NO. 27880, 27881, 27882

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, M.D., Provider-Appellant-Appellant,
v.
J.P. SCHMIDT, Insurance Commissioner,
Department of Commerce and Consumer Affairs,
State of Hawaii, Appellee-Appellee,
and
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Respondent-Appellee-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NOS. 05-1-1055, 05-1-1054, AND 05-1-1056)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Provider-Appellant-Appellant Emerson M.F. Jou (Dr. Jou) appeals from the March 14, 2006 Judgment entered in the Circuit Court of the First Circuit[1] dismissing this appeal for lack of subject matter jurisdiction because Dr. Jou filed his appeal to the circuit court after the time for doing so had passed. We affirm.

The following statutes are relevant:

Hawaii Revised Statutes (HRS) § 431:2-101 (1993) states:

> **Insurance division.** The insurance division is established within the department of commerce and consumer affairs.

HRS § 431:2-102 (Supp. 2006) states:

> **Insurance commissioner.** (a) The insurance division shall be under the supervision and control of an administrator who shall be

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[1] Judge Eden Elizabeth Hifo presided.

known as the insurance commissioner. The director of commerce and consumer affairs shall, with the approval of the governor, appoint the insurance commissioner who shall not be subject to chapter 76. The insurance commissioner shall hold the insurance commissioner's office at the pleasure of the director of commerce and consumer affairs and shall be responsible for the performance of the duties imposed upon the division.

(b) Commissioner, where used in this code, means the insurance commissioner of this State.

HRS § 431:10C-304 (1993) states:

**Obligation to pay personal injury protection benefits.** For purposes of this section, the term "personal injury protection insurer" includes personal injury protection self-insurers. Every personal injury protection insurer shall provide personal injury protection benefits for accidental harm as follows:

(1) Except as otherwise provided in section 431:10C-305(d), in the case of injury arising out of a motor vehicle accident, the insurer shall pay, without regard to fault, to the provider of services on behalf of the following persons who sustain accidental harm as a result of the operation, maintenance, or use of the vehicle, an amount equal to the personal injury protection benefits as defined in section 431:10C-103.5(a) payable for expenses to that person as a result of the injury:
   (A) Any person, including the owner, operator, occupant, or user of the insured motor vehicle;
   . . . ;
(2) Payment of personal injury protection benefits shall be made as the benefits accrue, except that in the case of death, payment of benefits under section 431:10C-302(a)(5) may be made immediately in a lump sum payment, at the option of the beneficiary;
(3) (A) Payment of personal injury protection benefits shall be made within thirty days after the insurer has received reasonable proof of the fact and amount of benefits accrued, and demand for payment thereof. All providers must produce descriptions of the service provided in conformity with applicable fee schedule codes;
   (B) If the insurer elects to deny a claim for benefits in whole or in part, the insurer shall, within thirty days, notify the claimant in writing of the denial and the reasons for the denial. The denial notice shall be prepared and mailed by the insurer in triplicate copies and be in a format approved by the commissioner. In the case of benefits for services specified in section 431:10C-103.5(a) the insurer shall also mail a copy of the denial to the provider; and
   (C) If the insurer cannot pay or deny the claim for benefits because additional information or loss documentation is needed, the insurer shall, within the thirty days, forward to the claimant

an itemized list of all the required documents. In the case of benefits for services specified in section 431:10C-103.5(a) the insurer shall also forward the list to the service provider;

(4) Amounts of benefits which are unpaid thirty days after the insurer has received reasonable proof of the fact and the amount of benefits accrued, and demand for payment thereof, after the expiration of the thirty days, shall bear interest at the rate of one and one-half per cent per month;

(5) No part of personal injury protection benefits paid shall be applied in any manner as attorney's fees in the case of injury or death for which the benefits are paid. The insurer shall pay, subject to section 431:10C-211, in addition to the personal injury protection benefits due, all attorney's fees and costs of settlement or suit necessary to effect the payment of any or all personal injury protection benefits found due under the contract. Any contract in violation of this provision shall be illegal and unenforceable. It shall constitute an unlawful and unethical act for any attorney to solicit, enter into, or knowingly accept benefits under any contract;

(6) Disputes between the provider and the insurer over the amount of a charge or the correct fee or procedure code to be used under the workers' compensation supplemental medical fee schedule shall be governed by section 431:10C-308.5; and

(7) Any insurer who violates this section shall be subject to section 431:10C-117(b) and (c).

HRS § 431:10C-315 (Supp. 2006) states, in part:

**Statute of limitations.** (a) No suit shall be brought on any contract providing motor vehicle insurance benefits or any contract providing optional additional coverage more than the later of:

(1) Two years from the date of the motor vehicle accident upon which the claim is based;

(2) Two years after the last payment of motor vehicle insurance benefits;

(3) Two years after the entry of a final order in arbitration;

(4) Two years after the entry of a final judgment in, or dismissal with prejudice of, a tort action arising out of a motor vehicle accident, where a cause of action for insurer bad faith arises out of the tort action; or

(5) Two years after payment of liability coverage, for underinsured motorist claims.

HRS § 431:10C-212 (Supp. 2006) states:

**Administrative hearing on insurer's denial of claim.** (a) If a claimant or provider of services objects to the denial of benefits by an insurer or self-insurer pursuant to section

431:10C-304(3)(B) and desires an administrative hearing thereupon, the claimant or provider of services shall file with the commissioner, within sixty days after the date of denial of the claim, the following:

(1) Two copies of the denial;
(2) A written request for review; and
(3) A written statement setting forth specific reasons for the objections.

(b) The commissioner has jurisdiction to review any denial of personal injury protection benefits.

(c) The commissioner shall:

(1) Conduct a hearing in conformity with chapter 91 to review the denial of benefits;
(2) Have all the powers to conduct a hearing as set forth in section 92-16; and
(3) Affirm the denial or reject the denial and order the payment of benefits as the facts may warrant, after granting an opportunity for hearing to the insurer and claimant.

(d) The commissioner may assess the cost of the hearing upon either or both of the parties.

(e) Either party may appeal the final order of the commissioner in the manner provided for by chapter 91.

The "Hearings Officer's Recommended Order Granting Respondent's Cross-Motion for Summary Judgment" was filed on August 26, 2002 and states, in part:

II. FINDINGS OF FACT

. . . .

2. As a result of injuries sustained in the November 17, 1992 motor vehicle accident, [Respondent-Appellee-Appellee State Farm Mutual Automobile Insurance Co., (State Farm)] made payments of no-fault benefits to and on behalf of Mr. [Teodoro] Duldulao.

3. [State Farm] has no record of receiving any request for payment from [Dr. Jou] for treatments provided to Mr. Duldulao on June 11, 1993, July 9, 1993, August 6, 1993, September 3, 1993, or October 6, 1993.

4. On or about April 22, 1994, [State Farm] made three separate payments to [Dr. Jou] for treatments provided to Mr.

Duldulao . . . .[2]

5. The April 22, 1994 payment to [Dr. Jou] was the last payment of any no-fault benefits made by [State Farm] on behalf of Mr. Duldulao.

6. After April 22, 1994, [State Farm] did not hear from [Dr. Jou] until March 21, 1997, when [State Farm] received a rebilling from [Dr. Jou], along with a cover letter dated February 24, 1997 and a letter from the Insurance Division dated February 19, 1997.

. . . .

8. [State Farm] subsequently determined that the statute of limitations had elapsed, and on or about April 29, 1997, [State Farm] issued a Denial of No-Fault Benefits to [Dr. Jou].[3]

9. By letter dated October 28, 1997, [Dr. Jou] informed [State Farm] that [Dr. Jou] was still seeking payment from [State Farm] for the disputed bills regarding his treatment of Mr. Duldulao.

10. By letter dated December 16, 1998, [Dr. Jou] requested a hearing to contest the disputed charges regarding the present case, as well as several other cases.

11. According to [Dr. Jou's] calculations, the amount in controversy as of June 30, 2002, was $210.89 ($110.50 for the actual disputed charges, plus $4.42 tax, plus $95.97 in interest).

III. CONCLUSIONS OF LAW

. . . .

In the present case, the Hearings Officer concludes that the applicable statue of limitations began running with the April 22, 1994 payment of no-fault benefits to [Dr. Jou], and lapsed as of April 22, 1996.

Consequently, the Hearings Officer further concludes that the Provider's March 21, 1997 request for payment of no-fault benefits for treatments rendered to Mr. Duldulao, was barred by the provisions of HRS §431:10C-315(a)(2).

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[2] On or about April 22, 1994, Respondent-Appellee-Appellee State Farm Mutual Automobile Insurance Co. (State Farm) paid the following to Provider-Appellant-Appellant Emerson M.F. Jou, M.D. for Teodoro Duldulao:

$134.68 for treatment on December 1, 1993;
$761.84 for treatment March 4, 1994 through March 28, 1994; and
$55.40 for treatment March 4, 1994 through March 28, 1994.

[3] State Farm's denial letter dated April 29, 1997 cited Hawaii Revised Statutes (HRS) § 431:10C-315(a).

> IV. RECOMMENDED ORDER
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> Based on the above, the Hearings Officer recommends that the Insurance Commissioner of the Department of Commerce and Consumer Affairs:
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> . . . .
>
> 2) grant [State Farm's] Cross-Motion for Summary Judgment.
>
> The Hearings Officer would also recommend that the parties each bear their own attorney's fees and costs.

(Footnotes added.)

On January 12, 2005, Senior Hearings Officer Rodney A. Maile issued the "Recommended Order on Remand Granting [State Farm's] Cross-Motion for Summary Judgment"

The Deputy Insurance Commissioner's Final Order entered on May 24, 2005 states, in part:

> [T]he Deputy Insurance Commissioner finds and concludes that [Dr. Jou's] claim for the disputed no-fault benefits is barred by the provisions of Hawaii Revised Statutes ("HRS") §431:10C-315(a). Accordingly,
>
> IT IS HEREBY ORDERED THAT [State Farm's] Cross-Motion for Summary Judgment be granted, and that [Dr. Jou's] Motion for Summary judgment be denied.
>
> IT IS FURTHER ORDERED THAT pursuant to the provisions of HRS §431:10C-211(a), each party each shall bear their own respective attorney's fees and costs.

On June 13, 2005, Dr. Jou filed an appeal to circuit court pursuant to HRS § 91-14 (Supp. 2006).[4]

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[4] HRS § 91-14 states in part:

> **Judicial review of contested cases.** (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary,

On January 23, 2006, the Insurance Commissioner filed an answering brief that (a) noted the more than nineteen month passage of time between State Farm's April 29, 1997 "Denial of No-Fault Benefits to [Dr. Jou]" and Dr. Jou's December 16, 1998 letter requesting a Department of Commerce and Consumer Affairs hearing to contest the denial, and (b) stated, in part:

> The source of the Commissioner's authority to adjudicate claim denial disputes is HRS § 431:10C-212 ("§ 212"). Section 212(a) mandates that a request invoking the Commissioner's jurisdiction be made by the claimant (Duldulao) or health care provider (Dr. Jou) "within sixty days after the date of denial of the claim." By analogy to the provision of HRS § 91-14(b) permitting review of final orders in contested cases and requiring that such review be instituted in the circuit court within thirty days after the ruling appealed from, the sixty-day provision of § 212(a) is mandatory and jurisdictional. *See e.g.*, Rivera v.

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for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) [Subsection effective until June 30, 2006. For subsection effective July 1, 2006, see below.] Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(b) [Subsection effective July 1, 2006. For subsection effective until June 30, 2006, see above.] Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

> Department of Labor and Industrial Relations, 100 Hawai'i 348, 349, 352, 60 P.2d 298, 299, 302 (2002) (holding that 30-day time to appeal under HRS § 91-14(b) is mandatory and jurisdictional).

On February 9, 2006, Dr. Jou filed "Provider-Appellant Emerson M.F. Jou, M.D.'s Motion to Disqualify the Honorable Eden Elizabeth Hifo and Circuit Court Judges Who May Petition for Retention Before the Hawaii Judicial Selection Commission". In an accompanying memorandum, counsel for Dr. Jou argued in part:

> Hawaii State judges have a pecuniary interest in their career option of possibly being retained, and the HJSC [Hawai'i Judicial Selection Commission] membership rules are central to the decision to seek reappointment. A judge's interest in the outcome of this and other insurance cases becomes pecuniary because four insurance industry representatives, including State Farm's present law firm, are now on the HJSC; and there is no rule or policy to arrest this infiltration. These individuals as fiduciaries of insurer-clients, obtain confidential information about judges coming before them, and vote on whether or not to retain a judge. "The probability of actual bias on the part of a judge or decision-maker is too high to be constitutionally tolerable when the adjudicator has a pecuniary interest in the outcome". Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1993); Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972). . . .
>
> There can be little doubt that a judge, including the judge in these proceedings has a pecuniary interest in possibly being reappointed, or that persons voting to retain this judge will, at the time of petition, represent insurance companies as fiduciaries. . . . Judges know this, and have unavoidable pecuniary interests in being retained by insurance company fiduciaries. This trap, set by the law firm at Bar and other insurance counsel, is not permitted by constitutional law, by HRS §601-7, or by the rules of professional conduct.

On February 15, 2006, a hearing was held by Judge Hifo. The record on appeal does not contain a transcript of this hearing. We take judicial notice that the HJSC retained Judge Hifo as a circuit court judge for a ten-year term commencing April 30, 2003.

On March 13, 2006, Judge Hifo entered the "Order Denying Provider-Appellant Emerson M.F. Jou, M.D.'s Motion to

Disqualify the Honorable Eden Elizabeth Hifo and Circuit Court Judges Who May Petition for Retention Before the Hawaii Judicial Selection Commission Filed 2/9/06".

On March 14, 2006, Judge Hifo entered the "Order Dismissing Provider-Appellant Emerson M.F. Jou, M.D.'s Notice of Appeal to Circuit Court, Filed June 13, 2005, For Lack of Subject Matter Jurisdiction".

The March 14, 2006 Judgment followed. Dr. Jou filed a notice of appeal on April 11, 2006.

In the June 19, 2006 Statement Contesting Jurisdiction, the Commissioner (1) cites the "shall file with the commissioner, within sixty days after the date of denial of the claim" time limit specified in HRS § 431:10C-212(a), (2) notes that Dr. Jou failed to timely request a contested case hearing from the denial of reimbursement for no-fault motor vehicle insurance benefit services Dr. Jou provided to Duldulao, and (3) contends:

> The Circuit Court's Dismissal Order . . . dismissed the appeal for lack of subject matter jurisdiction because the Commissioner lacked jurisdiction to consider the matter in the first instance. Accordingly, the Circuit Court lacked, and this Court lacks jurisdiction except to correct the error in jurisdiction in the agency proceedings. This secondary appeal must be dismissed for lack of subject matter jurisdiction.

In his June 23, 2006 Statement of Jurisdiction, Dr. Jou responds:

> [State Farm] refused and failed to serve denials or information itemizations within thirty (30) days from electing to pay benefits in part, mandated and required by HRS §431:10C-304(3), subsections (B) and (C). The lower court and the commissioner contend that providers have 60 days to file objections when void, 304(3)(B) denials are, as here, sent years

> later, or are not based on the actual election to withhold benefits many years earlier. RA 58, 59, 87-89 (void denial), 198 (reply brief below). The timely notice of denial was required on claims denied as far back as 1993 and State Farm is precluded from asserting otherwise by Orthopedics Associates v. HIG et al, 109 Haw. 185, 196[,] 124 P.3d 930, 941 (2005).

Although Dr. Jou challenges various findings of fact, quoted above, from the August 26, 2002 Hearings Officer's Recommended Order Granting Respondent's Cross-Motion for Summary Judgment, he does not challenge the following two findings:

> 8. [State Farm] subsequently determined that the statute of limitations had elapsed, and on or about April 29, 1997, [State Farm] issued a Denial of No-Fault Benefits to [Dr. Jou].
>
> . . . .
>
> 10. By letter dated December 16, 1998, [Dr. Jou] requested a hearing to contest the disputed charges regarding the present case, as well as several other cases.

Dr. Jou admits this apparent violation of the HRS § 431:10C-212(a) sixty day time limit for seeking an administrative review of State Farm's April 29, 1997 denial of his claim for benefits. He contends the time limit is equitably tolled and his violation is justified/authorized/excused/waived by State Farm's previous violation(s) of the following time limit imposed on it by HRS §431:10C-304(3)(B): "If the insurer elects to deny a claim for benefits in whole or in part, the insurer shall, within thirty days, notify the claimant in writing of the denial and the reasons for the denial." The circuit court disagreed with Dr. Jou. We agree with the circuit court.

Dr. Jou also challenges the March 13, 2006 Order Denying Provider-Appellant Emerson M.F. Jou, M.D.'s Motion to

Disqualify the Honorable Eden Elizabeth Hifo and Circuit Court Judges Who May Petition for Retention Before the Hawaii Judicial Selection Commission Filed 2/9/06. We conclude that the facts that Judge Hifo was retained by the HJSC in 2003, and in 2013 may petition to the HJSC for retention for another term, are not separately, or together, grounds disqualifying her from this case.

Accordingly, we affirm the circuit court's March 14, 2006 Judgment.

DATED: Honolulu, Hawai'i, April 13, 2007.

On the briefs:

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