

DISSENT BY ACOBA, J.

Respectfully, I would accept certiorari in this case.

In my view, the Intermediate Court of Appeals (ICA) gravely erred (1) in affirming the August 17, 2005 majority ruling of the Labor and Industrial Relations Appeals Board (LIRAB) that Petitioner/Claimant-Appellant Benedicto Caberto (Petitioner) did not present a prima facie case that he was permanently and totally disabled (PTD) under the odd-lot doctrine, and (2) in imposing on Petitioner the burden of proving by a preponderance of the evidence that he was precluded from performing some type of work under that doctrine. The LIRAB reached its decision by a vote of two to one, with Board Member Vicente F. Aquino dissenting.

I.

A.

In his Application, Petitioner claims (1) that he "made a prima facie showing that he [was] odd-lot PTD," and (2) that the LIRAB "improperly imposed the burden onto [sic] [him] to show that he [was] unable to work." First, as to the odd-lot doctrine, "briefly summarized, [it] 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." Tschiyama v. Kahului Trucking & Storage, Inc., 2 Haw. App. 659,

660-61, 638 P.2d 1381, 1382 (1982). A claimant has the burden of establishing a prima facie case that he falls within the odd-lot category. Yarnell v. City Roofing Inc., 72 Haw. 272, 275, 813 P.2d 1386, 1388 (1991).

As opposed to the burden of producing a preponderance of the evidence discussed infra, a prima facie case is defined only as "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1228 (8th ed. 2004). In order to determine whether this prima facie case is established in the odd-lot context, the court looks to the "degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, [and] age." Yarnell, 72 Haw. at 275, 813 P.2d at 1388 (quoting 2 A. Larson, Workmen's Compensation Law § 57.61(c) at 10-178 (1989)). Notably, "there is a presumption that, if claimant suffers physically, and bears the additional characteristics, then he has proved the prima facie case." Id. (emphasis added.) At that point, the burden shifts to the employer to "prove the existence of regular suitable employment." Id.

Here there was "enough evidence to . . . infer" that Petitioner fell within the odd-lot doctrine and to "rule in [his] favor." Black's Law Dictionary 1228. Hence, by virtue of the "presumption," the burden was thereafter on Respondent/Employer-Appellee Maui Electric Company (Respondent) to show "regular

suitable employment was available" to Petitioner. As an initial matter, there was no question that Petitioner suffered physically. In its Findings of Fact (findings) the LIRAB declared that "[o]n June 18, 1992, [Petitioner] felt a pop in his back while pulling cables at work[,]" and that "[Petitioner] has objective findings for degenerative disc disease in the lumbar spine with evidence that the condition had progressed since the industrial injury." As the LIRAB concluded, Petitioner was "entitled to benefits for 15% [permanent partial disability (PPD)] for his back condition."

Further, as related by Board Member Aquino in his dissent to the LIRAB's ruling, between 1988 and 1999, Petitioner sustained three separate work-related injuries while working for Respondent. Board Member Aquino stated that Petitioner

[1] continued to work despite his back pain that radiated to his lower extremities with some numbness, weakness, and tingling sensations. . . .

[2] On [February 27, 1998, Petitioner] began to see Dr. Gregory Chow, an orthopedic surgeon. Dr. Chow's impression was back pain caused by L4-5 disc degeneration which, according to him, probably occurred at the time of the work injury. . . . [3] On [March 3, 2005], Dr. Chow stated that Claimant needed continuing care for pain management, psychological counseling, feedback, and stress reduction, and that his condition would just get worse in time and might need surgery as a result of the 1992 injury.

(Emphasis added.)

Additionally, there was no question that there was evidence Petitioner bore the additional characteristics that would place him within the odd-lot doctrine. As Board Member Aquino related,

[o]n [June 1, 2002], Dr. Danilo Ponce, a psychiatrist, performed an independent psychiatric examination . . . of

[Petitioner]. . . . [Dr. Ponce] indicated that [Petitioner] definitely needed psychiatric treatment, preferably someone who could talk his dialect. He opined that [Petitioner] was not as yet psychiatrically stable and ratable. Thus, understandably, he did not give a rating.

. . . .
[On February 5, 2003,] Dr. Jonathan Gasper, [Petitioner's] treating physician, . . . indicated that although he agreed that [Petitioner] could return to light physical labor, his psychiatric problems had severely hampered his return to being a functional member of his family and community. . . .

. . . .
[At the April 4, 2005 LIRAB] hearing, Dr. Ponce . . . testified that [Petitioner was] still currently psychiatrically disabled and his ongoing major depression was disabling from any type of work, even modified, light duty basis. . . . Dr. Ponce concluded that [Petitioner] was [PTD] on the basis of his psychiatric condition.

[Petitioner's] vocational rehabilitation (VR) counselor, Ms. Norma Paet, reported that Lanai, where [Petitioner] lives, had only one major employer, Lanai Company, and its many employees were without work due to layoffs. Thus, even sedentary work would not work and would not compare to the level of wages [Petitioner] was earning. Ms. Paet indicated that [Petitioner] could not be considered for employment even on Maui because of transportation commute [sic] and that [Petitioner's] level of pain and difficulty walking without a cane was a major barrier in his mobility. It was too expensive to work out of Lanai.

. . . .
Ms. Paet testified that she closed the VR as unfeasible because there was no suitable and gainful employment for [Petitioner] with his restrictions and vocational abilities and aptitude.

(Emphases added.)

Based on this record, there was enough evidence from which to infer and to rule in favor of Petitioner in order to establish a prima facie case pertaining to the odd-lot doctrine. As Board Member Aquino concluded,

[h]ere, [Petitioner] cannot sit for extended [sic] period of time, nor can he stand for a prolonged period of time. His education and entire job experience were limited to electrical work. The employment must be regularly and continuously available to [Petitioner]. And "casual and intermittent" employment is not "suitable and gainful" employment. Accordingly, [Petitioner] falls under the odd-lot category.

(Emphasis added.) (Citation omitted.)

B.

Board Member Aquino also related that "[a]ssuming, arguendo, [Petitioner] does not fall under the odd-lot category, he may, and should, still be determined PTD[.]" While concerned with PTD, Board Member Aquino's discussion on this point is nevertheless pertinent to whether Petitioner falls within the odd-lot category. According to Board Member Aquino, the testimony of Dr. Ponce should have been credited over that of a May 29, 2002 written report by Dr. F. Peter Bianchi, that was relied upon by the LIRAB majority for the following reasons:

Significantly, unlike . . . Dr. Bianchi, Dr. Ponce delved into the cultural background of [Petitioner] consistent with the recommendations of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR).

As the DSM-IV-TR notes[,] in evaluating a patient "it is important that the clinician take into account the individual's ethnic and cultural context in the evaluation of each of the DSM-IV axes." . . .

. . . .
It is well settled that in assessing impairments the AMA Guides may be used as a reference but do not mandate their use to the exclusion of other appropriate factors. [Hawai'i Administrative Rules] § 12-10-21[;] [Cabatbat] v. County of Hawaii, 103 [Hawai'i] 1, 6, 78 P.3d 756, 762 (2003). In my view, Dr. Ponce's testimony, corroborated by VR counselor Ms. Paet, constituted more credible evidence of sufficient quality and probative value than that of Dr. Bianchi's written report and was enough to overcome the latter's reliance on the AMA Guides. Based on Dr. Ponce's years of experience as a psychiatrist, his treatment and thorough examination of [Petitioner] in accordance with the DSM-IV-TR's recommendations, I am constrained to give more weight to his opinion over that of Dr. Bianchi.

(Emphases added.)

As Board Member Aquino concluded, it is plain Petitioner satisfied his burden of establishing a prima facie case that he fell within the odd-lot category. Petitioner was forty-seven years old at the time of the hearing, and his

"education and entire job experience were limited to electrical work." Based on the record, as Petitioner argued in his Opening Brief, he was "limited in his English language capabilities due to living in a community on Lanai where he predominantly converses in his native tongue of Ilocano." Furthermore, as Petitioner's VR counselor Ms. Paet testified, she closed the VR as unfeasible because there was no suitable and gainful employment for [Petitioner] with his restrictions and vocational abilities and aptitude in any viable location. As Dr. Ponce testified, based on the appropriate use of the DSM-IV-TR, Petitioner's psychiatric condition left him permanently and physically disabled. These "additional characteristics," coupled with his physical impairment, demonstrate prima facie that Petitioner fell within the odd-lot category.

II.

Second, the LIRAB majority, in its findings related to odd-lot factors, applied the incorrect burden of proof. In its ruling, the LIRAB majority found, in regard to the odd-lot factors, that "[t]he preponderance of the medical evidence shows that . . . [Petitioner] was not precluded from performing some type of work with certain physical restrictions." (Emphasis added.) The LIRAB's pertinent findings related to the odd-lot doctrine were:

10. The preponderance of the medical evidence shows that while [Petitioner] was unable to return to his usual and customary job, he was not precluded from performing some type of work with certain physical restrictions.

13. Given [Petitioner's] age, work experience, educational experience, extent of permanent impairment ratings for the work injury, and the lack of credible medical evidence that he cannot perform any work, we find that [Petitioner] has not presented a prima facie case that he falls within the odd-lot category for PTD. Although VR was closed as not feasible, in light of the other evidence, we find that the VR closure, by itself, is insufficient to support a finding for odd-lot PTD.

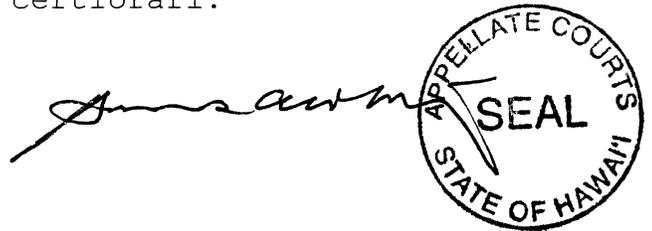
(Emphases added.) Apparently on this basis, the LIRAB, in its Conclusions of Law, concluded that "[Petitioner] is not odd-lot PTD."

However, the preponderance of the evidence burden was wrongfully applied to Petitioner. Black's Law Dictionary defines "preponderance of the evidence as "[1] [t]he greater weight of evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; [2] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Black's Law Dictionary 1228 (emphases added).

In essence, the LIRAB indicated that Petitioner was required to establish by a preponderance of the evidence that he was "precluded from performing some type of work." But Petitioner was not required to make such a showing in establishing eligibility for the odd-lot category. See Yarnell, 72 Haw. at 276, 813 P.2d at 1389. Instead, Petitioner's burden was to "establish the prima facie case to assert that the odd-lot category might be applied." Id. As stated supra, Petitioner

established his prima facie case of odd-lot application by showing physical impairment and providing enough evidence of "additional characteristics" from which to infer and to rule in his favor as to the odd-lot doctrine. He was not required at that point to establish his claim by a preponderance of the evidence. Rather, the burden of proof shifted to Respondent, as the employer. Therefore, the LIRAB's failure to shift the burden to Respondent was an error of law requiring reversal by the ICA. Id. (holding that LIRAB's finding "specifically put[ting] the burden on appellant of proving that he was unable to work" was an error of law).

Accordingly, I would accept certiorari.

A handwritten signature in black ink is written over a circular official seal. The seal contains the text "APPELLATE COURTS" at the top, "SEAL" in the center, and "STATE OF HAWAII" at the bottom.