NO. 25368

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

VICTOR D. GILFILLAN, Claimant-Appellant, v.
CITY AND COUNTY OF HONOLULU, HONOLULU POLICE DEPARTMENT, Employer/Insurance Carrier-Appellee

APPEAL FROM LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 96-347 (2-92-28339))

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Claimant-Appellant Victor D. Gilfillan (Gilfillan) appeals from a Decision and Order entered by the State of Hawaiʻi Labor and Industrial Relations Appeals Board (the LIRAB) on September 6, 2002.[1]

On November 26, 1992, Gilfillan suffered injuries from a motor vehicle accident while he was working for the City and County of Honolulu. The first hearing by the Director of the State of Hawaiʻi Department of Labor and Industrial Relations (the Director) occurred on April 3, 1996. On May 31, 1996, the Director issued a decision awarding Gilfillan fifteen percent (15%) permanent partial disability (PPD) of the whole person as a result of his work injuries.

Gilfillan then filed his claim with the LIRAB. The

[1] Presiding were Chairman Randall Y. Iwase and Members Carol K. Yamamoto and Vicente F. Aquino.

LIRAB awarded him benefits for a twenty-nine (29%) PPD. Gilfillan is now appealing the LIRAB's judgment. He argues "that a permanent partial disability of 35% to 40% would more accurately reflect the long-standing and significant residual impairment found in this case." We affirm.

BACKGROUND

On November 26, 1992, Gilfillan, a police sergeant, was struck from behind while the car he was driving was stopped in traffic. He suffered "pain to back of neck". A letter was sent to Gilfillan from Employer-Appellee City and County of Honolulu (the City and County of Honolulu) acknowledging that "[w]orker's compensation benefits are being provided to you by the City and County of Honolulu as a result of your accident."

On December 8, 1992, Gilfillan was examined by Dr. Peter Diamond, who had in the past treated Gilfillan for lower back pain. Dr. Diamond diagnosed him with "musculogigamentous strain, lumber spine with mild radiculitis." In his December 15, 1992 notes, Dr. Diamond wrote that "patient complains of increase in back pain with radiation into the left leg[.]" After trying physical therapy and pain medications without much success, Gilfillan was referred to Dr. John S. Smith. On July 2, 1993, Dr. John S. Smith performed surgery on Gilfillan's L4-5 and L5-S1. In a follow-up visit, Dr. John S. Smith reported that "[Gilfillan] is still having some pain and on occasion gets some

left leg spasms, but is generally better and improving in this endurance."

On January 24, 1995, Dr. Deborah Agles evaluated Gilfillan's medical case. Dr. Agles recounted Gilfillan's history of back problems including recurrent pain which continues to persist after surgery was completed on July 2, 1993. Using the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Agles rated Gilfillan's injury to be in "DRE Lumbosacral Category III, Radiculopathy. This equates to a 10% whole person impairment." Dr. Agles also stated that Gilfillan's "low back impairment rating of 10% whole person should be apportioned so that 60% or 6% whole person is apportioned to the slip and fall injury of 1990 and 40% or 4% whole person is apportioned to the motor vehicle accident of 11/26/92 which resulted in permanent aggravation of symptoms with surgical intervention."

On July 20, 1995, Dr. Robert Smith evaluated Gilfillan to determine the permanent disability rating for Gilfillan's injury. Dr. Robert Smith used the Guides to the Evaluation of Permanent Impairment, 4th Edition, for purposes of the partial permanent disability rating and concluded, in relevant part, as follows:

> The total lumbar range of motion impairment is 1%.
>
> Reference is made to table 75, page 113, whole-person impairment % due to specific spine disorders. If the range of motion model is

> utilized, table 75 would apply, including paragraph 2e; surgically treated disc lesion with residual, medically documented pain and rigidity, lumbar % impairment of the whole person 10%. He would also qualify for paragraph 2F, multiple levels, add 1% per level. Adding paragraph 2E and F, we have 11% impairment. Combining this 11% with the 1% based on the lost range of motion, we have a total according to the combined values table on page 322, or 12% whole person impairment. Reference is made to table 83 page 130. He qualifies for L5 sensory deficit = 5% L.E., and S1 sensory deficit = 5% L.E. Combined = 10% L.E. = 10 X 0.4 =4% whole person. 12% + 4% = 16% whole person grand total.
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> Using the injury or diagnosis-related estimates model, I would agree with Dr. Agles, that he would qualify for DRE lumbosacral category 3, 10% whole person impairment.
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> . . . .
>
> Although this is a consensus judgment, I am not sure that it applies in the long run in this case. Once a fusion has occurred at L4-5 and L5-S1, there is increased motion occurring at the levels of the lumbar spine above the fusion, which in the long run, results in accelerated degeneration of the segments above. I am thus providing both methods of permanent impairment as it exists today."[2]

On April 3, 1996, the Department of Labor and

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[2] In an October 16, 1995 letter, Dr. Deborah Agles responded to Dr. Robert Smith's evaluation as follows:

> In other words, he is providing the second method of rating anticipating further deterioration as a result of the surgical fusion that was performed. My rating simply is directly related to the injury that was presented and as the DRE categories are the preferred method as per the AMA Guides, this is the model I utilized.
>
> I feel it is up to your discretion whether you use the DRE Model or the Range of Motion Model and in this case, although the ratings are similar, there is an increased impairment by calculation via the Range of Motion Model. I feel that Dr. Smith's rating is appropriate and that either method can be utilized in this case.
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> Although I do stand by my rating, I certainly have no difficulties with Dr. Smith's impairment evaluation also and in light of our two ratings being somewhat dissimilar in calculations, it may be prudent to allow DCD to make the decision on Mr. Gilfillan's case.
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> In a letter dated November 17, 1995, Dr. John S. Smith noted that he reviewed Gilfillan's records, Dr. Robert Smith's report and Dr. Angle's report. Dr. John S. Smith recommended combining both factors, the radiculopathy and the "two level fusion of his lumbar spine", which would give a 24% impairment of the whole individual. In the May 31, 1996 Decision, the Director decided that Dr. John S. Smith's "report is stricken from the record for failure to meet the time constrictions set forth in Section 12-10-75, Workers' Compensation Related Administrative Rules."

Industrial Relations Disability Compensation Division held a hearing. The Director's May 31, 1996 Decision states as follows:

DECISION

1. Pursuant to Sections 386-21 and 386-26, HRS, said employer shall pay for such medical care, services and supplies as the nature of the injury may require.

2. Pursuant to Section 386-31(b), HRS, said employer shall pay to claimant weekly compensation of $437.00 for temporary total disability from work beginning December 18, 1992 through May 12, 1993; July 2, 1993 through January 2, 1994 for 47 2/7 weeks, for a total of $20,663.85.

3. Pursuant to Section 386-32(a), HRS, said employer shall pay to claimant weekly compensation of $437.00 for 15.00% permanent partial disability of the whole person beginning January 3, 1994 for 46.8000 weeks, for a total of $20,451.60.

4. Pursuant to section 386-32(a), HRS, said employer shall pay to claimant one lump sum of $750.00 for disfigurement as follows: 5 1/2" x 1/8" hyperpigmented surgical scar, mid low back.

On June 5, 1996, Gilfillan appealed the Director's Decision and Order. An August 8, 1996 conference resulted in a pretrial order identifying the sole issue on appeal as "the extent of permanent disability resulting from the work injury of November 26, 1992[.]"

Due to persisting complaints of increasing back pain and lower extremity problems, Gilfillan was, on September 9, 1996, referred to Dr. Thomas Drazin, a neurologist, for further evaluation. After testing, Dr. Drazin reported that there is "electrical evidence to suggest a chronic left L4-L5 and L5-S1 radculopathy." After a few visits with Dr. Drazin, Gilfillan was referred back to Dr. John S. Smith who eventually recommended further surgery. On August 22, 1997, Gilfillan underwent a

posterior spinal fusion revision at the L4-5 level. Gilfillan returned to work on November 15, 1997.

On April 7, 1998, Dr. John Sterling Endicott performed an independent medical evaluation of Gilfillan and reported, in relevant part, that Gilfillan

> reports that he has persistent lower back pain that ranges from a 5 to 8 on a 1 to 10 scale. He has intermittent right radicular pain, and he has a chronic left leg and foot numbness. He has bilateral lower extremity aching to the mid calf. He notes crepitation with movement and painful range of motion. . . .
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> Mr. Gilfillan was injured when he was at a stop light and was rear ended by a Ford Taurus going about approximately 50 miles per hour, apparently. . . .
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> . . . .
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> [Gilfillan] would be preliminarily classified based on the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, according to Table 70, page 108. Initially he would have been placed and still would be placed under previous spine operation with loss of motion segment integrity or radiculopathy, which placed him in either Category III, IV, or V.
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> His previous impairment ratings indicated DRE Category III by the DRE method. Dr. Smith's evaluation had indicated a 16% impairment whole person by the Range of Motion model. Given that his injury was two-level and it was not a straightforward radiculopathy, consideration for impairment beyond the DRE Category III would have been reasonable in the past.
>
> Given his current situation of re-fusion at the L4-L5 level due to lack of stability there, and his findings on exam today, his categorization appears to be beyond that of DRE Category III, clearly. When utilizing differentiators of electrodiagnostic studies, Dr. Drazin's evaluation showed multiple level radiculopathy, chronically, at L4-L5 and L5-S1 on the left. His exam clinically shows both right and left radicular findings, consistent with L4 and S1 radiculopathies.
>
> Using the Range of Motion Model to better differentiate his impairment category, he would be found to have invalid flexion/extension measurements based on the straight leg raising criterion. The tightest straight leg raise is 52 degrees, and the greatest value of sacral flexion plus extension is 30 degrees. This is greater than a 15 degree difference. Thus, the flexion measurement is thrown out. Despite this, he has five degrees impairment due to extension loss, 1 degree impairment due to right lateral flexion loss, and 3 degrees of left lateral flexion loss, for a total of 9% impairment. Table 75 would give rise to 10% for the lumbar disc surgery, plus 1% for an additional level, plus 2%

> for the second operation, for 13% whole person. Combining 13% with 9% is 21% whole person.
>
> His exam clinically gives rise to bilateral L5 motor loss that would be deemed a mild Grade IV, 10% times 27% which rounds to 4% lower extremity impairment in the right leg and 4% impairment in the left leg. He has a 1% right S1 sensory loss and a 1% left L5 sensory loss. This is 5% lower extremity on the right in total and 5% lower extremity impairment on the left. This combines for 10% lower extremity impairment, which converts to 4% whole person impairment. Combining 21% with 4% is 24% whole person impairment. This would indicate that the best DRE Category for Mr. Gilfillan would be DRE Category V, radiculopathy and motion segment instability. This would be appropriate given the significance of his surgeries, his findings on exam, and the pathology for which he was treated. Interestingly, this correlates well with what Dr. Smith has stated to the patient's attorney back in 1995 after the first surgery.
>
> The following are answers to your numbered questions and statements:
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> . . . .
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> 6. For the type of injury that Mr. Gilfillan sustained, what is the estimated recovery time?
>
> ANSWER: Given the type of injury he had, and he had two-level disc pathology, the initial recovery from his fusion was appropriate at about little over one year post-fusion returning to regular work. However . . . he had progressive increased pain and subsequently required a second surgery. He now is left with chronic bilateral radiculopathy and chronic pain, and he is medically retired from his police officer work as of the upcoming June date. It is not an unusual scenario, after multiple fusion surgeries, to be left with significant residual."

(Emphasis in original.)

The LIRAB noted that the parties waived a hearing in place of simultaneously submitted written closing arguments.

In his written closing argument, Gilfillan argues, in relevant part, as follows:

> As projected, [Gilfillan] retired from his job as a police officer in June of 1998 after more than 22 years of service.
>
> What is [Gilfillan's] condition today? On July 12, 2002, [Gilfillan] forwarded an e-mail (Exhibit "D") describing his present symptoms and condition. These are summarized as follows:

1. Chronic lower back, daily on a scale of 6-10;

2. Consistent daily sciatica at a 7/10;

3. Consistent bilateral leg cramps at a 10/10;

4. Limited feeling in left foot and shin;

5. Occasional weakness in left leg;

6. Loss of feeling on left side of penis;

7. Unable to sit for more than 1 hour;

8. Difficulty in walking;

9. Loss of balance due to left leg weakness;

10. Difficulty bending, 7/10 daily;

11. Broken sleep due to leg cramps nightly;

12. Unable to perform sexually due [to] back pain;

13. Rely heavily on SOMA, Tylenol 3 and Percoset;

14. Unable to do routine things such as vacuum, help wife or work to help financially.

> Despite a long course of medical treatment and two surgical procedures on the low back, [Gilfillan] is left, as noted by Dr. Endicott above, "with significant residual." [Gilfillan's] condition is certainly not improved since his rating in 1998 and appears to have worsened with the passage of time. With what [Gilfillan] has had to endure since the rating in 1998 and his lack of employability, it is submitted that the 24% rating recommended by Dr. Endicott, although significant, is too low and does not adequately account for [Gilfillan's] current symptoms and condition.
>
> Accordingly, it is submitted that a permanent partial disability of 35% to 40% would more accurately reflect the long-standing and significant residual impairment found in this case.

In its written closing argument, the City and County of Honolulu stated, in relevant part, as follows:

> [Gilfillan] has apparently accepted the rating contained in Dr. Endicott's April 7, 1998 report as he declined to submit any other rating examination. The sole issue on appeal can therefore be more aptly described as the extent of [Gilfillan's] residuals due to the November 26, 1992 accident.
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> . . . .
>
> The Disability Compensation Division, Department of Labor

> and Industrial Relations, determined that [Gilfillan] suffered fifteen percent (15%) impairment of the whole person as a result of the November 26, 1992 accident of which five percent (5%) was for residuals. Given the similarity of subjective complaints and the lack of medical intervention over the past four years, [the City and County of Honolulu] submits the amount of residuals awarded by the [Director] in [the] May 31, 1996 decision appears appropriate in light of [Gilfillan's] condition.
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> . . . .
>
> Based on the foregoing points and authorities, [the City and County of Honolulu] submits that [Gilfillan] suffered twenty-nine percent (29%) permanent partial disability of the whole person as a result of the November 26, 1992 injury and respectfully requests that the May 31, 1996 decision be amended accordingly.

On September 6, 2002, the LIRAB issued its Decision and Order in relevant part as follows:

> For the reasons stated below, we modify the Director's decision to conclude that Claimant is entitled to benefits for 29% permanent partial disability ("PPD") of the whole person for the November 22, 1992 work injury.
>
> Findings of Facts
>
> 1. Claimant, a police officer, injured his low back on November 26, 1992, when the car he was driving was struck by another vehicle.
>
> 2. Claimant had a prior low back injury in 1990 that resulted in protrusions at the L4-5 and L5-S1 levels. Claimant did not have any nerve root impingement prior to the November 26, 1992 industrial injury.
>
> 3. On July 2, 1993, Claimant underwent a laminectomy and discectomy with bilateral decompression at L4-5 and L5-S1.
>
> 4. On January 24 , 1995, Dr. Deborah Agles evaluated Claimant for permanent impairment. Using the 4th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guide"), Dr. Agles placed Claimant in DRE (or Diagnosis Related Estimate) lumbosacral category III, and rated him at 10% permanent partial impairment of the whole person. Dr. Agles attributed 6% of that rating to his 1990 injury and the remaining 4% to the 1992 motor vehicle accident.
>
> 5. On July 20, 1995, Dr. Robert Smith evaluated Claimant for permanent impairment, using both the Range of Motion ("ROM") and DRE methods in the 4th edition of the AMA Guides. Under the ROM method, Dr. Smith rated Claimant at 16% permanent partial impairment of the whole person for his low back condition. Under the DRE model, Dr. Smith concurred with Dr. Agles that Claimant belonged in DRE lumbosacral category III, which corresponded to a 10% impairment.

6. By decision dated May 31, 1996, the Director awarded Claimant benefits for 15% PPD of the whole person for his low back condition.

7. Claimant returned to full duty following the Director's decision. In or around July of 1996, Claimant developed leg cramps with increasing back pain. Because of Claimant's persisting symptoms, Dr. Smith feared that the fusion may not be solid. A subsequent MRI scan, performed on August 5, 1996, showed post-operative changes that consisted of epidural scarring and fibrosis at the L4-5 level. There was no evidence of disc herniations.

8. In September of 1996, Claimant saw Dr. Thomas Drazin, a neurologist, for an evaluation. Following diagnostic testing, Dr. Drazin reported that the tests showed evidence consistent with a left L4-5 and L5-S1 radiculopathy.

9. Although the MRI showed no evidence of disc re-herniations, according to Dr. Smith, Claimant's persisting complaints of cramps and shooting pains were suggestive of motion or instability at L4-5. Dr. Smith recommended further surgery to re-fuse the L4-5 level.

10. On August 22, 1997, Claimant underwent a second surgery that consisted of a posterior spinal fusion revision at the L4-5 level. It was hoped that the procedure would stabilize the vertebral joint.

11. On November 15, 1997, Claimant returned to limited duty with restrictions of no lifting over 20 pounds, bending, and sitting for long periods without change of position.

12. On April 7, 1998, Claimant saw Dr. John Endicott for a permanent impairment evaluation. At the evaluation, claimant described his chronic low back pain, intermittent radicular pain, chronic left leg and foot numbness, crepitation with movement, and decreased tolerance for sitting. Using the 4th edition of the AMA guides, Dr. Endicott placed Claimant in DRE lumbosacral category V and rated Claimant's lumbar condition at 24% permanent partial impairment of the whole person. Dr. Endicott noted that Claimant's multiple fusion surgeries left him with significant residuals. We credit Dr. Endicott's impairment rating and the documentation of Claimant's residuals from his work injury.

13. In June of 1998, Claimant retired from his job.

14. There is no record of Claimant seeking or receiving further medical treatment since 1998.

Conclusions of Law

Based on the foregoing, we conclude that Claimant is entitled to benefits for 29% PPD of the whole person, as a result of his November 26 , 1992 work injury.

Gilfillan filed a notice of appeal on October 1, 2002.

This appeal was assigned to this court on June 18, 2003.

STANDARDS OF REVIEW

Appellate review of a LIRAB decision is governed by HRS § 91-14(g) (1993), which states that:

> 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 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.

We have previously stated:

> [FOFs] 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. Alvarez v. Liberty House, Inc., 85 Hawai'i 275, 277, 942 P.2d 539, 541 (1997); HRS § 91-14(g)(5).
>
> [COLs] are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law. Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997) (citations omitted); HRS §§ 91-14(g)(1), (2), and (4).
>
> "A COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." Price v. Zoning Bd. of Appeals of City and County of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994). When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field.

> Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "[T]he court should not substitute its own judgment for that of the agency." *Id.* (citing Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

> In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000) (quoting Curtis v. Board of Appeals, 90 Hawai'i 384, 392-93, 978 P.2d 822, 830-31 (1999) (quoting Poe v. Hawai'i Labor Relations Board, 87 Hawai'i 191, 197, 953 P.2d 569, 573 (1998))) (alterations in original).

Igawa v. Koa House Rest., 97 Hawai'i 402, 405-06, 38 P.3d 570, 573-74 (2001).

DISCUSSION

Gilfillan's point of error is as follows: "In awarding [Gilfillan] a twenty-nine (29%) permanent partial disability, the [LIRAB] took into consideration factors which are inappropriate to a determination of such disability, namely: 1) retirement, and 2) continuing medical care." Gilfillan argues that

> [e]conomic factors and continued medical care are not relevant to determining PPD as the same be in cases of total disability. PPD is an indemnity payment for a loss or impairment of a physical function and unlike temporary total disability benefits, **is not compensation to replace current loss of wages**. (Emphasis added.) Cuarisma v. Urban Painters, Ltd., 583 P.2d 321, 59 Haw[.] 409, 420 (1975). See also: 1969 House Standing Commite[e] Report, No: 193.
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> . . . .
>
> No explanation for the PPD award is made by the [LIRAB] other than "based upon the foregoing" which can only refer to the Findings of Fact portion of the decision and order. PPD was the sole issue for determination by the Appeals Board by agreement of the parties. In this regard, although the [LIRAB] gave special credence to the April 7, 1998 PPD evaluation done by John S. Endicott, M.D., the [LIRAB] also clearly refers to the fact: 1) [Gilfillan] retired from his job in June of 1988, and 2) that there was no record of any medical care since 1998. Neither factor is relevant to the determination of a PPD in [Gilfillan's] case. Although it cannot be specifically determined from the language of [the] decision, other than "based on the foregoing," the extent to which the [LIRAB] may have relied upon such factors is clearly erroneous based upon the clear mandate of the statutes

> cited above and case law.[3]
>
> . . . .
>
> The [LIRAB] offered no explanation or basis for its award of an additional five percent (5%) PPD over and above the impairment percentage of twenty-four percent (24%) determined by John S. Endicott, M.D. in his April 7, 1998 evaluation of [Gilfillan]. . . .
>
> Despite the reliance upon Dr. Endicott's report, there is no explanation how or in what manner the [LIRAB] concluded that an additional five percent (5%) PPD was appropriate in [Gilfillin's] case. What is clear, however, is the [LIRAB] considered in its Finding[s] of Fact matters clearly as a matter of law inappropriate to the determination of a PPD. Again, to what extent these matters impacted the [LIRAB] decision only fuels the arbitrary, capricious nature of pulling the additional five percent (5%) PPD out of the air without explanation particularly when the record is clear that [Gilfillan] has a significant residual disability.

(Emphasis in original.)

We conclude that Gilfillan's point lacks merit. First, we repeat Gilfillan's position stated in his written closing argument:

> Despite a long course of medical treatment and two surgical procedures on the low back, [Gilfillan] is left, as noted by Dr. Endicott above, "with significant residual." [Gilfillan's] condition is certainly not improved since his rating in 1998 and appears to have worsened with the passage of time. With what [Gilfillan] has had to endure since the rating in 1998 and his lack of employability, it is submitted that the 24% rating recommended by Dr. Endicott, although significant, is too low and does not adequately account for [Gilfillan's] current symptoms and condition.
>
> Accordingly, it is submitted that a permanent partial disability of 35% to 40% would more accurately reflect the long-

[3] For legal support, Gilfillan cited language from Cuarisma v. Urban Painters, Ltd., 59 Haw. 409, 420, 583 P.2d 321, 327 (1975), "Permanent partial disability compensation is an indemnity payment for the loss or impairment of a physical function and, unlike temporary total disability benefits, is not compensation to replace current loss of wages." Id. This language, taken from a Legislative Committee Report, was intended to explain the purpose of the permanent partial disability compensation statute, § 386-32(a). The issue for the Cuarisma court to determine was whether Chapter 386 "preclude[d] the award of benefits for permanent total disability and for disfigurement resulting from the same work accident." The court decided it did not and that both forms of compensation could coexist. It is not clear how this case law is relevant to the issue on appeal which deals with only PPD.

> standing and significant residual impairment found in this case.

In light of his position stated above, it is impossible to understand the basis for Gilfillan's position that the LIRAB's decision was "arbitrary, capricious" and that LIRAB "pull[ed] the additional five percent (5%) PPD out of the air without explanation[.]" The record supports a decision of "29%" more than it supports "35% to 40%".

Second, in light of the position taken by the City and County of Honolulu in its written closing argument, it is impossible to understand Gilfillan's complaint that "[t]he [LIRAB] offered no explanation or basis for its award of an additional five percent (5%) PPD over and above the impairment percentage of twenty-four percent (24%) determined by John S. Endicott, M.D. in his April 7, 1998 evaluation of [Gilfillan]."

Third, in its findings of fact nos. 13 and 15, the LIRAB did no more than repeat undisputed facts noted in the record and in Gilfillan's closing argument.[4] Nothing supports Gilfillan's conclusion, in his opening brief, that

> [t]he [LIRAB's] decision and order dated September 6, 2002 should be remanded for further proceedings to determine [Gilfillan's] PPD as a result of his November 26, 1992 work accident and with instructions that only loss of physical and mental function be considered in making a final determination. Matters related to retirement and continuing medical care should not be considered in this endeavor.

[4] The court record includes an e-mail from Gilfillan to his counsel, submitted as exhibit D, describing his current medical condition. In his e-mail, Gilfillan said that his doctors have not requested him to come in for follow up treatment.

CONCLUSION

Accordingly, we affirm the September 6, 2002 Decision and Order entered by the State of Hawai‘i Labor and Industrial Relations Appeals Board.

DATED: Honolulu, Hawai‘i, March 23, 2004.

On the briefs:

Richard K. Griffith
for Claimant-Appellant.

Chief Judge

Paul K. W. Au,
Deputy Corporation Counsel,
City and County of Honolulu,
for Employer/Insurance
Carrier-Appellee.

Associate Judge

Associate Judge