

NO. 27058

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIIEMERSON M.F. JOU, M.D.,
Provider-Appellant,
vs.J.P. SCHMIDT, Insurance Commissioner, Department of
Commerce and Consumer Affairs, State of Hawaii,
Appellee-Appellee,

and

PROGRESSIVE HAWAII INSURANCE CORPORATION,
Respondent-AppelleeAPPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 04-1-0504)SUMMARY DISPOSITION ORDER

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

In this secondary appeal, Provider-Appellant Emerson M.F. Jou, M.D. (Dr. Jou), appeals from the Judgment filed on December 14, 2004, in the Circuit Court of the First Circuit (circuit court) in favor of Respondent-Appellee Progressive Hawaii Insurance Company (Progressive) and Appellee-Appellee J.P. Schmidt, Insurance Commissioner for the Department of Commerce and Consumer Affairs of the State of Hawaii (Insurance Commissioner).¹ The circuit court affirmed the Insurance Commissioner's Final Order, filed on February 17, 2004, that adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order, filed on January 22, 2004.

Dr. Jou treated Jo Ann Domingo and Christian Castro (Claimants) for injuries they sustained in a car accident. Dr. Jou billed Progressive \$6,639.90 for treatments rendered to Domingo and \$6,784.87 for treatments rendered to Castro. Progressive paid a reduced amount, approximately \$5,000 less than the billings

¹ The Honorable Eden Elizabeth Hifo presided.

submitted by Dr. Jou. When Dr. Jou and Progressive could not resolve their dispute over the payment on the billings, Dr. Jou filed a request for a hearing with the Insurance Division of the Department of Commerce and Consumer Affairs, seeking a review of Progressive's payment reductions. A hearings officer determined that Progressive's reduced payment on the amounts billed for myofascial release was improper, but otherwise rejected Dr. Jou's challenges to Progressive's reduction in payment on amounts billed on other items. The Insurance Commissioner subsequently adopted the hearings officer's recommended decision, and the circuit court affirmed the Insurance Commissioner.

On appeal, Dr. Jou argues that the circuit court erred in: (1) failing to summarily rule in his favor based on Progressive's violation of the procedural notice requirements of Hawaii Revised Statutes (HRS) § 431:10C-304(3) (1993);² (2)

² At the time relevant to Provider-Appellant Emerson M.F. Jou, M.D.'s claim for payment, Hawaii Revised Statutes (HRS) § 431:10C-304(3) (1993) provided:

§431:10C-304 Obligation to pay no-fault benefits. For purposes of this section, the term "no-fault insurer" includes no-fault self-insurers. Every no-fault insurer shall provide no-fault benefits for accidental harm as follows:

.

- (3) (A) Payment of no-fault 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.
- (B) Subject to section 431:10C-308.6, relating to peer review, 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(10)(A)(i) and (ii), the insurer shall also mail a copy of the denial to the provider.
- (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

upholding the Insurance Commissioner's decision to deny Dr. Jou's claim that Progressive acted improperly when it reduced or disallowed his billings for office visits, medical supplies, hot and cold pack therapy, and ultrasound therapy; and (3) upholding the hearings officer's decision to permit Maria Valderes Kesilava to testify as an expert in the field of bill coding. Dr. Jou further argues that the decisions of the circuit court and the Insurance Commissioner violated his rights under the Hawai'i and United States Constitutions to due process, to equal protection, to practice his profession of choice, and to be free from the taking of his property without just compensation.

After a careful review of the record and the briefs submitted by the parties, we resolve the arguments raised by Dr. Jou as follows:

1. We agree with Dr. Jou that Progressive violated the procedural notice requirements of HRS § 431:10C-304(3) by failing to issue denial notices or request additional information when it paid a reduced amount on his billings. Orthopedic Associates of Hawaii, Inc. v. Hawaiian Ins. & Guar. Co., 109 Hawai'i 185, 194-97, 124 P.3d 930, 939-42 (2005). However, we reject Dr. Jou's claim that Progressive's violation of the procedural notice requirements of HRS § 431:10C-304(3) precluded Progressive from contesting Dr. Jou's claim for payment in full on his billings. In TIG Ins. Co. v. Kauhane, 101 Hawai'i 311, 67 P.3d 810 (App. 2003), this court held that an insurer's violation of the procedural requirements of HRS § 431:10C-304(3) (1993) did not automatically result in the insurer having to pay the disputed claim. Id. at 327-29, 67 P.3d at 826-28. Instead, we held that notwithstanding the violation of HRS § 431:10C-304(3), the insurer was entitled to have the

benefits for services specified in section 431:10C-103(10)(A)(i) and (ii), the insurer shall also forward the list to the service provider.

Insurance Commissioner rule on the substantive merits of the disputed claim. Id.³

Here, the Insurance Commissioner considered Dr. Jou's claim for additional payments and ruled on the merits. The record indicates that Progressive's failure to comply with the procedural notice requirements of HRS § 431:10C-304(3) did not affect Dr. Jou's substantial rights. Dr. Jou was fully aware that Progressive had paid less than the amounts he billed, and the statements accompanying Progressive's payments included codes relating to the reasons for the reductions. Dr. Jou also supplied Progressive with all the information and documentation he believed were necessary to support his claim. We conclude that Progressive's violation of HRS § 431:10C-304(3) did not preclude the Insurance Commissioner from deciding Dr. Jou's claim on the merits, nor did it preclude the circuit court from affirming the Insurance Commissioner's decision.

2. The record supports the decision of the Insurance Commissioner to deny Dr. Jou's claim that Progressive's acted improperly when it reduced or disallowed Dr. Jou's billings for office visits, medical supplies, hot and cold pack therapy, and ultrasound therapy. We specifically reject Dr. Jou's argument that he was entitled to reimbursement for physical therapy services (which pertained to the hot and cold pack and ultrasound therapies) performed by third parties not licensed as physical therapists but acting under his supervision. This issue was previously decided against Dr. Jou in a summary disposition order issued by the Hawai'i Supreme Court in AIG Hawaii Ins. Co. v. Jou, No. 24566, 2004 WL 1879846 (Haw. Aug. 24, 2004). See Exotics Hawaii-Kona, Inc. v. E.I. Dupont De Nemours & Co., 104 Hawai'i 358, 90 P.3d 250 (2004); Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(c) (providing that unpublished dispositional orders may be cited for collateral estoppel purposes). We conclude that the circuit court

³ We noted that there were other potential sanctions that could be imposed on the insurer for violating HRS § 431:10C-304(3) instead of precluding the insurer from contesting the claim. TIG Ins. Co. v. Kauhane, 101 Hawai'i 311, 327-29, 67 P.3d 810, 826-28 (App. 2003).

did not err in affirming the Insurance Commissioner's decision regarding the denial of Dr. Jou's payment claims.

3. We reject Dr. Jou's claim that the hearings officer erred in permitting Maria Valderes Kesilava to testify as an expert in the field of bill coding. The agency hearing was not subject to the rules of evidence and "all relevant oral or documentary evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." Hawai'i Administrative Rules § 16-201-21(a) (2007). Under this standard, the hearings officer did not abuse her discretion in permitting Kesilava's testimony.

4. We reject Dr. Jou's constitutional claims. Dr. Jou fails to present a discernable argument in support of his claim that his constitutional rights to due process, to equal protection, and to be free from the taking of his property without just compensation were violated. We therefore disregard these claims. State v. Moore, 82 Hawai'i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996). Dr. Jou's claim that he was denied his right to practice his profession of choice is without merit.

III.

We affirm the December 14, 2004, Judgment of the circuit court.

DATED: Honolulu, Hawai'i, November 21, 2007.

On the briefs:

Stephen M. Shaw
for Provider-Appellant

David A. Weber
Deborah Day Emerson
Deputy Attorneys General
for Appellee-Appellee

Katharine M. Nohr
for Respondent-Appellee


Presiding Judge


Associate Judge


Associate Judge