

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26930

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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
FIRST INSURANCE COMPANY, Respondent/Appellee/Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 04-1-0153)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 DEC 20 AM 8:13

FILED

Provider-Appellant-Appellant Emerson M. F. Jou, M.D., (Jou) appeals from the Judgment filed on October 5, 2004 in the Circuit Court of the First Circuit (circuit court).^{1/} The circuit court (1) entered judgment against Jou and in favor of Respondent-Appellee-Appellee First Insurance Company of Hawaii, Ltd. (FIC) and Appellee-Appellee J.P. Schmidt, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawai'i (Insurance Commissioner); (2) affirmed the December 30, 2003 Commissioner's Final Order^{2/}; and (3) dismissed Jou's appeal to the circuit court.

On appeal, Jou alleges that the circuit court

1. erroneously gave deference to the agency ruling in a case dealing with a question of statutory construction, i.e.

^{1/} The Honorable Sabrina S. McKenna presided.

^{2/} In the December 30, 2003 Commissioner's Final Order, the Insurance Commissioner adopted the Hearings Officer's Recommended Order and incorporated it into the Commissioner's Final Order and found that Jou had "failed to initiate the instant proceedings within the limitations period, and the Hearings Officer [had] properly dismissed the case."

whether Hawaii Revised Statutes (HRS) § 431:10C-315(a) may be tolled by an automobile insurer's partial payment to a doctor;

2. violated the Hawai'i Administrative Procedures Act by affirming the illegal rulemaking by the Insurance Commissioner;

3. violated Jou's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 5 of the Hawai'i Constitution, by affirming the Insurance Commissioner's rulemaking, reactivating tolled statutes of limitations retrospectively as to Jou in this and other pending cases;

4. violated Jou's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 5 of the Hawai'i Constitution by affirming the Insurance Commissioner's rulemaking, reactivating tolled statutes of limitations retrospectively as to Jou and other pending cases;

5. violated Jou's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 5 of the Hawai'i Constitution because the circuit court judge was informed at argument that due to insurer-packing of the Judicial Selection Commission, she should disqualify herself; and

6. violated Jou's rights under the Takings Clause of the Fifth Amendment to the United States Constitution and Article I, § 5 of the Hawai'i Constitution because the circuit court was informed during argument that rulemaking by the Insurance Commissioner constituted a Takings Clause violation.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that Jou's appeal is without merit.

Therefore,

The Judgment filed on October 5, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, December 20, 2007.

On the briefs:

Stephen M. Shaw
for Provider/Appellant/Appellant.

David A. Webber
Deborah Day Emerson
Deputy Attorneys General
for Appellee/Appellee
J.P. Schmidt.

Dennis E. W. O'Connor
Kelvin H. Kaneshiro
(Reinwald, O'Connor & Playdon LLP)
for Respondent/Appellee/Appellee
First Insurance Company of Hawaii,
Ltd.


Presiding Judge


Associate Judge


Associate Judge