

*** NOT FOR PUBLICATION ***

NO. 26104

IN THE SUPREME COURT OF THE STATE OF HAWAII

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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In the Matter of the Claim of
LEONILA CHRISTOPHER, Claimant-Appellee-Appellant

vs.

AIG HAWAII INSURANCE CO., Respondent-Appellant-Appellant,
and
INSURANCE COMMISSIONER, STATE OF HAWAII, Appellee-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 02-1-2379)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Duffy, JJ., and
Circuit Judge Ayabe, in place of Acoba, J., recused)

Respondent-Appellant-Appellant AIG Hawaii Insurance Company (AIG) appeals from the September 15, 2003 final judgment of the Circuit Court of the First Circuit.¹ AIG contends that, in affirming the September 9, 2002 final order [hereinafter, CFO] of the Insurance Commissioner (Commissioner), the circuit court erred when it: (1) affirmed the CFO's clearly erroneous finding that Claimant-Appellee-Appellee Leonila Christopher did not commit fraud in connection with her claim for no-fault insurance benefits arising out of an automobile accident; (2) affirmed the CFO's conclusion of law that Christopher was a real party in interest to pursue claims for the unpaid medical bills of her

¹ The Honorable Eden Elizabeth Hifo presided over this matter.

provider, Pain Management Clinic, Inc.; (3) failed to find that the Hearings Officer of the Insurance Division, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i [hereinafter, Hearings Officer] displayed bias against AIG and abused her discretion in denying AIG's motions for her recusal; (4) affirmed the CFO's finding that AIG was liable for medical expenditures billed pursuant to untimely submitted treatment plans; (5) affirmed the CFO's finding that AIG was liable for medical expenditures based on services provided by unlicensed providers; and (6) affirmed and granted awards of attorney's fees and costs that were excessive and unreasonable, and based in part on claims which were settled or on which Christopher did not prevail. Christopher responds that: (1) there is substantial evidence in the record to support the Commissioner's determination that Christopher did not commit fraud; (2) Christopher is the real party in interest because coverage was denied by AIG on the basis of fraud; (3) the record as a whole demonstrates that the Hearings Officer was not biased against AIG and thus did not abuse her discretion in denying AIG's motions for recusal; (4) the amounts claimed for medical services were supported by timely submitted or not properly denied treatment plans; (5) fees for services provided by unlicensed providers are recoverable under Hawai'i Administrative Rules (HAR); and (6) the awards of fees and costs were not

unreasonable based on the length and complexity of the litigation.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold:

- (1) The Commissioner's finding that Christopher did not commit fraud is not clearly erroneous because there is substantial evidence in the record to support the finding -- including Christopher's testimony, which was expressly found credible by the Hearings Officer, the testimony of Robert Hyman, M.D., and an MRI showing damage to Christopher's spine -- and the record does not leave this court with the firm conviction that a mistake was made. See Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (appellate court's scope of review under the clearly erroneous standard is limited to (1) determining whether there is substantial evidence in the record to support the ruling; and (2) if there is such evidence, determining whether the record nevertheless leaves the court with the definite and firm conviction that a mistake has been made); In re Doe, 95 Hawai'i 183, 196-7, 20 P.3d 616, 629-30 (2001) (testimony of one credible witness may constitute substantial evidence;

assessing credibility is solely the province of the fact-finder);

- (2) AIG waived any "real party in interest" defense it had by not including it in its first responsive pleading or motion to dismiss and failing to raise it until almost three years after the case was filed. Cf. Hawai'i Rules of Civil Procedure (HRCP) Rule 12(g) (providing that defenses other than lack of subject matter jurisdiction, failure to state a claim, and failure to join a party indispensable under HRCP Rule 19, may be waived if not asserted in a first HRCP Rule 12 motion); 6A Wright, Miller & Kane, Federal Practice and Procedure Civ. 2d § 1554 (1990) ("it probably is appropriate to include the [real party in interest] objection in the answer to the complaint, thereby treating it as something in the nature of an affirmative defense under [Federal Rule of Civil Procedure] Rule 8(c)");
- (3) The Hearings Officer did not abuse her discretion in denying AIG's motions for her recusal because adverse rulings, even when later found to be erroneous, do not constitute evidence of bias, and the record here does not reflect any evidence of bias or prejudice such as to show that the Hearings Officer clearly exceeded the

bounds of reason or disregarded rules of law to the substantial detriment of AIG. State v. Ross, 89 Hawai'i 371, 375-76, 974 P.2d 11, 15-16 (1998) (appellate review of a motion for recusal is conducted under the abuse of discretion standard); id. at 378, 974 P.2d at 18 ("petitioners may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous");

- (4) The plain language of the CFO, read in conjunction with the Hearings Officer's June 27, 2001 Findings of Fact, Conclusions of Law, and Recommended Order from which the CFO was taken, does not require AIG to pay for medical expenses incurred pursuant to treatment plans or bills submitted after the date of AIG's final denial of coverage, February 18, 1997, and thus AIG's appeal is moot (i.e., the relief requested has already been granted) to the extent it seeks to deny recovery of medical expenditures that were not accrued, unpaid, and submitted within the thirty days prior to February 18, 1997. See September 9, 2002 CFO (AIG's obligation to pay for no-fault benefits is "limited to the accrued, unpaid medical expenditures it received within thirty days [preceding] the date of the issued denial");

- (5) Medical expenditures based on services provided by unlicensed persons who work under the direct control and supervision of the attending physician practitioners are recoverable. HAR § 16-23-106(a) (1993) ("Attending physicians may prescribe treatment in their discipline to be carried out by persons certified or licensed to provide the service or by persons who work under the direct control and supervision of the attending physician.") (Emphasis added.). As found by the Hearings Officer, the disputed medical services were provided by persons under the direct supervision of Dr. Hyman;
- (6) Neither the Commissioner nor the circuit court committed an abuse of discretion in awarding attorney's fees and costs in the amounts stated because (a) Christopher's claims were not frivolous, fraudulent, excessive, or unreasonable; (b) the fees and costs awards themselves were not unreasonable; and (c) the statutory scheme permits awards of fees and costs for claims that were settled or on which the claimant did not prevail. See Wong v. Hawaiian Ins. Cos., 64 Haw. 189, 192, 637 P.2d 1144, 1146 (1981) (decision to award fees and costs in no-fault insurance cases will not be set aside except for abuse of discretion) (citations

omitted); Hawai'i Revised Statutes (HRS) § 431:10C-304(5) (1993) ("The insurer shall pay, subject to section 431:10C-211, . . . all attorney's fees and costs of settlement or suit necessary to effect the payment of any or all no-fault benefits found due under the contract.") (Emphasis added.); HRS § 431:10C-211(a) (1993) ("A person making a claim for no-fault benefits may be allowed an award of a reasonable sum for attorney's fees, and reasonable costs of suit . . . unless . . . the claim was unreasonable, fraudulent, excessive, or frivolous."). Therefore,

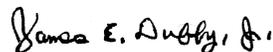
IT IS HEREBY ORDERED that the circuit court's September 15, 2003 final judgment is affirmed.

DATED: Honolulu, Hawai'i, October 7, 2005.

On the briefs:

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