

NO. 26052

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

EMILY S. REESE, Claimant-Appellant,
v.

ALOHA UNLIMITED TRAVEL, INC. and
ISLAND INSURANCE COMPANY, Employer/Insurance Carrier-Appellee,
and
SPECIAL COMPENSATION FUND, Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. 96-561 (2-92-31311))

MEMORANDUM OPINION

(Lim, Presiding Judge, Foley, and Nakamura, JJ.)

In this workers' compensation case, Claimant-Appellant Emily S. Reese (Reese or Claimant) appeals from the following orders filed by the Labor and Industrial Relations Appeals Board (the Board): 1) Decision and Order filed on May 4, 2000; 2) Order Denying Motion to Dismiss filed on April 9, 2003; 3) Amended Decision and Order filed on April 9, 2003, and 4) Order Denying Motion for Reconsideration filed on July 28, 2003. Although Reese lists the preceding four orders in her notice of appeal, the points of error she raises on appeal focus on the Board's Amended Decision and Order.¹

¹ The April 9, 2003, Amended Decision and Order filed by the Labor and Industrial Relations Appeals Board (the Board) effectively overturned the Board's May 4, 2000, Decision and Order. Accordingly, the May 4, 2000,

EMILY REESE
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BACKGROUND

From September 24, 1986, to October 23, 1993, Reese was employed full-time as a customer service representative by Aloha Unlimited Travel, Inc. (Aloha). From February 14, 1992, to October 23, 1993, she was employed part-time as a cocktail waitress at the Sheraton Makaha Resort and Country Club (Sheraton). On October 23, 1992, Reese stopped working at Aloha and Sheraton due to work-related injury to both hands. Although the parties agreed that Reese had sustained injury to her hands, the precise nature the injury was unclear. Reese's injury has been variously diagnosed as bilateral carpal tunnel syndrome (CTS), bilateral basal thumb carpometacarpal (CMC) joint arthritis, and reflex sympathetic dystrophy (RSD).

In January of 1993, Aloha accepted liability for the injury to Reese's hands. On April 12, 1993, the Director of the Department of Labor and Industrial Relations (the Director) issued a decision finding that Reese has sustained a compensable injury to both hands arising out of her employment with Aloha and was entitled to open-ended temporary total disability (TTD) benefits. The Director further found that Reese was entitled to concurrent employment benefits, by virtue of her part-time work for Sheraton, to be paid by the Special Compensation Fund (SCF) in accordance with Hawaii Revised Statutes (HRS) § 386-51.5

Decision and Order is not in issue in this appeal. The *res judicata* and collateral estoppel claims raised by Claimant-Appellant Emily S. Reese (Reese or Claimant) in her Motion to Dismiss were considered and rejected by the Board in its Amended Decision and Order. Reese's challenge to the April 9, 2003, Order Denying Motion to Dismiss is subsumed within her challenge to the Amended Decision and Order.

(1993). The Director's April 12, 1993, decision was not appealed.

In September 1993, Aloha obtained a statement from Reese detailing the nature of her duties as a cocktail waitress for Sheraton. On October 26, 1993, Aloha received an opinion from Dr. Maxwell Urata that Reese's job with Sheraton had aggravated or contributed to her hand and wrist symptoms. The following day, Aloha filed a motion to join Sheraton in Reese's October 23, 1992, injury claim. On November 15, 1993, Reese filed a WC-5 claim against Sheraton, alleging that her work as a cocktail waitress had aggravated her "hand/wrist/arm injury." On January 3, 1994, Aloha filed a motion to consolidate Reese's claim against Sheraton with her claim against Aloha. While Aloha's motions to join and consolidate were still pending, Reese settled her workers' compensation claim against Sheraton on a "full wash" basis for \$15,000. Over Aloha's objection, Reese's settlement with Sheraton was approved by the Director and the Board.

Thereafter, Aloha, the SCF, and Reese engaged in protracted litigation which culminated in the Board's April 9, 2003, Amended Decision and Order. In its Amended Decision and Order, the Board ruled that the injury to Reese's hands was dually caused and/or aggravated by her employment with Aloha and Sheraton and that liability for the injury would be apportioned equally between each employer. Given Reese's full-wash settlement with Sheraton, the Board's ruling effectively reduced

Reese's benefits because she could not seek payment from Sheraton beyond the \$15,000 settlement. The Board declined to rule on Aloha's request for a credit for the benefits it had paid in excess of its 50 percent share or on SCF's request for reimbursement of the benefits it had paid. The Board found that these requests should be presented in the first instance to the Director.

ISSUES

In this appeal, Reese argues that the Board erred in:

- 1) concluding that Aloha and the SFC were not barred by the doctrines of *res judicata* and collateral estoppel from seeking apportionment of liability between Aloha and Sheraton;
- 2) considering the apportionment issue because Aloha and the SCF were guilty of laches and thus equitably estopped from seeking apportionment;
- 3) apportioning liability between Aloha and Sheraton because there was no legal authority for apportioning liability;
- 4) apportioning liability 50%/50% between Aloha and Sheraton because there was insufficient evidence to justify attributing 50% of Reese's injury to her employment with Sheraton;
- 5) failing to determine whether Reese's work at Aloha alone was sufficient to disable her from all employment; and
- 6) giving the SCF a credit for all concurrent wages paid to Reese when the SCF failed to preserve the issue of whether it had overpaid benefits. With the exception of point 4, we reject Reese's arguments as being without merit. We agree with Reese that there was insufficient evidence to support a 50%/50%

apportionment between Aloha and Sheraton. We remand the case to the Board with instructions to apportion liability between Aloha and Sheraton based on the proportion of wages earned by Reese from each employer. Flor v. Holguin, 94 Hawai'i 70, 92, 9 P.3d 382, 404 (2000).

DISCUSSION

I.

We reject Reese's claim that the failure of Aloha and the SCF to appeal the Director's April 12, 1993, decision barred them from seeking apportionment of liability between Aloha and Sheraton under the doctrines of *res judicata* and collateral estoppel. The Director's April 12, 1993, decision did not address or decide the issue of apportionment of liability between Aloha and Sheraton. At the time of the Director's April 12, 1993, decision, the posture of the case was that Reese contended that the injury to her hands was due solely to her employment with Aloha. Reese's contention was not disputed as Aloha accepted liability and the SCF accepted responsibility for paying benefits based on Reese's concurrent employment with Sheraton. It was not until several months after the Director's April 12, 1993, decision that the following events occurred: 1) Aloha obtained a statement from Reese detailing the nature of her Sheraton work activities; 2) Dr. Urata opined that Reese's job with Sheraton aggravated or contributed to her hand and wrist symptoms; and 3) Reese filed a claim against Sheraton alleging that her work at Sheraton had aggravated her hand and wrist

injury. Contemporaneous with these events, Aloha asserted its apportionment claim.

Because the Director's April 12, 1993, decision did not decide the issue of apportionment of liability between Aloha and Sheraton, the doctrines of *res judicata* and collateral estoppel did not preclude the Board's from addressing the apportionment issue. See Dorrance v. Lee, 90 Hawai'i 143, 148-49, 976 P.2d 904, 909-10 (1999) (requiring that "the issue decided in the prior adjudication is identical with the one presented in the action in question" as one of the conditions for applying the doctrines of *res judicata* and collateral estoppel). In addition, Reese's subsequent filing of a claim against Sheraton and obtaining a settlement from Sheraton is inconsistent with her contention that the Director's April 12, 1993, decision had resolved the question of apportionment of liability between Aloha and Sheraton. If the Director had indeed determined that Aloha was solely liable for Reese's injury, Reese would not have been entitled to obtain compensation from Sheraton.

II.

Aloha and the SCF were not guilty of laches and thus were not equitably estopped from seeking apportionment. There was no unreasonable delay by Aloha or the SCF in bringing the claim for apportionment. Any prejudice to Reese was not attributable to any delay in bringing the apportionment claim, but to Reese's decision to settle with Sheraton before the apportionment issue was resolved. Accordingly, the criteria for

invoking the doctrine of laches was not satisfied, see Adair v. Hustace, 64 Haw. 314, 320-21, 640 P.2d 294, 300 (1982), and the Board did not err in considering the apportionment issue.

III.

In Flor, 94 Hawai'i at 92, 9 P.3d at 404, the Hawai'i Supreme Court recognized that apportionment of liability between employers was permissible where multiple concurrent employers were simultaneously liable for the employee's benefits. Based on Flor, the Board had the legal authority to apportion liability between Aloha and Sheraton.

IV.

Although the Board had the authority to apportion liability between Aloha and Sheraton, we conclude that the Board erred in apportioning liability equally between the two employers. With respect to the apportionment of liability between concurrent liable employers, the court in Flor stated:

[W]e agree with the courts that have approved the apportionment of liability in proportion to the wages earned by the employee in the employ of each of those employers. Such a rule is consistent with the general principle that workers' compensation disability benefits are determined on the basis of the employee's weekly earnings, see HRS § 386-31 [1993], and it is simple to apply, thereby reducing the risk and cost of the litigation respecting the liability of each of the concurrent employers.

Id. At minimum, Flor imposes a preference for apportionment based on the wages earned from each employer. There is language in Flor suggesting that deviation from this preferred method of apportionment may be permissible where the medical evidence provides a rational basis for a different apportionment and the apportionment will serve the interest of fairness. Id. at 90, 9

P.3d at 382. In Reese's case, however, there was no substantial evidence to support the Board's deviation from the preferred wage-based method of apportionment and thus no rational basis for the Board's 50%/50% apportionment between Aloha and Sheraton.

The only medical evidence supporting the Board's 50%/50% apportionment was a statement made by Dr. Patrick Murray in a letter he sent to Aloha's counsel. Quoted verbatim, Dr. Murray's statement was as follows:

In answer to your specific questions:

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2) Q: Would [Reese's] job at Aloha Limited [sic] Travel and as a waitress at the Sheraton Makaha contribute to aggravating or to the development of her left wrist and carpal tunnel symptoms?

A: It [sic] would state that it is 50%/50%.

Dr. Murray provided no support for, or explanation of how he arrived at, his conclusory 50%/50% apportionment. Moreover, it is ambiguous whether Dr. Murray's apportionment applied only to Reese's left hand condition or to the condition of both hands. The opinions of the other doctors cited by the Board did not support the Board's 50%/50% apportionment. The other doctors simply opined that both jobs contributed to or aggravated Reese's hand condition without providing a percentage apportionment between the two jobs. It was undisputed that Reese worked longer hours and earned more wages at her full-time job at Aloha than at her part-time job at Sheraton.

We conclude that there was no substantial evidence to support the Board's 50%/50% apportionment and that the Board

erred in apportioning liability equally between Aloha and Sheraton. We remand the case to the Board with directions to apportion liability between Aloha and Sheraton based on the proportion of wages earned by Reese from each employer, which is the method of apportionment endorsed by the Hawai'i Supreme Court in Flor.

V.

The Board did not err in failing to determine whether Reese's work at Aloha alone was sufficient to disable her from all employment. There was compelling evidence establishing that the work Reese did at both Aloha and Sheraton contributed to and aggravated the injury she sustained to her hands.

VI.

We reject Reese's claim that the Board erred in giving the SCF a credit for all concurrent wages paid. The Board declined to rule on whether the SCF was entitled to a credit or reimbursement in favor of that issue first being decided by the Director. We also reject Reese's claim that the SCF failed to preserve its right to claim a credit for its overpayments. The SCF's right to claim a credit or reimbursement did not arise until the Board apportioned liability between Aloha and Sheraton in the Amended Decision and Order.

CONCLUSION

We affirm the April 9, 2003, Order Denying Motion to Dismiss filed by the Labor and Industrial Relations Appeals Board (the Board). We vacate the portion of the Board's April 9, 2003,

Amended Decision and Order that apportioned liability 50%/50% between Aloha and Sheraton, but otherwise affirm the April 9, 2003, Amended Decision and Order. We remand the case for further proceedings consistent with this memorandum opinion.

DATED: September 15, 2006, at Honolulu, Hawaii.

On the briefs:

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Richard H. Hirai
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Li-Ann Yamashiro
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Presiding Judge



Associate Judge



Associate Judge