

*** NOT FOR PUBLICATION ***

NO. 24888

IN THE SUPREME COURT OF THE STATE OF HAWAII

SANDRA S. MISHIMA,
Claimant-Appellant,

vs.

HOLIDAY MART, INC.,
Employer-Appellee,

and

HAWAII INSURANCE GUARANTY ASSOCIATION,
Insurance Carrier-Appellee.

NORMA T. YARA
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STATE OF HAWAII

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(Case No. AB 90-692 (2-77-19564))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba and Duffy, JJ.)

The claimant-appellant Sandra S. Mishima appeals from the decision and order, filed on January 10, 2002, of the Labor and Industrial Relations Appeals Board (LIRAB).

On appeal, Mishima contends that the LIRAB erred in: (1) "not enforcing the settlement agreement reached between the parties"; (2) "not enforcing prior decisions [that] the 1977 [i]njury permanently aggravated [Mishima]'s back"; and (3) "not recognizing [the] relation between back and psychiatric components of [Mishima]'s 1977 injury" (emphases omitted).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the LIRAB's January 10, 2002 decision and order for the following reasons:

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(1) The LIRAB correctly denied Mishima's October 9, 2001 motion for summary judgment. Of the five arguably probative exhibits attached to her motion, only Herbert Takahashi's January 31, 2001 declaration attests to Gilbert Kurata's behavior at the moment of alleged contract formation. Moreover, the only evidence therein of Kurata's state of mind was Takahashi's statement that "Kurata agreed to the terms of [Takahashi's] proposal for settlement." This statement amounts to Takahashi's legal conclusion that Kurata "agreed," without any factual support. Accordingly, as LIRAB Chairman Randall Iwase implied, Mishima's exhibits, viewed in a light most favorable to the claimant-appellee Holiday Mart, Inc. and the insurance carrier-appellee Hawaii Insurance Guaranty Association [hereinafter, collectively, "the Appellees"], did not foreclose "genuine issue[(s)] as to any material fact and [show] that [Mishima was] entitled to a judgment as a matter of law" with respect to the alleged formation of a settlement. Cf. Poe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 196, 952 P.2d 569, 574 (1998).

(2) Notwithstanding the director's finding in the 1981 decision that Mishima was permanently and totally disabled (PTD), the 1981 decision also provided that, "[p]ursuant to [Hawai'i Revised Statutes (HRS) § 386-21 (Supp. 1979)], [the Appellees] shall pay for such medical care, services and supplies as the nature of the [1977 injury] may require" and not, as Mishima asserts, that the Appellees would remain liable in perpetuity for treatments to (a) Mishima's back, and (b) any correlative malady. (Emphases added.) Moreover, the director's use of the language

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"[p]ursuant to [HRS § 386-21]" implies that Mishima was entitled to "medical care, services and supplies" "furnish[ed]" by the Appellees only "so long as reasonably needed." See HRS § 386-21. The language of the decision shows that the director contemplated a future date when treatment might run its course, and that Mishima's concededly PTD status was independent of her need for "medical care, services and supplies."¹ In sum, the LIRAB did not need to give collateral estoppel effect to the director's 1981 decision inasmuch as the practical effect of that decision "was subject to modification by its own terms or by applicable law, and events have occurred subsequent to the [1981 decision] that warrant modification of the contemplated kind." See Restatement (Second) of Judgments § 73(1) & cmt. a (1980 & Supp. 2005).

(3) Mishima attempts to argue that, even if this court affirms the LIRAB's findings of fact (FOFs) that her "back condition was psychosomatic," her 1977 injury is still compensable "[g]iven the interrelatedness between [her] back condition and her psychiatric condition." Construing Mishima's position as liberally as possible, she could be arguing that, because (a) the aggregate effect of her back condition and her mental illness renders her unable to work, and (b) her back condition continues to aggravate her mental illness, the Appellees must continue to provide care for her back condition.

¹ Furthermore, Hawaii's workers' compensation law, HRS ch. 386, mentions "permanent total disability" only in the context of an employer's responsibility to continue a percentage of weekly wages, not open-ended and indefinite expenses for all future treatment or rehabilitation for any and all subsequent conditions. See HRS §§ 386-31, -33, -35, 51 (1993 & Supp. 2000).

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Mishima apparently presupposes that her current back condition was caused by the 1977 injury. To the contrary, the LIRAB's uncontested FOFs² indicate that "[l]umbar spine x-rays in 1987 and 1989, and the CAT scans in 1986 and 1990, have all been negative. . . . Dr. Kam, Dr. Hector, Dr. Watanabe, and Dr. Eliashof have all indicated that [Mishima]'s ongoing low back symptoms are non-organic/psychiatric in origin." (Emphasis added.) In light of uncontroverted evidence, the factual premise of Mishima's argument is fatally flawed. Therefore,

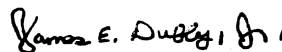
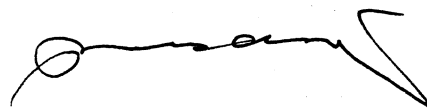
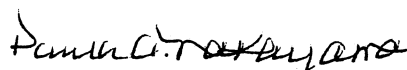
IT IS HEREBY ORDERED that the decision and order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, May 4, 2006.

On the briefs:

Rebecca L. Covert, of
Takahashi, Masui & Vasconcellos,
for the claimant-appellant
Sandra S. Mishima

Wayne W. H. Wong,
for the employer-appellee
Holiday Mart, Inc.
and the insurance
carrier-appellee Hawaii
Insurance Guaranty Association



² Mishima rebuts the applicability of the LIRAB's 1990 FOFs on collateral estoppel grounds, but raises no substantive challenge.