

SUPREME COURT OF HAWAI‘I

Josephine S. Chay v. State of Hawai‘i, Department of Education

174 P.3d 366 (Haw. 2007) · No. No. 26496 · Decided November 30, 2007

SUMMARY

The Supreme Court of Hawai‘i affirmed a Labor and Industrial Relations Appeals Board decision awarding Josephine S. Chay benefits for a 20% permanent partial disability arising from a work injury. The court held that substantial evidence supported the findings that Chay was not medically or vocationally permanently and totally disabled under Hawai‘i law, including under the odd-lot doctrine.

CASE DETAILS

|                       |                                                                                                                                                                                                                                               |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Hawai‘i                                                                                                                                                                                                                      |
| WRITING FOR THE COURT | Moon, C.J.; Levinson, J.; Nakayama, J.; Acoba, J.; Duffy, J.                                                                                                                                                                                  |
| JURISDICTION          | Hawaii                                                                                                                                                                                                                                        |
| DECIDED               | November 30, 2007                                                                                                                                                                                                                             |
| DOCKET                | No. 26496                                                                                                                                                                                                                                     |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                      |
| PROCEDURAL POSTURE    | Claimant appealed the Labor and Industrial Relations Appeals Board's decision awarding her benefits for a twenty-percent permanent partial disability while rejecting her claims of permanent total disability.                               |
| STANDARD OF REVIEW    | The court reviewed the Appeals Board's findings under the substantial-evidence standard in the whole record. Witness credibility and the weight of testimony are generally matters for the trier of fact and will not be disturbed on appeal. |
| PRECEDENTIAL VALUE    | published                                                                                                                                                                                                                                     |
| PARTIES               | Josephine S. Chay v. State of Hawai‘i, Department of Education                                                                                                                                                                                |

TOPICS

- workers compensation
- administrative law
- appellate procedure
- standard of review
- remedies

PRACTICE AREAS

- workers compensation
- administrative law
- appellate procedure
- employment law
- remedies

## QUESTIONS PRESENTED

1. Whether substantial evidence supported the finding that Chay's psychiatric impairment did not render her medically permanently and totally disabled under Hawai'i Revised Statutes § 386-31.
2. Whether substantial evidence supported the finding that Chay was not permanently and totally disabled under the odd-lot doctrine.
3. Whether the Appeals Board adequately addressed the psychometric evidence, properly rejected the vocational expert's unemployability opinion, and properly found that Chay retired because she lacked motivation.
4. Whether substantial evidence supported the award of only a twenty-percent permanent partial disability rating for the work injury.
5. Whether the court should reach the merits despite Chay's technical failure to quote disputed findings of fact as required by Hawai'i Rules of Appellate Procedure Rule 28(b)(4)(C).

## HOLDINGS

1. Chay was not medically permanently and totally disabled under Hawai'i Revised Statutes § 386-31 because substantial evidence in the whole record showed that she was not precluded from working.
2. Chay was not permanently and totally disabled under the odd-lot doctrine because substantial evidence supported the Appeals Board's findings concerning her psychiatric impairment, employability, vocational evidence, and reason for retirement.
3. Chay was no more than twenty percent permanently and partially disabled as a result of the June 4, 1998 work injury.
4. The court would address the merits despite Chay's technical violation of Hawai'i Rules of Appellate Procedure Rule 28(b)(4)(C) because the disputed findings were encompassed in the points of error and argument section of her opening brief.

## KEY QUOTATIONS

*“Chay is not medically permanently and totally disabled, inasmuch as the substantial evidence in the whole record, specifically, her testimony about her self-sufficiency and the opinions of Dr. Slomoff and Dr. Tsushima, reflects that she is not precluded from working;”*

*“Therefore, IT IS HEREBY ORDERED that the Appeals Board's March 10, 2004 Decision and Order is affirmed in all respects.”*

## FACTUAL BACKGROUND

Chay sustained a work-related injury on June 4, 1998, and sought workers' compensation benefits based in part on psychiatric impairment. The Appeals Board found that she had a twenty-percent permanent partial disability but remained capable of working and was not permanently and totally disabled medically or under the odd-lot doctrine. The Board also found that she retired because she lacked motivation and declined unskilled or semiskilled employment, and it declined to credit vocational expert Mizono's contrary opinion that she was unemployable.

## PROCEDURAL HISTORY

The Labor and Industrial Relations Appeals Board issued a March 10, 2004 Decision and Order concluding that Chay was entitled to benefits for a twenty-percent permanent partial disability arising from her June 4, 1998 work injury. The Appeals Board determined that she was not medically permanently and totally disabled under Hawai'i Revised Statutes § 386-31 and was not permanently and totally disabled under the odd-lot doctrine. Chay appealed to the Supreme Court of Hawai'i, which affirmed the Appeals Board in all respects.

## DISPOSITION

affirmed

## CASES CITED

- Tsuchiyama v. Kahului Trucking and Storage, Inc., 2 Haw. App. 659, 660-61, 638 P.2d 1381, 1382 (1982)
- Morgan v. Planning Department, County of Kauai, 104 Hawai'i 173, 180, 86 P.3d 982, 989 (2004)
- Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 235, 948 P.2d 1055, 1076 (1997)
- Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001)
- Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001)
- In Re Kauai Elec. Div. of Citizens Utils. Co., 60 Haw. 166, 166, 590 P.2d 524, 527 (1978)
- Atchley v. Bank of Hawai'i, 80 Hawai'i 239, 245, 909 P.3d 567, 573 (1996)

## OPINION

### PER CURIAM.

JOSEPHINE S. CHAY, Claimant-Appellant, v. STATE OF HAWAII, DEPARTMENT OF EDUCATION Employer-Appellee, Self-Insured. No. 26496 In the Supreme Court of Hawaii. November 30, 2007. On the briefs: Lowell K.Y. Chun-Hoon of King, Nakamura & Chun-Hoon, for claimant-appellant, Josephine S. Chay. James E. Halvorson and Kathryn-Jean T.K. Taniguchi, Deputy Attorneys General, for employer-appellee, State of Hawai'i, Department of Education.

SUMMARY DISPOSITION ORDER MOON, C.J., LEVINSON, NAKAYAMA, ACOBA, and DUFFY, JJ. Claimant-Appellant Josephine S. Chay ("Chay") appeals from the Labor and Industrial Relations Appeals Board's[1] ("Appeals Board") March 10, 2004 Decision and Order, which concluded that she is entitled to benefits from Employer-Appellee State of Hawai'i, Department of Education ("Employer") for twenty percent permanent partial disability of the whole person, as a result of the June 4, 1998 work injury, and is not permanently totally disabled[2] either medically, under Hawai'i Revised Statutes ("HRS") § 386-31,[3] or under the odd-lot doctrine.[4] On appeal, Chay argues that the Appeals Board erred[5] inasmuch as it: (1) found that her psychiatric impairment does not render her medically permanently and totally disabled under HRS § 386-31; (2) found that she is not permanently and totally disabled under the odd-lot doctrine, based on (a) insufficient findings regarding her psychiatric impairment, (b) not

crediting a vocational expert's opinion that she is unemployable based on her age, presentation, and psychiatric impairment, and (c) the finding that she retired because she lacked motivation, although her treating psychiatrist did not release her to work; and (3) found that she is only twenty percent permanently and partially impaired although it is not supported by the 2nd Edition of the AMA Guides and her psychiatric condition.

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 hold that: (1) Chay is not medically permanently and totally disabled, inasmuch as the substantial evidence in the whole record, specifically, her testimony about her self-sufficiency and the opinions of Dr. Slomoff and Dr. Tsushima, reflects that she is not precluded from working;[6] (2) Based on substantial evidence in the whole record, Chay is not permanently and totally disabled under the odd-lot doctrine, and the Appeals Board properly (a) made sufficient findings regarding the psychometric evidence of the extent of Chay's psychiatric impairment,[7] (b) found that Chay's psychiatric impairment did not render her unemployable based on substantial evidence in the record, (c) did not credit Mizono's opinion that Chay was unemployable, inasmuch as it observed him testify and found his opinion inconsistent with Dr. Slomoff's; and (d) found that she retired because she lacked motivation,[8] based on her statements that she is "not interested in unskilled or semiskilled jobs"; and (3) Chay is no more than twenty percent permanently and partially disabled as a result of the June 4, 1998 work injury, inasmuch as this level of psychiatric impairment is substantially supported by the whole record.

Therefore, IT IS HEREBY ORDERED that the Appeals Board's March 10, 2004 Decision and Order is affirmed in all respects. NOTES [1] Board Chairman Randall Y. Iwase and Board member Carol K. Yamamoto presided. [2] HRS § 386-1 (1993) defines 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."

[3] HRS § 386-31 (1993) provides, in pertinent part: In the case of the following injuries, the disability caused thereby shall be deemed permanent and total: (1) The permanent and total loss of sight in both eyes; (2) The loss of both feet at or before the ankle; (3) The loss of both hands at or above the wrist; (4) The loss of one hand and one foot; (5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or one leg and one arm; (6) An injury to the skull resulting in incurable imbecility or insanity.

In all other cases the permanency and totality of the disability shall be determined on the facts. [4] The odd-lot doctrine may be invoked: 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.

It seems to be accepted that the employee has the burden of establishing prima facie that he falls within the odd-lot category. *Tsuchiyama v. Kahului Truckinci and Storage, Inc.*, 2 Haw. App. 659, 660-61, 638 P.2d 1381, 1382 (1982) (citation omitted).

[5] Technically, Chay failed to comply with Hawaii Rules of Appellate Procedure ("HRAP") Rule 28(b)(4)(C), inasmuch as her points of error do not quote the disputed findings of fact. Employer contends that pursuant to HRAP Rule 28(b)(4)(C), this court must disregard Chay's assertions that the Appeals Board erred in its findings. See *Morgan v. Planning Dep't, County of Kauai*, 104 Hawai'i 173, 180, 86 P.3d 982, 989 (2004) "Indeed, it is well settled that failure to comply with HRAP Rule 28(b)(4) is alone sufficient to affirm the circuit court's judgment." (Relying on *Kawamata Farms, Inc. v. United Agri Prods.*, 86 Hawai'i 214, 235, 948 P.2d 1055, 1076 (1997).).

Nevertheless, the disputed findings of fact are encompassed within the points of error and argument section of her opening brief. Therefore, we address the merits of Chay's arguments, notwithstanding the technical violation of HRAP Rule 28(b)(4)(C). See *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawaii 408, 420, 32 P.3d 52, 64 (2001) (addressing the merits of the issues on appeal despite HRAP Rule 28(b)(4)(C) violations, to support "' the policy of affording litigants the opportunity to have their cases heard on the merits, where possible') (citations omitted).

[6] See *Tamashiro v. Control Specialist, Inc.*, 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) (ruling that when reviewing the Appeals Board's findings, "the credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal").

[7] See *In Re Kauai Elec. Div. of Citizens Utils. Co.*, 60 Haw. 166, 166, 590 P.2d 524, 527 (1978) (citations omitted) (explaining that an administrative agency's findings of fact must include "the basic facts, from which the ultimate facts in terms of the statutory criterion are inferred.. so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision").

[8] See *Atchley v. Bank of Hawai'i*, 80 Hawai'i 239, 245, 909 P.3d 567, 573 (1996) (affirming the Appeals Board's determination that claimant, a "highly educated, professional man with marketable skills" was not permanently totally disabled under the odd-lot doctrine, in part because he was not working due to his "lack [of] interest").