground that the LIRAB failed to convert its award of 4 percent PPD of the whole person to an award based on the impairment of his right great toe, a specific body part covered by the schedule of awards for PPD under HRS § 386-32(a)<sup>3</sup>. The LIRAB denied Kapuwai's motion for reconsideration on March 29, 2006.

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<sup>3</sup> HRS § 386-32(a) provides in relevant part that:

Where a work injury causes permanent partial disability, the employer shall pay the injured worker compensation in an amount determined by multiplying the effective maximum weekly benefit rate prescribed in section 386-31 by the number of weeks specified for the disability as follows:

. . . .  
Great toe. For the loss of a great toe, thirty-eight weeks;

. . . .  
Loss of use. Permanent loss of the use of a hand, arm, foot, leg, thumb, finger, toe, or phalanx shall be equal to and compensated as the loss of a hand, arm, foot, leg, thumb, finger, toe, or phalanx;

Partial loss or loss of use of member named in schedule. Where a work injury causes permanent partial disability resulting from partial loss of use of a member named in this schedule, and where the disability is not otherwise compensated in this schedule, compensation shall be paid for a period that stands in the same proportion to the period specified for the total loss or loss of use of the member as the partial loss or loss of use of that member stands to the total loss or loss of use thereof;

. . . .  
Other cases. In all other cases of permanent partial disability resulting from the loss or loss of use of a part of the body or from the impairment of any physical function, weekly benefits shall be paid at the rate and subject to the limitations specified in this subsection for a period that bears the same relation to a period named in the schedule as the disability sustained bears to a comparable disability named in the schedule. In cases in which the permanent partial disability must be rated as a percentage of the total loss or impairment of a physical or mental function of the whole person, the maximum compensation shall be computed on the basis of the corresponding percentage of the product of three hundred twelve times the effective maximum weekly benefit rate prescribed in section 386-31.

(Emphases added.)

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Kapuwai also submitted a request to the LIRAB that the City be required to pay \$2,535, [pursuant to HRS § 386-93(b),<sup>4</sup>] which represented one-half of the attorney's fees and cost[s] incurred by Kapuwai in the City's appeal to the LIRAB. In support of his request, Kapuwai argued that the City raised two issues in the appeal (the extent of the PPD award and the extent of the disfigurement award); that Kapuwai was the prevailing party on the issue of disfigurement; and that the LIRAB did not reverse but only modified the [d]irector's decision on the issue of PPD. The LIRAB effectively denied Kapuwai's request by not assessing the City with 50 percent of Kapuwai's attorney's fees and costs, but instead making Kapuwai's attorney's fees and costs a lien upon the compensation payable by the City to Kapuwai.

Kapuwai, 119 Hawai'i at 307-08, 196 P.3d at 309-10. On April 28, 2006, Kapuwai filed a timely notice of appeal from the LIRAB's (1) February 6, 2006 decision and order and (2) March 29, 2006 order denying Kapuwai's motion for reconsideration.

B. Appeal Before the ICA

On direct appeal, Kapuwai contended that the LIRAB erred "as a matter of law" when it "failed to 'convert' its award of 4 [percent] PPD of the 'whole person' to an award of the right great toe under the 'schedule' of injuries pursuant to [HRS] § 386-32(a)." Specifically, Kapuwai argued that:

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<sup>4</sup> In 2001 -- the date that Kapuwai became permanently disabled -- HRS 386-93(b) provided in relevant part that:

If an employer appeals a decision of the director or appellate board, the costs of the proceedings of the appellate board or the supreme court of the State, together with reasonable attorney's fees shall be assessed against the employer, if the employer loses; provided that if an employer or an insurance carrier, other than the employer who appealed, is held liable for compensation, the costs of the proceedings of the appellate board or the supreme court of the State together with reasonable attorney's fees shall be assessed against the party held liable for the compensation.

(Emphases added.)

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Where an injured worker suffers a work injury which causes permanent partial disability to his/her great toe [HRS § 386-32(a)] mandates that ". . . an employer **shall** pay the scheduled amount determined by multiplying the effective maximum weekly benefit rate prescribed in § 386-31, HRS" by "38 weeks" as identified in the "schedule." By the use of the word "shall," it is clear that the Hawai'i Legislature determined that the payment of . . . [PPD] benefits pursuant to the "scheduled" amount are mandatory in nature requiring that certain "compulsory action" be taken. The "compulsory action" required by the LIRAB was to "convert" the "4 [percent] PPD of the whole person" to a PPD award of the scheduled injury, that being "great toe."

(Bold emphasis in original.) (Internal citations omitted.)

Moreover, Kapuwai asserted that the AMA Guides, Third Edition, should be used in converting the PPD award from 4 percent whole person permanent partial impairment to a percentage of an impairment of the right great toe. According to Kapuwai, under the AMA Guides, the 4 percent whole person award would be converted to a "73 [percent] permanent partial impairment through 90 [percent] permanent partial impairment] for a PPD award within the range of \$15,173.78 through \$18,707.40." Kapuwai further argued that, "[w]here two remedies are available (i.e., lower percentage within the range of 73 [percent] to 90 [percent]), . . . Kapuwai should receive the benefit of the most favorable remedy (i.e., 90 [percent] PPD of the right great toe)." He contended that this "most favorable remedy" approach was "consistent with the benevolent purpose and scope of Hawaii's workers' compensation law."

Kapuwai additionally contended that the LIRAB erred in denying his request for attorney's fees and costs.

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Specifically, Kapuwai argued that the LIRAB should have ordered the City to pay his costs and 50 percent of his attorney's fees because HRS § 386-93(b) reflects the legislature's intention to

relieve a claimant of the burden of paying attorney's fees and costs where an employer appeals and the non-appealing employer or insurance carrier is held liable for compensation due to the claimant. Moreover, the legislative history clearly indicates that the appealing employer should pay for costs and fees "even where he does not lose the appeal." This "may happen when an employer appeals on the grounds that the amount of compensation is excessive and succeeds in having the amount reduced." Under this bill, "the appealing employer would be required to pay such costs and fees." . . . The [l]egislature['s] reference to the appealing employer to be [sic] "required to pay such costs and fees" could only refer to the situation now at hand.

The City responded that the LIRAB correctly awarded Kapuwai 4 percent PPD of the whole person inasmuch as it "was not compelled or obligated to convert its award of 4 [percent] PPD of the whole person to that of the right great toe because use of . . . [the HRS §] 386-32 . . . schedule is not exclusive when an injury is not clean cut and there are complications to other parts of the body," that is, Kapuwai's injury caused him to have an unsteady gait and permanent limp and interfered with his daily living activities. As such, the City maintained that the LIRAB correctly awarded Kapuwai PPD based on his whole person. Additionally, the City contended that the LIRAB did not abuse its discretion in failing to order it to pay Kapuwai's attorney's fees and costs because "[the City] prevailed on the crucial issue of PPD on appeal and [was] the prevailing party under [HRS §] 386-93(b)."

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On November 12, 2008, the ICA issued its opinion, concluding that Kapuwai was entitled to a PPD award based on the impairment of his great toe if that award is determined to exceed an award based on the impairment of his whole person. Kapuwai, 119 Hawai'i at 306-07, 196 P.3d at 308-09. In reaching such conclusion, the ICA relied on this court's decision in Respicio v. Waiialua Sugar Co., 67 Haw. 16, 675 P.2d 770 (1984), wherein we adopted the trend of "departing from the exclusiveness of scheduled allowances" and held that, under HRS § 386-32(a), "[b]enefits will be limited to schedule amounts if the loss is 'clean cut,' i.e., where there are no complications to other parts of the body" but "[l]oss of a smaller member may be treated as a percentage loss of a larger member if the effects of the loss extend to other parts of the body." 67 Haw. at 18, 675 P.2d at 772 (citation omitted). The ICA determined that Respicio applied to the case at bar and concluded that, inasmuch as "[t]here was evidence in the record that the effects of Kapuwai's great toe injury extended to and interfered with the efficiency of other parts of the body and his whole person[,] . . . the LIRAB was not limited to basing its PPD award on the impairment of Kapuwai's great toe, but could determine the extent to which the effects of Kapuwai's great toe injury resulted in the impairment of his whole person." Kapuwai, 119 Hawai'i at 311, 196 P.3d at 313.

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However, the ICA ultimately concluded that HRS § 386-32(a) entitled Kapuwai "to a PPD award based on the impairment of his great toe if that [award] exceeds the LIRAB's current award based on the impairment of his whole person." Id. (emphasis added). Inasmuch as "[t]he LIRAB did not determine what Kapuwai's PPD award would have been if based on the impairment of his great toe under the HRS § 386-32(a) schedule," the ICA could not itself "tell if an award based on the impairment of Kapuwai's great toe would exceed the amount awarded by the LIRAB based on the PPD of Kapuwai's whole person." Id. Accordingly, the ICA vacated the LIRAB's decision and remanded the case to the LIRAB for a determination of a PPD award based on the impairment of Kapuwai's great toe as requested by him.<sup>5</sup> Id. at 306-07, 196 P.3d at 308-09.

Based upon its decision to remand the case to the LIRAB for further proceedings, the ICA recognized that it could not "decide" Kapuwai's remaining contention regarding the LIRAB's denial of his requested attorney's fees and costs because "[t]he determination of whether the City is the loser of its appeal to the LIRAB under HRS § 386-93(b) must be based on the final decision of the LIRAB." Id. at 313, 196 P.3d at 315 (citation omitted). Inasmuch as the ICA vacated the

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<sup>5</sup> However, the ICA declared that it did "not agree with Kapuwai's contention that, where the AMA Guides provide a range of percentages for an impairment, the rating physician and the LIRAB must select the highest percentage in the range." Id. at 312, 196 P.3d at 314.

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LIRAB's decision and order, there was no final decision upon which the award of attorney's fees and costs could be based. Despite the ICA's recognition that it could not "decide" the issue of attorney's fees, it, nevertheless, opined on the application of HRS § 386-93(b) to "provide guidance . . . to assist the LIRAB on remand." Id. at 306, 196 P.3d at 308.

Specifically, the ICA, after conducting a review of the legislative history of HRS § 386-93(b), stated:

We conclude that[,] when an employer does not dispute the compensability of the employee's injury and only appeals on the ground that a PPD award is excessive, it should be regarded as the loser under HRS § 386-93(b) if it fails to obtain a substantial reduction in the compensation award. In our view, this test is faithful to both the language of HRS § 386-93(b), which only permits the assessment of attorney's fees and costs against an appealing employer "if the employer loses," and the legislative purpose to discourage unnecessary appeals and avoid unfairly burdening an employee with the costs of defending against an appeal. The test was derived by construing the language of HRS § 386-93(b) within the context and spirit of the workers' compensation law.

The crucial issue in the type of case presented here is the amount of compensation the employer is required to pay. The employer does not prevail on this issue if it only obtains a minor or insubstantial reduction in the award. In determining whether the employer has achieved a substantial reduction in the award, the LIRAB should consider both the relative and absolute amount of the reduction. For example, if the employer appeals only a small compensation award, a large percentage reduction in the award may not be sufficient to avoid the assessment of the employee's attorney's fees and costs. As noted, we do not agree with Kapuwai's contention that the employer should automatically be regarded as the loser on appeal if it fails to obtain the full reduction it requested. In construing a different attorney's fees statute, the Hawai'i Supreme Court has held that "where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees." Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 620, 575 P.2d 869, 879 (1978). However, we believe the LIRAB may consider the position taken by the employer on appeal as a factor in its determination of

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whether the employer is the loser and has achieved a substantial reduction in the award.

Id. at 318-19, 196 P.3d at 320-21.

The ICA entered its judgment on appeal on December 8, 2008. On January 23, 2009, Kapuwai timely filed his application for a writ of certiorari. The City filed a response on February 6, 2009. This court accepted Kapuwai's application on March 3, 2009.

II. STANDARDS OF REVIEW

A. Agency Decisions

Appellate review of the LIRAB's decision is governed by HRS § 91-14(g) (1993), which 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 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 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.

Under HRS § 91-14(g), conclusions of law (COLs) are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3).

A COL is not binding on an appellate court and is freely reviewable for correctness. Thus, the court reviews COLs de novo, under the right/wrong standard.

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Tam v. Kaiser Permanente, 94 Hawai'i 487, 494, 17 P.3d 219, 226 (2001) (citations, original brackets, and ellipsis omitted) (format altered).

B. Ripeness

It is axiomatic that ripeness is an issue of subject matter jurisdiction. "Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo."

Kaho'ohanohano v. Dep't of Human Servs., 117 Hawai'i 262, 281, 178 P.3d 538, 557 (2008) (citation omitted).

III. DISCUSSION

As previously indicated, the City contends on application that the ICA erred in: (1) ruling "that it was necessary to remand this case for the [LIRAB's] determination of a [PPD] award based on an impairment of [Kapuwai's] great toe" and (2) concluding that "an employer is regarded as the loser on appeal if it fails to obtain a substantial reduction of the compensation award." At the outset, we hold that the City's contention regarding remand to the LIRAB is without merit inasmuch as we agree with the ICA's rationale supporting its ultimate conclusion that (1) Kapuwai's case should be remanded to the LIRAB for a determination of a PPD award based on the impairment of Kapuwai's great toe and that, (2) as between the awards for the great toe and the whole person, Kapuwai is entitled to the greater. Kapuwai, 119 Hawai'i at 311, 196 P.3d at 313. However, we are concerned about the

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liberty taken by the ICA to provide guidance with respect to HRS § 386-93(b) (dealing with liability for attorney's fees and costs) in light of its decision to remand the case to the LIRAB for further proceedings.

As indicated above, the ICA stated that it would not "decide" the issue whether Kapuwai was entitled to attorney's fees and costs because "[t]he determination of whether the City is the loser of its appeal to the LIRAB under HRS § 386-93(b) must be based on the final decision of the LIRAB," which decision will presumably be issued after remand. Kapuwai, 119 Hawai'i at 313, 196 P.3d at 315 (citation omitted).

Nevertheless, the ICA, in its opinion, set forth "guidance on how to interpret HRS § 386-93(b)," id., which, in our view, renders that portion of the opinion advisory because the issue of attorney's fees and costs was not ripe for decision.

Preliminarily, we acknowledge that neither party has challenged the advisory nature of the ICA's opinion, i.e., that the issue of attorney's fees and costs was not ripe for decision. However, we are equally cognizant that this court has previously stated that,

[w]hile the courts of the State of Hawai'i are not bound by a "case or controversy" requirement, we nonetheless recognize that the "'prudential rules' of judicial self-governance 'founded in concern about the proper -- and properly limited -- role of courts in a democratic society' are always of relevant concern." Life of the Land v. Land Use Commission, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (citations omitted). For "even in the absence of constitutional restrictions, courts must still carefully weigh the wisdom, efficacy,

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and timeliness of an exercise of their power before acting." Id.

State v. Fields, 67 Haw. 268, 274, 686 P.2d 1379, 1385 (1984) (emphasis added) (footnote and brackets omitted).

Additionally, we have previously indicated that, in "the absence of ripeness," appellate courts are "without jurisdiction to consider [the] appeal." State v. Moniz, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987) (holding that "appellate courts are under an obligation to insure that they have jurisdiction to hear and determine each case" and, "because of the absence of ripeness and standing, [this court was] without jurisdiction to consider [an] appeal").<sup>6</sup>

Moreover, it is well-settled in this jurisdiction that, "[i]f the parties do not raise the issue [of a lack of subject matter jurisdiction], a court sua sponte will." Tamashiro v. Dep't of Human Servs., State of Hawai'i, 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (emphasis added) (citations omitted). "When reviewing . . . whether the lower court has jurisdiction, [our appellate courts] retain jurisdiction, not on the merits, but only for the purpose of correcting the error in jurisdiction."

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<sup>6</sup> In the federal court system (which -- unlike the ICA and this court -- is bound by the federal constitution's Article III case and controversy requirement), it is well-established that:

Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.

Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990), cert. denied, 502 U.S. 943 (1991) (citation omitted).

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Id. (citation, internal quotation marks, and original brackets omitted). Thus, we may properly raise the issue of ripeness sua sponte and, additionally, retain jurisdiction for the limited purpose of correcting the ICA's error in jurisdiction.

In light of the ICA's remand, the LIRAB has yet to make a final decision on the underlying worker's compensation claim. As such, any determination whether the employer "loses" and, thus, is required to pay attorney's fees and costs is premature, i.e., not ripe. Accordingly, we conclude that, inasmuch as there is no current "controversy" over attorney's fees and costs, the ICA's issuance of an advisory opinion on an unripe issue implicates concerns "about the proper -- and properly limited -- role of courts in a democratic society" and contravenes the "prudential rules of judicial self-governance." Fields, 67 Haw. at 274, 686 P.2d at 1385. The dissent, however, disagrees with our conclusion inasmuch as it believes that "this court has also issued advisory opinions in the past" and that the majority in this case has not "explain[ed] why we may issue advisory opinions and the ICA . . . cannot." Dissenting op. at 1, 3. In support of its argument, the dissent points to a number of cases wherein this court has provided guidance to the trial courts on remand.

Although the dissent is correct, it overlooks an important distinction between the cases it cites and the case at bar. Specifically, in the cases cited by the dissent, this

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court provided guidance to another court, i.e., an entity within the same branch of government; whereas, in the instant case, the ICA provided guidance to the LIRAB, an administrative agency within the coequal executive branch of government, which, as discussed more fully infra, raises serious concerns regarding separation of powers, judicial interference, and premature adjudication.

In the context of the premature review of administrative decisions, we have stated that:

The rationale underlying the ripeness doctrine and the traditional reluctance of courts to apply injunctive and declaratory remedies to administrative determinations is to prevent courts, through avoidance of **premature adjudication**, from entangling themselves in abstract disagreements over administrative policies, and also to **protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties.** Thus, prudential rules of judicial self-governance founded in concern about the proper -- and properly limited -- role of courts in a democratic society, **considerations flowing from our coequal and coexistent system of government**, dictate that we accord those charged with drafting and administering our laws a reasonable opportunity to craft and enforce them in a manner that produces a lawful result.

Save Sunset Beach Coal. v. City & County of Honolulu, 102

Hawai'i 465, 483, 78 P.3d 1, 19 (2003) (emphases added) (format altered) (citations, internal quotation marks, and original brackets omitted). In our view, the foregoing rationale clearly recognizes the separation of powers doctrine as it relates to the adjudication of matters reserved for administrative agencies in the other branches of government. In other words, the administrative agency of a separate,

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coequal branch of government should be accorded the opportunity to first decide and enforce its own decisions without the premature interference by the judiciary.

None of the cases cited by the dissent involve this court's issuance of an advisory opinion providing guidance to an administrative agency or entity within the executive or legislative branches or within county government. In fact, this court, in Save Sunset Beach, declined to issue an opinion regarding challenges to a proposed use of the county zoning district because the issue was not ripe. 102 Hawai'i at 482-83, 78 P.3d at 18-19. Likewise, the ICA, in Bremner v. City & County of Honolulu, 96 Hawai'i 134, 28 P.3d 350 (App. 2001), refused to decide a constitutional challenge to a county zoning ordinance because the ordinance had not yet been implemented, and the issue was, therefore, again not ripe for adjudication. Id. at 143-44, 28 P.3d 359-60. Implicit in these cases is the demonstration of the appellate courts exercising restraint and not prematurely delving into areas committed to the other branches of government -- a principle recognized by this court in Fields.

In Fields, this court was faced with the issue whether a condition of probation contravened the defendant's constitutional right to be free of unreasonable searches and seizures. 67 Haw. at 271-73, 686 P.2d at 1384-85. Specifically, the probation condition imposed upon the

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defendant made her "subject at all times during the period of her probation to a warrantless search of her person, property and place of residence for illicit drugs and substances by any law enforcement officer including her probation officer." Id. at 273, 686 P.2d at 1384. The Fields court recognized that, inasmuch as the government had not yet made an effort to enforce the particular condition of probation, the ripeness doctrine, if strictly applied to the situation at bar, would "preclude an adjudication of the issue raised on appeal." Id. at 275, 686 P.2d at 1386. Nevertheless, this court determined that "[o]ther important considerations" led it "to believe [it was] confronted with the exceptional case demanding attention in advance of an actual attempt by the government to enforce the condition." Id. Specifically, this court declined to apply the ripeness doctrine inasmuch as: (1) "the deprivation of a fundamental right may not be lightly regarded, even when exacted as part of the price of conditional release"; and (2) the probationary condition at issue was a creature of judicial ingenuity and that, therefore, its "inquiry would focus on the propriety of judicial action[, and that it] would not be venturing 'into areas committed to other branches of government.'" Id. at 275-76, 686 P.2d at 1386 (citation omitted). Based on the foregoing, the Fields court concluded that it was appropriate "to act before there [was] an attempt

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to enforce the sentencing court's order, since [its] bounden duty include[d] the prevention of serious judicial mistakes in situations where resort to appeal may be otherwise foreclosed." Id.

Indeed, the guidance provided by this court in nine of the eleven cases cited by the dissent focused on the propriety of judicial action or the deprivation of constitutional rights, and none ventured into areas committed to other branches of government. See, e.g., State v. Nichols, 111 Hawai'i 327, 340, 141 P.3d 974, 987 (2006) (providing guidance to the circuit court on remand regarding jury instructions); Courbat v. Dahana Ranch, Inc., 111 Hawai'i 254, 141 P.3d 427 (2006) (providing guidance to the circuit court regarding the correct application of a statute on remand); KNG Corp. v. Kim, 107 Hawai'i 73, 110 P.3d 397 (2005) (providing guidance to the circuit court on remand that statute did not violate the due process or equal protection clause); Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 104 P.3d 912 (2004) (providing guidance to the circuit court on remand with regard to setting of appropriate sanctions pursuant to Hawai'i Rules of Civil Procedure Rules 11 and 16, which rules are promulgated by the supreme court); Ditto v. McCurdy, 102 Hawai'i 518, 78 P.3d 331 (2003) (providing guidance regarding writs of execution and the applicability of the district court rules, which are also promulgated by the supreme court); State v.

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Wakisaka, 102 Hawai'i 504, 78 P.3d 317 (2003) (providing guidance to the circuit court regarding evidentiary matters, i.e., the exclusion of an expert witness); State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001) (addressing evidentiary matters to provide guidance to the circuit court on remand); State v. Mahoe, 89 Hawai'i 284, 972 P.2d 287 (1998) (providing guidance to the circuit court on remand regarding a jury instruction); State v. Kauhi, 86 Hawai'i 195, 948 P.2d 1036 (1997) (addressing unripe evidentiary and constitutional issues).

With respect to the two remaining cases cited by the dissent, to wit: E&J Lounge Operation Co., Inc. v. Liquor Commission of City & County of Honolulu, 118 Hawai'i 320, 350, 189 P.3d 432, 462 (2008), and In re Water Use Permit Applications, 105 Hawai'i 1, 12, 93 P.3d 643, 654 (2004), we fail to see how those cases constitute advisory opinions on unripe issues. In both cases, this court decided issues squarely presented and necessary for a full and complete discussion of its ultimate holding in each case. It did not address any unripe issues or provide guidance to a separate government agency.

Based on the foregoing, we believe the dissent's citations to the above cases as support for its position that the ICA's advisory opinion in this case should be allowed to stand because this court has also issued advisory opinions in the past is unavailing. This court's issuance of previous

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advisory opinions, as cited by the dissent, is consistent with this court's prior case law and practice of limiting its guidance to entities within the judicial branch while refraining from doing so in cases involving a separate governmental entity.

We agree, however, with the dissent that the determination whether it is the LIRAB or the appellate courts that awards attorney's fees and costs depends on when the appeal is "final." Dissenting op. at 4-5 (citing Lindinha, 104 Hawai'i at 171, 86 P.3d at 980 (stating "we read [HRS § 386-93(b)] as assessing fees and costs against an employer if the employer loses the final appeal" (emphasis added))). In other words, "the statute plainly authorizes assessment of attorney's fees and costs against the employer if it loses, whether the case ends in the LIRAB or this court." Id. (emphasis added). By providing that "the costs of proceedings of the appellate board or the supreme court of the State, together with reasonable attorney's fees shall be assessed against the employer, if the employer loses," HRS § 396-93(b) (emphasis added), the legislature clearly contemplated that proceedings could end and be final at the LIRAB-level, thereby empowering the LIRAB to make an award of attorney's fees and costs "if the employer loses."

We disagree, however, with the dissent's position that it was permissible for the ICA to provide guidance to the

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LIRAB because "the plain language of HRS § 386-93(b) applies to the judicial branch of the government in the same manner as the executive branch." Dissenting op. at 5. The fact that the statute applies to both the judicial and executive branches does not render it permissible for the judicial branch to interfere with the decision-making process of an executive branch agency simply because the statute bestows the same decision-making authority upon the judicial branch. Because an appeal from a decision of the director can, depending on the circumstances, become "final" at the LIRAB-level or the appellate-level, the statute must necessarily contemplate those circumstances.

In the present case, the appeal at the LIRAB-level was not final because Kapuwai appealed to the ICA and the City further appealed to this court. Likewise, the appeal at the ICA and this court was also not "final" for purposes of attorney's fees and costs in light of the remand to the LIRAB for further proceedings regarding Kapuwai's PPD award. Once the LIRAB makes such determination and, if no further appeal is taken, then, the "final appeal" would have occurred at the LIRAB-level, empowering it to make the requisite determination and award of fees and costs. By opining on the application of the subject statute, the ICA invaded the province of the LIRAB to make its own independent assessment as to whether the City, under HRS § 386-93(b), is the "lose[r]" for purposes of an

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award of attorney's fees and costs. As such, the ICA impermissibly ventured into an area legislatively committed to the LIRAB and, thus, implicates separation-of-powers concerns that were not present in the decisions cited by the dissent.

Finally, the dissent also maintains that, if "the ICA lacked jurisdiction because the attorney's fees and costs issue is unripe, then it logically follows that we too lacked jurisdiction to issue the advisory opinions that we did." Dissenting op. at 4 (citation omitted). However, as discussed supra, the guidance provided by this court in the cases cited by the dissent (1) focused on the propriety of judicial action or the deprivation of constitutional rights, (2) did not venture into areas committed to other branches of government, thereby obviating any separation-of-power concerns, and (3) were consistent with its "bounden duty" to prevent judicial mistakes or the reoccurrence of a judicial mistake on remand. Fields, 67 Haw. at 276, 686 P.2d at 1386.

In sum, we conclude that the ICA's opinion regarding the issue of attorney's fees and costs was not ripe for decision and constitutes an advisory opinion akin to the issuance of an opinion where there is no subject matter jurisdiction. Moniz, 69 Haw. at 373, 742 P.2d at 376. More importantly, the advisory portion of the ICA's opinion constitutes inappropriate judicial interference with an administrative decision of an entity within a separate, coequal

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branch of government that has not been formalized and has not yet affected the challenging parties in a concrete way, Save Sunset Beach, 102 Hawai'i at 483, 78 P.3d at 19, thereby implicating separation-of-powers concerns. Consequently, we hold that the ICA's exercise of appellate power in this case constitutes error that must be corrected by this court by vacating the advisory section of the ICA's opinion.

IV. CONCLUSION

Based on the foregoing, we vacate the part of the ICA's opinion, specifically section II, that deals with the issue of attorney's fees and costs.

Paul K. Hoshino, Deputy  
Corporation Counsel, for  
petitioner/employer-appellee,  
self-insured

Herbert R. Takahashi and  
Danny J. Vasconcellos (of  
Takahashi Vasconcellos &  
Covert), for respondent/  
claimant-appellant

