

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

KENNETH W. MCHENRY,	)	CASE NO. AB 92-028(WH)
	)	DCD No.: 9-89-01972
Claimant-Appellee,	)	9-91-00794
Deceased,	)	
	)	D/A: August 30, 1987
vs.	)	March 6, 1989
	)	
KAISER PERMANENTE DBA HAWAII	)	
PERMANENTE MEDICAL GROUP,	)	Jul 17 2026, 8:18 am
	)	FILED _{akw}
Employer-Appellant,	)	Labor and Industrial Relations
Self-Insured.	)	Appeals Board
	)	
	)	
	)	
	)	
	)	

ORDER GRANTING, IN PART AND DENYING, IN PART EMPLOYER'S MOTION

This workers' compensation case is before the Labor and Industrial Relations Appeals Board on appeal by Employer, Self-Insured KAISER PERMANENTE DBA HAWAII PERMANENTE MEDICAL GROUP from the Decision filed by the Director of Labor and Industrial Relations on December 19, 1991.

On June 17, 2026, Employer filed a "1) Motion to Amend or Supplement Issue on Appeal, and 2) Motion for Extension of Deadlines for Trial" (hereinafter collectively referred to as "Motion"). Employer filed its Motion as a non-hearing motion.

No opposition to Employer's Motion was received by the Board.

Based upon the record, written Motion, and memorandum in

support of Motion, the Board makes the following findings of fact, analysis, and order relevant to the determination of Employer's Motion:

FINDINGS OF FACT

1. Claimant, a physician, alleged that he sustained a neck injury on August 30, 1987 while in the employ of Employer, when he fell asleep in chair, with his neck over the back of the chair (hereinafter, "1987 injury").

2. Claimant's claim for this 1987 injury was designated as Disability Compensation Division ("DCD") Case No. 9-89-01972.

3. On February 22, 1991, Claimant filed a WC-5 Employee's Claim for Compensation form ("WC-5"), dated January 27, 1991, alleging that he aggravated his prior cervical injury and sustained cord compression on March 6, 1989¹, when he was "travelling to [the] hospital to deliver a baby on an emergency call" when his "car stalled" and he had to "push[] it, aggravating [his] back" (hereinafter, "1989 injury").

4. Claimant's claim for this 1989 injury was designated as DCD Case No. 9-91-00794.

5. The DCD consolidated Claimant's 1987 injury (DCD Case No. 9-89-01972) and 1989 injury (DCD Case No. 9-91-00794) for purposes of review and hearing.

6. A hearing was held before the DCD on October 8, 1991 to

¹ Claimant's WC-5 reflects a date of injury of March 8, 1989. However, the Director's December 19, 1991 Decision from which this appeal was taken and subsequent correspondence from Claimant's then attorney reflect a date of injury of March 6, 1989. Thus, the Board refers to the updated date of accident of March 6, 1989.

address the issue of compensability and other issues as appropriate in DCD Case Nos. 9-89-01972 and 9-91-00794.

7. On December 19, 1991, the Director entered his Decision regarding Claimant's 1987 injury (DCD Case No. 9-89-01972) and 1989 injury (DCD Case No. 9-91-00794).

8. The Director's 1991 Decision reflects that during the October 8, 1991 hearing, Employer contested liability for Claimant's 1987 and 1989 injuries to his neck, arguing that Claimant's neck condition was due to an accident that occurred, earlier, in 1979 or 1980, when Claimant was struck by a parking lot gate.

9. The Director, in his 1991 Decision, determined that Claimant's 1987 injury (DCD Case No. 9-89-01972) was compensable.

10. In doing so, the Director determined that Claimant "suffered an aggravation of his preexisting neck condition on August 30, 1987." Citing various medical reports, the Director concluded that Claimant "suffered further compression of his spinal cord from sleeping with his neck extended over the back of a chair." The Director further concluded that as a result of the 1987 injury, Claimant "developed early myelopathy."

11. At the time of the Director's 1991 Decision, the Director "found no evidence in the record to support [E]mployer's position that the aggravation resolved to pre-injury status."

12. In support of his determination that the record did not support a finding that the 1987 aggravation had resolved, the Director further

noted that, as a result of the 1987 injury, Claimant underwent cervical spine surgeries in November of 1987 and May of 1989. The Director stated that both surgeries were related to the 1987 injury.

13. The Director specifically determined that “matters of temporary disability, permanent disability, and/or disfigurement, if any, shall be determined at a later date” with respect to Claimant’s 1987 injury.

14. The Director noted that while the parties agreed that Claimant was disabled, “there is disagreement on the temporary total disability period” and stated that if Claimant and Employer did not resolve this issue on their own, a “further hearing will be scheduled. . .”

15. The Director stated only that Claimant “is temporarily totally disabled at this time,” without awarding any periods of disability.

16. The Director’s December 19, 1991 Decision is silent as to whether Claimant’s 1987 injury resulted in a temporary or permanent aggravation of Claimant’s pre-existing neck condition.

17. With respect to Claimant’s February 22, 1991 claim for compensation (WC-5) for a 1989 injury, the Director denied compensability of the 1989 injury. Page 3 of the Director’s Decision, under the heading “DECISION,” reads as follows:

3. The claim for compensation filed February 22, 1991 is hereby denied (CN: 99199794).

18. The Director concluded that, in light of his other findings, it was “unnecessary to explore the matters related to the March 6, 1989 claim of

injury.”

19. Employer timely appealed the Director’s December 19, 1991 Decision.

20. Claimant did not appeal the Director’s December 19, 1991 Decision.

21. Following Employer’s appeal of the Director’s December 19, 1991 Decision, the Board convened an initial conference on February 13, 1992. During this initial conference, the issues on appeal were set, and discovery deadlines were established.

22. Prior to the initial conference, Claimant, who was represented by counsel, filed a Pre-Trial Statement on February 10, 1992. In relevant part, Claimant stated that the issue on appeal would be determined by Employer.

23. Prior to the initial conference, Employer filed a Pretrial Conference Statement on February 12, 1992. In relevant part, Employer stated that the issue on appeal was “Compensability of the August 30, 1987 alleged industrial accident in Case No. 9-89-01972.” No other issue on appeal was identified by Employer.

24. The record on appeal is devoid of any pretrial order confirming the issues on appeal.

25. It is not known whether or not the Board issued a pretrial order following the initial conference. It was not uncommon in the 1990s for the Board not to issue pretrial orders confirming the issue(s) on appeal and the

deadlines on appeal. If a pretrial order was issued, the pretrial order is not part of the Board's record on appeal.

26. On February 25, 1992, the Board issued an Order Granting Motion for Stay of Payments and Benefits.

27. Trial in this appeal was scheduled for November 18, 1992. Trial did not proceed as scheduled because on November 10, 1992, Employer informed the Board that a trial was not necessary because the parties had agreed to a settlement, in principle.

28. The record reflects that Employer's attorney provided a settlement document to Claimant's attorney on or about November 17, 1992.

29. Between November 1992 and July 2003, for a period of over 10 years, Employer and Claimant agreed to settle this matter, but a settlement document was not executed by the parties and submitted to the Board.

30. On July 29, 2003, the Board entered a Stipulation for Remand, wherein Employer and Claimant agreed to temporarily remand this matter to the Director. The stipulation did not identify the issues to be determined by the Director on remand.

31. Two and a half (2½) years later, or on February 16, 2006, the DCD returned this matter to the Board. The DCD explained that the parties had not requested a hearing before the Director and had not identified any issue to be heard by the Director.

32. Over one (1) year later, on April 30, 2007, the Board entered a second Stipulation for Remand wherein Employer and Claimant again agreed

to temporarily remand this matter to the Director. The stipulation did not identify the issues to be determined by the Director on remand.

33. Claimant died on September 18, 2020 in the State of Utah.

34. The Board was not informed of Claimant's death until over two (2) years later, on February 24, 2023.

35. Between April 30, 2007 and September 2025, or for over 18 years, the Director did not take any action in this matter. It appears that the parties did not request a hearing before the Director and had not identified any issue to be heard by the Director.

36. On September 22, 2025, the Director returned jurisdiction of this matter to the Board.

37. Between September 2025 and May 2026, the Board, with the assistance of Employer's attorney and Claimant's former attorney, attempted to identify the personal representative or special administrator of Claimant's Estate.

38. Almost 28 years elapsed since Employer informed the Board that this matter had settled (November 10, 1992) and Claimant's death (September 18, 2020), and the parties did not execute a settlement agreement during this period of time.

39. Approximately 5 years and 10 months have passed since Claimant's death (September 18, 2020), and no person has presented himself/herself/themselves to the Board as the personal representative or special administrator of Claimant's Estate, and no person has substituted as

Claimant, in this appeal.

40. On May 29, 2026, the Board entered a First Amended Pretrial Order. In relevant part, the First Amended Pretrial Order confirmed that the sole issue to be determined on appeal is as follows:

Whether Claimant sustained a personal injury to the neck on August 30, 1987 (DCD Case No. 9-89-01972) and/or March 6, 1989 (DCD Case No. 9-91-00794), arising out of and in the course of employment.

41. Also in relevant part, the First Amended Pretrial Order noted that all discovery deadlines had passed.

42. Also in relevant part, the First Amended Pretrial Order set a trial date of September 8, 2026.

ANALYSIS

I. Compensability

By way of its Motion, Employer seeks to amend the Board's First Amended Pretrial Order to limit the issue on appeal as to whether Claimant sustained a compensable injury to his neck on August 30, 1987, thereby omitting the issue as to whether Claimant sustained a compensable injury on March 6, 1989.

The Board determines that Employer's request to amend the issue on appeal, in this particular respect, has merit. In this instance, Employer is the only party who appealed the Director's December 19, 1991 Decision. Employer has been consistent since the outset of its appeal that it contests the Director's determination that Claimant's 1987 injury is compensable. Notably,

Employer's Pretrial Conference Statement filed as far back as February 12, 1992 identified the issue on appeal as compensability of the 1987 injury and made no reference to the 1989 injury. Further, if Claimant contested the Director's determination that the 1989 injury was not compensable, Claimant should have, but did not, file an appeal of the Director's 1991 Decision. To the contrary, Claimant, through his counsel, deferred the identification of issue(s) on appeal to Employer.

Accordingly, the Board GRANTS Employer's Motion to amend the issue on appeal as follows:

Whether Claimant sustained a personal injury to the neck on August 30, 1987 (DCD Case No. 9-89-01972), arising out of and in the course of employment.

By doing so, the Board recognizes that the Director's determination that Claimant's claim for compensation filed February 22, 1991 (DCD Case No. 9-91-00794 for a March 6, 1989 date of injury that was previously identified as a March 8, 1989 date of injury) is denied stands. Neither Claimant nor Employer raised or is raising the Director's denial of compensability of the 1989 injury.

II. Temporary vs. Permanent Aggravation

By way of its Motion, Employer further requests that an issue be added. Namely, Employer requests that, if it is determined that Claimant's 1987 injury is compensable, the Board determine whether the 1987 injury is a temporary or permanent aggravation. And if a temporary aggravation, Employer requests that the Board determine the duration of the aggravation.

It is well-settled that the Director has “original jurisdiction” over all workers’ compensation disputes arising under Hawaii Revised Statutes (“HRS”) Chapter 386. HRS § 386-73 states, in relevant part:

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter.

(Emphasis added.) Stated otherwise, this means that all issues or controversies arising in workers’ compensation cases must first be reviewed and determined by the Director.

Even though the Board may be in possession of the case file, the Board cannot review and make any determinations regarding issues not previously adjudicated or determined by the Director. This mandate is further supported by HRS § 371-4(b) which states that the “Board shall have power to decide appeals from decisions and orders of the director of labor and industrial relations issued under the workers’ compensation law and any other law for which an appeal to the board is provided by law” (emphasis added) and LAB Rules § 12-47-20 which states that “the board may decline to hear and determine any issue which the director in the decision on appeal did not decide or left for future determination.” In other words, the Board’s jurisdiction is limited to a review of decisions and orders by the Director in which an appeal has been taken.

Accordingly, the Board cannot make any determinations regarding an issue or controversy that was not previously decided by the Director. Thus, even if a case file is under the Board’s jurisdiction, this does not mean that the

Board can determine every issue or controversy that may arise within the context of that case. When a case file is under the Board's jurisdiction, the Board's review and determination are limited to certain issues on appeal – issues that were previously decided by the Director and properly appealed to the Board.

In this case, Employer's appeal concerned the Director's December 19, 1991 Decision which was essentially limited to the finding that Claimant's 1987 injury was compensable and that Claimant's 1989 injury was not compensable. Although Employer apparently argued before the Director that Claimant suffered from a serious, preexisting neck condition, the Director did not make any determination as to whether Claimant's 1987 injury was a temporary or permanent aggravation. While the Director did conclude that Claimant's 1987 injury was an aggravation of a pre-existing neck condition and although the Director was of the belief that this aggravation extend through, at least, May of 1989 when Claimant underwent the second of two cervical spine surgeries, the Decision is absolutely devoid of any conclusion by the Director as to whether or not Claimant's 1987 injury permanently aggravated his preexisting neck condition or whether it reverted back to pre-1987 injury status.

Employer is mistaken in its assumption that, by finding that Claimant aggravated his preexisting neck condition as a result of the 1987 injury, the Director "meant that this was not a temporary aggravation." See Employer's Motion at page 3. Similarly, Employer is also mistaken in its

assumption that “by not limiting the period of liability for the aggravation, the aggravation was permanent and ongoing and was not temporary in nature.” Id. To the contrary, the Director specifically found that Claimant “is temporarily totally disabled at this time.” That is, at the time the Director issued his Decision, he believed Claimant’s condition to be, at least, temporary. By deferring a determination as to the duration of Claimant’s temporary disability status and by deferring a determination as to whether or not Claimant was permanently disabled, the Director did not determine if and when Claimant’s 1987 injury, then in its “temporary” state, was a permanent aggravation of a preexisting injury or a temporary aggravation of a preexisting injury. Thus, the Director did not adjudicate the issue of the nature of Claimant’s 1987 aggravation (i.e., temporary vs. permanent), and as such, the Board cannot address this issue on appeal. Accordingly, the Board DENIES Employer’s request to include this issue on appeal.

The Board’s conclusion herein is also consistent with Employer’s own Pretrial Conference Statement, filed on February 12, 1992. Notably, Employer did not identify the nature of the 1987 aggravation (i.e., temporary vs. permanent) as a potential issue on appeal.

III. Discovery

By way of its Motion, Employer seeks an opportunity to conduct and submit additional discovery. It has been 34 years since Employer’s appeal of the Director’s 1991 Decision. Employer avers that during this time, discovery was conducted in Claimant’s civil cases, indicating that this discovery may be

relevant to the matter before the Board.² Employer is not requesting that the trial date of September 8, 2026 be extended. Rather, Employer requests that discovery deadlines be assigned prior to September 8, 2026.

Given the length of time that has elapsed since Employer's appeal of this matter, the unique circumstances of this case, and the strong possibility of the existence of discovery that may aid in the Board's determination of this appeal, the Board GRANTS Employer's request to conduct and submit further discovery and assigns the following deadlines as requested by Employer:

Unnamed witness notification:	August 21, 2026
Live witness identification:	August 28, 2026
Medical reports submission:	August 28, 2026
Discovery cut-off:	September 8, 2026

Additionally, and consistent with the Board's current pretrial orders, the Board also orders the following "Board Ordered Medical Records Submission" deadline:

On or before the medical reports submission deadline as stated above, all parties must file with the Board, at their own expense, originals or copies of all medical records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline. This submission shall be entitled "Board Ordered Medical Records Submission." Attorneys must ensure that the Board is in possession of all medical records in

² The Board gently reminds Employer that pursuant to § 12-47-21, Hawaii Administrative Rules ("HAR"), Board Rules of Practice and Procedure, when filing a motion, "[i]f the motion requires consideration of facts not appearing in the record, it shall be supported by an affidavit." In this instance, Employer's Motion did not include an affidavit or declaration supporting this allegation or statement by Employer. However, for purposes of this Motion, the Board considered and credited Employer's statements regarding discovery in Claimant's civil cases.

the attorney's possession, as well as their clients' possession. This includes but is not limited to the filing with the Board any and all subpoenaed medical records regarding Claimant; any and all medical records regarding Claimant in the possession of Insurance Carrier/Adjuster/Administrator; and any and all billing statements pertaining to medical treatment, tests, reports, and/or procedures regarding Claimant in the possession of any party. A copy of the "Board Ordered Medical Records Submission" must be served on all parties to the appeal.

Any "Board Ordered Medical Records Submission" that is 50 pages or more must be submitted on either: (1) white paper, 8.5 x 11 inches in size, single-sided; or (2) on a CD, DVD, or USB drive (i.e., thumb drive, flash drive) accompanied by an appropriate written declaration (see paragraph, below).

The Board will not accept a "Board Ordered Medical Records Submission" as an attachment to an email to the Board if the attachment is 50 pages or more.

In the event that a party previously filed any and all records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline and no further submissions of medical records are being made, the party shall file a "Board Ordered Medical Records Submission" which affirmatively states that no further submissions of medical records are being made pursuant to the Board's order because any and all records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline were previously filed and are part of the record on appeal.

ORDER

Having considered Employer's motion and being fully apprised in the premises,

IT IS HEREBY ORDERED that Employer's motion be and hereby is GRANTED, in part, and DENIED, in part as follows:

1. The Board GRANTS Employer's Motion to amend the issue on appeal to the extent that the sole issue on appeal is amended as follows:

Whether Claimant sustained a personal injury to the neck on August 30, 1987 (DCD Case No. 9-89-01972), arising out of and in the course of employment.

2. The Board DENIES Employer's Motion to amend the issue on appeal to include the Board's determination of whether, if the 1987 injury is compensable, whether the 1987 injury was a temporary or permanent aggravation of a pre-existing condition.

3. The Board GRANTS Employer's Motion to conduct and file further discovery and establishes the following deadlines on appeal:

Unnamed witness notification:	August 21, 2026
Live witness identification:	August 28, 2026
Medical reports submission:	August 28, 2026
Discovery cut-off:	September 8, 2026

Board Ordered Medical Records Submission: On or before the medical reports submission deadline as stated above, all parties must file with the Board, at their own expense, originals or copies of all medical records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline. This submission shall be entitled "Board Ordered Medical Records Submission." Attorneys must ensure that the Board is in possession of all medical records in the attorney's possession, as well as their clients' possession. This includes but is not limited to the filing with the Board any and all subpoenaed medical records regarding Claimant; any and all medical records regarding Claimant in the possession of Insurance Carrier/Adjuster/Administrator; and any and all billing statements pertaining to medical treatment, tests, reports, and/or procedures regarding Claimant in the possession of

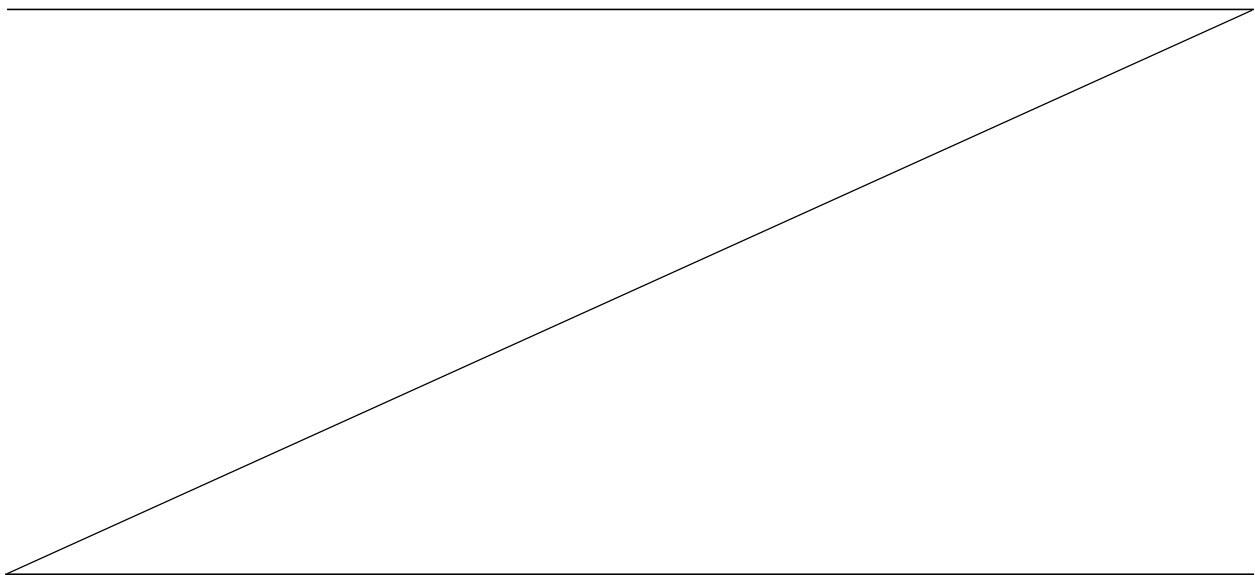
any party. A copy of the “Board Ordered Medical Records Submission” must be served on all parties to the appeal.

Any “Board Ordered Medical Records Submission” that is 50 pages or more must be submitted on either: (1) white paper, 8.5 x 11 inches in size, single-sided; or (2) on a CD, DVD, or USB drive (i.e., thumb drive, flash drive) accompanied by an appropriate written declaration (see paragraph, below).

The Board will not accept a “Board Ordered Medical Records Submission” as an attachment to an email to the Board if the attachment is 50 pages or more.

In the event that a party previously filed any and all records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline and no further submissions of medical records are being made, the party shall file a “Board Ordered Medical Records Submission” which affirmatively states that no further submissions of medical records are being made pursuant to the Board’s order because any and all records regarding Claimant that were in their possession as of 14 days before the medical reports submission deadline were previously filed and are part of the record on appeal.

The Board will issue a Second Amended Pretrial Order consistent with the foregoing.



Dated: Honolulu, Hawai'i,

Jul 17 2026



DAMIEN A. ELEFANTE, Chair



HARRY YEE, Member

EXCUSED

DOUGLAS T. MOORE, Member

Kenneth W. McHenry v. Kaiser Permanente dba Hawaii Permanente Medical Group, et al.; AB 92-028(WH); Order Granting, in Part and Denying, in Part Employer's Motion

A digital copy of the Board's Order Granting, in Part and Denying, in Part Employer's Motion was also posted on the Board's website and will remain on the Board's website for at least 180 days from the date of filing.

Kenneth T. Goya, Esq.
For Employer/Insurance
Carrier-Appellant

A certified copy of the foregoing was served upon the above-captioned parties or their legal representatives on the date of filing noted above.

LABOR APPEALS BOARD - 830 PUNCHBOWL ST, RM 404, HONOLULU, HI 96813 - (808)586-8600

If you need a language interpreter or if you need an auxiliary aid/service or other accommodation due to a disability, please contact the Board at (808) 586-8600 and/or dlir.appealsboard@hawaii.gov as soon as possible, preferably at least ten (10) business days prior to your hearing or conference date. Requests made as early as possible have a greater likelihood of being fulfilled. If a request is received after the reply date, the Board will try to obtain the interpreter, auxiliary aid/service, or accommodation, but the Board cannot guarantee that the request will be fulfilled.

Upon request, this notice is available in alternate/accessible formats such as large print, Braille, or electronic copy.

Equal Opportunity Employer/Program
Auxiliary aids and services are available
upon request to individuals with disabilities.
TDD/TTY Dial 711 then ask for (808) 586-8600

Kenneth W. McHenry v. Kaiser Permanente dba Hawaii Permanente Medical Group, et al.; AB 92-028(WH); Order Granting, in Part and Denying, in Part Employer's Motion

This certifies that the foregoing is a
full, true, and correct copy of the
original on file in this office.

/s/ *A. Watanabe* for LIRAB