NO. 27029

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

NORMAN P. ENOS, Claimant-Appellant,

vs.

ELITE MECHANICAL, INC., and EAGLE INSURANCE COMPANIES, Employer/Insurance Carrier-Appellee,

and

SPECIAL COMPENSATION FUND, Appellee.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2002-433 (2-99-06954))

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

In this workers' compensation case, Claimant-Appellant Norman P. Enos appeals from the November 29, 2004 decision and order of the Labor and Industrial Relations Appeals Board (LIRAB) affirming in part and modifying in part the September 6, 2002 decision of the Director of the Department of Labor and Industrial Relations (Director) awarding Enos temporary total disability (TTD) and permanent partial disability (PPD) benefits. On appeal, Enos contends that the LIRAB erred in determining that he is not permanently and totally disabled (PTD) on either a medical or odd-lot basis. Specifically, Enos argues that: (1) the LIRAB erred as a matter of law in (a) concluding that he failed to make out a prima facie case that he was PTD on an odd-

lot basis, and thus (b) failing to shift the burden to Insurance Carrier-Appellee Eagle Insurance Companies (Eagle) and Employer-Appellee Elite Mechanical, Inc. (Elite) [hereinafter collectively, Elite] to show that appropriate employment existed for Enos; (2) the LIRAB clearly erred in making certain findings of fact and failing to make findings about other facts that would support a finding of PTD; and (3) the LIRAB erred as a matter of law in utilizing Enos's medical capability to engage in light sedentary work as the test for whether he was PTD when it should have assessed whether he had a reasonable prospect of finding work in the normal labor market. Enos further asserts that his psychiatric condition warrants greater than 15% PPD of the whole person. Elite counters that: (1) (a) the LIRAB did not clearly err in determining that Enos had failed to establish a prima facie case of PTD under the odd-lot doctrine, and (b) therefore the burden never shifted; (2) the LIRAB did not err in finding that Enos was not PTD either on a medical or odd-lot basis; and (3) the LIRAB did not err in determining Enos's PPD benefits. Appellee Special Compensation Fund (SCF) also argues that: (1) there is substantial evidence in the record to support the LIRAB's finding that Enos is not PTD on an odd-lot basis; (2) the LIRAB did not err in identifying or applying the legal standard for "total disability" because it implicitly found that Enos had a reasonable prospect of finding work in the normal labor market;

and (3) the LIRAB's overall PTD finding is not clearly erroneous because it is supported by substantial evidence.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) The LIRAB did not clearly err in finding that the evidence did not place Enos prima facie within the odd-lot category, and thus, the LIRAB did not err as a matter of law in concluding that the burden to show appropriate employment did not shift to Elite. See Yarnell v. City Roofing, Inc., 72 Haw. 272, 276, 813 P.2d 1386, 1389 (1991) (stating that it is a question of fact as to whether a person prima facie falls within the odd-lot category, but shifting the burden of proof is a question of law) (citing Worker's Comp. Claim of Canon v. FMC Corp., 718 P.2d 879, 885 (Wyo. 1986)). The results of the functional capacity evaluation [hereinafter, FCE], the opinions of Frank Izuta, M.D., John Endicott, M.D., and Anthony Mauro, M.D., that Enos was capable of sedentary work for eight hours a day, and the opinion of Jon Streltzer, M.D., that Enos had only a mild psychological condition, combined with Enos's young age, education, and experience provide substantial evidence to support the LIRAB's finding. See Yarnell, 72 Haw. at 275, 813 P.2d at 1388 ("If the evidence of degree of obvious physical impairment, coupled with

other facts such as claimant's mental capacity, education, training, or age, places claimant prima facie in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant." (Citation omitted.)); see also Igawa v. Koa House Rest., 97 Hawai'i 402, 409-10, 38 P.3d 570, 577-78 (2001) ("It is well established that courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field." (Citation omitted.)); Steinberg v. Hoshijo, 88 Hawai'i 10, 18, 960 P.2d 1218, 1226 (1998) ("[A]n appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." (Citation omitted.)). Thus, the LIRAB did not err as a matter of law in determining that the burden was not on Elite to demonstrate the existence of suitable employment;

(2) The LIRAB's finding that Enos is not PTD on a medical basis is supported by substantial evidence in the record, including: (a) the results of the FCE, with which Dr. Izuta, Dr. Endicott, and Dr. Mauro all agreed, showing that Enos was capable of sedentary, light work for eight hours a day; and (b) Dr. Streltzer's opinion that Enos was not psychiatrically disabled

from work, but may have had motivational issues that prevented him from returning to work. Implicit in these conclusions is the view that there is a reasonable possibility that Enos could find suitable work in the normal labor market. To remand under the circumstances because the LIRAB did not recite the statutory language would elevate form over substance. See HRS § 386-1 (1993) (defining "total disability" as "disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market"); In re Estate of Herbert, 90 Hawai'i 443, 454, 979 P.2d 39, 50 (1999) ("It is not the function of appellate courts to second-guess the trier of fact where there is substantial evidence in the record to support its conclusion." (Citation omitted.)); Protect Ala Wai Skyline v. Land Use & Controls Comm. of City Council of City & County of Honolulu, 6 Haw. App. 540, 547, 735 P.2d 950, 955 (1987) ("[T]he law does not require that all the evidence put before an administrative agency must support the agency's findings. It is legally sufficient if the findings are supported by the reliable, probative and substantial evidence in the whole record." (Citations omitted.)), overruled on other grounds by GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998); and

(3) The LIRAB did not err in finding that Enos's psychiatric condition warrants 15% PPD of the whole person

inasmuch as the opinions of Dr. Streltzer and Dr. Ronald Barozzi provide substantial evidence in support thereof. See Igawa, 97 Hawai'i at 409-10, 38 P.3d at 577-78; Protect Ala Wai Skyline, 6 Haw. App. at 547, 735 P.2d at 955. Therefore,

IT IS HEREBY ORDERED that the LIRAB's November 29, 2004 decision and order is affirmed.

DATED: Honolulu, Hawai'i, October 27, 2006.

On the briefs:

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