

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28803

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CIRILO R. RAGASA, SR., Claimant-Appellant, v
FRED LAU HAWAIIAN LANDSCAPE COMPANY, INC., and
FIRST INSURANCE COMPANY OF HAWAII, LTD.,
Employer/Insurance Carrier-Appellee, and
SPECIAL COMPENSATION FUND, Appellee

NORMA I. YARRA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 DEC 30 AM 7:54
Jean Kikumoto

FILED

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2006-245 (2-00-18097))

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Leoanrd, JJ.)

Claimant-Appellant Cirilo R. Ragasa, Sr. (**Ragasa**)
appeals the Labor and Industrial Relations Appeals Board's
(**Board**) Decision and Order (**Decision**) in Case No. AB 2006-245 (2-
00-18097), filed on October 2, 2007.

On appeal, Ragasa contends that Findings of Fact Nos.
8, 16, 17, 21, 22, and 23 are clearly erroneous. Ragasa also
challenges the conclusion of law that holds he did not fall
within the odd-lot category and is therefore not permanently and
totally disabled.

Upon careful review of the record and the briefs
submitted by the parties and the issues raised by the parties, we
resolve Ragasa's points of error as follows:

We conclude that Findings of Fact Nos. 8, 16, 17, 21,
22, and 23 are not clearly erroneous. More specifically: the
record does not reflect that any physician opined that Ragasa
could not do any work; Rasaga's deposition clearly reflects that
he told the vocational rehabilitation counselor that his knee
hurt and he could not work; the record reflects that a vocational
rehabilitation counselor identified actual, viable and suitable
jobs available in the normal labor market, during the relevant

period, taking into account Ragasa's limitations; Ragasa did not establish prima facie that he fell within the odd-lot category of PTD; and thus, Employer-Appellee Fred Lau Hawaiian Landscape Co., Inc. did not fail to rebut Ragasa's prima facie case that he fell within the odd-lot category.

The odd-lot doctrine holds "that where an employee receives a work-related permanent partial disability which combined with other factors such as age, education, experience, etc., renders him, in fact, unable to obtain employment, he is entitled to be treated as being permanently totally disabled." Tsuchiyama v. Kahului Trucking and Storage, Inc., 2 Haw. App. 659, 660-1, 638 P.2d 1381, 1382 (1982).^{1/} "It seems to be accepted that the employee has the burden of establishing prima facie that he falls within the odd-lot category." Id. at 661, 638 P.2d at 1382.

The uncontested evidence is that Ragasa could perform light work even with his knee pain. Ragasa presented no medical opinion regarding his ability to work. LIRAB credited a vocational rehabilitation counselor's (**Kobayashi**) testimony that his vocational rehabilitation was closed because Ragasa stated that he could not do any job even though it met his physical limitations and skills. Kobayashi's testimony that the labor market survey was positive was credited over the June 1, 2004 report by another vocational rehabilitation counselor (**Inoue**). Credibility of witnesses will not be disturbed on appeal. Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001).

Both Inoue and Kobayashi found multiple jobs in which employers stated that they would consider hiring Ragasa in 2005. Kobayashi concluded that these jobs were suitable and gainful

^{1/} Both Ragasa and Lau do not dispute that Ragasa was permanently partially disabled, thus, Ragasa has proven the first part of a prima facie case under the odd-lot doctrine.

employment in 2005. Kobayashi stated that she again found multiple jobs in which employers stated that they would consider hiring Ragasa in 2007. Kobayashi stated that these jobs were suitable and gainful employment in 2007. Ragasa refused to consider those jobs. Despite Ragasa's limited skills, limited education, and age, he failed to establish prima facie that he fell within the odd-lot category because he did not desire to return to work, which was available to him notwithstanding his limitations.

Therefore, the Board's determination that Ragasa did not make a prima facie showing of permanent total disability under the odd-lot doctrine is not clearly erroneous in light of the reliable, probative, and substantial evidence. Tsuchiyama v. Kahului Trucking and Storage, Inc., 2 Haw. App. 659, 661, 638 P.2d 1381, 1382 (1982).

For these reasons, we affirm the Board's October 2, 2007 Decision.

DATED: Honolulu, Hawai'i, December 30, 2008.

On the briefs:

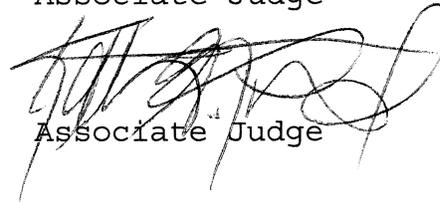
Stanford H. Masui
Wendy L. Campaniano
(Masui & Campaniano, LLP)
for Claimant-Appellant

Scott R. Devenney
Ann K. Watanabe
Paul A. Brooke
(Devenney Watanabe & Brooke)
for Employer/Insurance
Carrier-Appellee

Mark J. Bennett
Attorney General
Frances E.H. Lum
Li-Ann Yamashiro
Deputy Attorneys General
Department of the Attorney
General, State of Hawaii
Labor Division


Presiding Judge


Associate Judge


Associate Judge