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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

JANIS N. EFHAN
CLERK

ESMERALDA ROJAS ORDONEZ,

Plaintiff,

v.

HAWAII EMPLOYERS' MUTUAL
INSURANCE COMPANY; et al.,

Defendants.

CIVIL NO. 06-1-0138
(Non Motor Vehicle Tort)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW; JUDGMENT;
CERTIFICATE OF SERVICE**

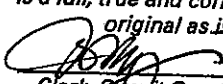
FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

This matter was tried between September 8, 2008 and September 11, 2008. This Court, as the trier of fact, considered the testimony of the witnesses, (live and by deposition) as well as the exhibits entered into evidence and the written and oral arguments of counsel. Having assessed the facts of the case, the applicable law, the Court now enters the following findings of fact and conclusions of law.

II. Findings of Fact

Throughout the trial, the Court kept careful notes of the testimony of the witnesses and the exhibits that the parties relied upon. In coming to these factual findings, the Court had the opportunity to assess the credibility of witnesses. The Court observed the witnesses on direct and cross-examination. Among other things, the Court had the opportunity to assess witness demeanor and these findings are based in part of these credibility determinations.

*I do hereby certify that the foregoing
is a full, true and correct copy of the
original as issued. Filed*

Clerk, Circuit Court, Fifth Circuit
State of Hawaii

In January 2005, HEMIC had sufficient information to conclude that Ms. Rodriguez's death was compensable under the Hawai'i workers compensation statutes and regulations. The delay by HEMIC in acknowledging the fact that the claim was compensable, and—generally—the failure to give Ms. Ordonez's interests as much consideration as their own, was unreasonable and in violation of established industry standards for good faith and fair dealing. The Court incorporates all the testimony and exhibits in its ruling, and specifically also finds the following:

1. On January 4, 2005, Mayra Del Pilar Rodriguez ("Ms. Rodriguez") was employed by G & R Tour Company. That day she died in an accident arising out of and while in the course of that employment. Compensability of this claim was conclusively established pursuant to the D.C.D. Order dated January 19, 2006. Mayra Del Pilar Ordonez died in an accident arising out of and while in the course of employment with G & R Tour Company.

2. On January 5, 2005, the President of G & R Tours signed a WC-1 Form, Employer's Report of Industrial Injury. (Exhibit J-1 (hereinafter referred to as "J-1"), OZ0906, 0926, and 0943).

3. The WC-1 form indicates that the employer answered the question "What was employee doing when injured?" with the statement: "Operating ATV (All Terrain Vehicle) Claimant was assigned to inspect the route following weekend rainstorm."

4. On January 5, 2005, the WC-1 form was forwarded to HEMIC by Charles Okamoto. (J-1, OZ 0950 and 0951).

5. In a telephone call on January 5, 2005 Ms. Ana Abbey of HEMIC learned from Mr. Okamoto that "Mayra was from Venezuela with no family here in Hawai'i. She is survived by her mother and two grown sons in Venezuela." (J-1, OZ 0939).

6. Also on January 5, 2005, Eric England of HEMIC advised other HEMIC employees that HEMIC should investigate what entity the decedent is employed by "before spending any unnecessary bucks doing any further claim setting." (J-1, OZ 0939).

7. On January 6, 2005 Ms. Stacy Miller wrote that based on a conversation with "Warren [Ando]," "Decedent was reportedly on the tour company payroll." (J-1, OZ 0938).

8. On January 6, 2005, Warren Ando went to G & R Tours and conducted interviews and an investigation. Mr. Ando's notes indicate Ms. Rodriguez was supposed to inspect the trail and report back."

The supervisor [Chris Faye] indicated that the decedent bumped into her at Big Save and asked for the keys and cell phone and wanted to work the day of the incident. The supervisor indicated that the decedent should be careful as there weren't many people working that day and that she should just scope out the trail and report to the supervisor so that they could plan on whether tours should be sold for the following days.

J-1, OZ 0914 and OZ 0937.

9. Although her official supervisor at Ms. Rodriguez's time of death, by the date of January 4, 2005, Ms. Faye "was not actually actively supervising" Ms. Rodriguez. Ms. Rodriguez directly reported Warren Robinson, Ms. Faye's supervisor.

10. According to Ms. Faye, Ms. Rodriguez stated she had authorization from Mr. Warren Robinson to inspect the trails on the day Ms. Rodriguez died.

11. Mr. Okamoto reported to Mr. Warren Robinson as an employee of Gay & Robinson, Inc. In January of 2005, Mr. Okamoto had apparent authority to direct operations at G & R Tours¹. Mr. Okamoto is the person who authorized Ms. Faye to work on January 4, 2005.

12. On the day of the accident, Ms. Faye had no knowledge that Mr. Okamoto or Mr. Robinson restricted Ms. Rodriguez's duties.

13. Mr. Okamoto testified that clearing trails was part of Ms. Rodriguez's job, which he told Mr. Ando during the initial investigation. If Mr. Goya had asked him whether Ms. Rodriguez was doing her job for G & R Tours at the time she died, Mr. Okamoto would have told Mr. Goya, "Yes, she was." Mr. Okamoto had actually seen Ms. Rodriguez remove and clear tree limbs from the trails as part of her job.

14. Mr. Okamoto also contradicts the allegation that Ms. Faye told Ms. Rodriguez not to remove anything she might find on the trail. He testified that he was told by Ms. Faye that Ms. Rodriguez was simply instructed "don't tackle a task you can't

¹ Mr. Warren Robinson also exercised authority over G & R Tours and their employees. Ms. Faye acknowledged that if Warren Robinson asked her to do something at work, she would do it and consider herself still acting as an employee of G & R Tours. Mr. Robinson also had the responsibility to train G & R Tour employees about the safe operating procedures for the ATVs.

handle." Ms. Rodriguez's job duties included inspecting the trails, "as well as remove whatever she can . . . from the trail that would impede the bike riders."

15. Stacy Miller's claim note to file stated: "Claimant was not wearing helmet and was not yet assigned to begin removal of tree (she would most likely not have been alone). It appears she had begun the work for ER based on her initiative and anticipation of assignment so if a claim is filed we will not likely prevail." (J-1 OZ 0879)

16. Ms. Rodriguez was a rogue employee of Gay & Robinson Tours and did not follow the chain of command in the performance of her work activities.

17. Gay & Robinson Tours, as the employer of Ms. Rodriguez, allowed Ms. Rodriguez to conduct herself and perform her work activities in the manner that she did, including, but not limited to, not following the chain of command.

18. The acts and omissions of Ms. Rodriguez on the date of her death were for the benefit of her employer Gay & Robinson Tours.

19. On January 11, 2005, Mr. Okamoto wrote to Venerose Galvez at HEMIC and inquired about the status of paying death benefits to Ms. Ordonez.

20. On January 11, 2005, Mr. Okamoto wrote to Venerose Galvez and gave her the name and address of Ms. Ordonez, her phone number, and contact information with Carlos Pantoja "who is communicating with us on behalf of Mrs. Ordonez." He also gave the name of Ms. Rodriguez's children, and asked if HEMIC needed information to get in touch with the son and daughter. (J-1, OZ 0856-57).

21. On January 11, 2005, Galvez wrote back to Charles Okamoto of G & R Tours that "with regard to the funeral/burial expenses, HEMIC will pay these expenses directly to the providers(s)." (J-1, OZ 0935). In the same email, Ms. Galvez wrote, "yes, the death benefits will be paid to the decedent's mother, which is \$48,516.00 (312 x \$622 max rate x 25%)."

22. Furthermore, on January 11, 2005, Ms. Galvez wrote a Loss Report to the Reinsurer on January 11, 2005. (J-1 OZ 0931-32) She writes "In accordance with 386-41 of the Hawai'i Revised Statutes, we will pay the funeral expenses . . . and burial expenses." Also, she concluded, "We would anticipate to have all issues resolved in the next 2-4 months."

23. On March 15, 2005 Ms. Okamoto emailed again asking if HEMIC distributed the "final settlement check to Mayra Rodriguez mother." (J-1 OZ 0856).

24. On March 19, 2005, HEMIC never contacted Ms. Ordonez, her sons, Mr. Pantoja or Ms. Obadia during the course of their investigation of this matter. Ms. Obadia's information was provided to HEMIC on March 19, 2005. (J-1, OZ 0855).

25. Ms. Rodriguez was providing financial support to her mother Ms. Ordonez prior to Ms. Rodriguez' death.

26. Despite Ms. Miller's conclusion that Ms. Ordonez had a compensable worker's compensation death claim, HEMIC did not process Ms. Ordonez' claim efficiently or effectively.

27. On May 20, 2005, Ms. Ordonez filed a WC-5a form with the Department. (J-1 OZ 0836-0838).

28. Over a month passed with no activity on the claim. On July 1, 2005 Ms. Galvez wrote to Ms. Miller asking "Please advise if you will further handle this claim. If so, where do we go from here?" (J-1 OZ 0832).

29. On July 5, 2005, in a Litigation Transmittal Referral to Ms. Miller, Ms. Galvez (now Ms. Calma) stated the "issue is whether to voluntarily accept compensability and pay death benefits or to have DCD issue a decision." (J-1, OZ 0829).

30. Another month passed with no activity on the claim.

31. On August 8, 2005 attorney David Robinson wrote to HEMIC on behalf of Ms. Ordonez and asked if there "is some legal or factual reason for not having commenced said benefits." (J-1, OZ 0821). Mr. Robinson also notes that since the death of her daughter and the lack of benefits paid by HEMIC, Ms. Ordonez' "sole means of support has been a pittance from Venezuelan welfare." Id.

32. On August 16, 2005, Ms. Miller replied to Mr. Robinson and gave no factual or legal explanation regarding the delay in making payments. She stated simply "Please be advised that we are awaiting a hearing for a determination of dependents." No issue is raised concerning whether the death is work related, or that compensability was contested. (J-1, OZ 0816).

33. The Court is unable to find evidence of any investigation into the alleged question of compensability between May, 2005 and the hearing on November 29, 2005. Between May and the November Hearing, no one from HEMIC asked the employer any further questions about the issue of whether or not Ms. Rodriguez died performing functions related to her job. Defendant's expert, Ms. Tamashiro was asked if there was anything what HEMIC did to investigate compensability. The only investigation she recalled were "attempts to meet with the employer." Those attempts were all before May, 2005. The official WC-3 Carrier's Case Report (J-1 OZ 0839), closing the file on May 12, 2005, does not include non-compensability as a reason the file was closed.

34 HEMIC did not request that any witnesses appear at the Hearing to present a defense. Mr. Okamoto was not asked to attend the hearing. Ms. Faye was not asked to attend the hearing. When Mr. Okamoto got notice of the hearing, he asked G & R's Treasurer, Clem Lum, to attend the hearing to find out what happened. There is no record in any of the claim file documents which indicate a request to anyone to appear at the hearing was made by Ms. Miller or anyone else at HEMIC. No continuance of the hearing was requested on behalf of HEMIC.

35. Ms. Ordonez's WC-5a made a claim for dependent benefits. (J-1 OZ 0838). Between the time that claim was made on May 20, 2008 and the time Mr. David Robinson appeared in the case, HEMIC did no investigation into the question of Ms. Ordonez's dependency. Once Mr. Robinson appeared, the only investigation done into the question of dependency were several letters to the employer and Mr. Robinson asking for documents. See, for example J-1 OZ 0787, 0786 and 0801. Mr. Robinson sent an affidavit by Ms. Ordonez to HEMIC on September 21, 2005. (J-1 OZ 0799-800).

36. HEMIC did not thoroughly, or promptly investigate any questions related to the compensability of this claim and did not have any reasonable basis to force the matter to hearing before commencing payments.

37. HEMIC's motivation in delaying Ms. Ordonez' claim for beneficiary death benefits was to delay payment so the statute of limitations would expire and HEMIC could avoid paying Ms. Ordonez her beneficiary death benefits.

38. HEMIC's misconduct and motivation in delaying Ms. Ordonez' claim for beneficiary death benefits were oppressive, willful and in reckless disregard for Ms. Ordonez' rights.

III. Conclusions of Law

A workers' compensation insurance carrier has a duty to act in good faith in dealing with workers' compensation claimants, and a breach of this duty gives rise to a cause of action in tort for insurer bad faith. *Hough v. Pacific Ins. Co., Ltd.*, 83 Hawai'i 457, 468-69, 927 P.2d 858, 869-70 (1996). A reasonableness standard governs bad faith claims. *The Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996).

A death is compensable under Section 386-3 of the Hawai'i Revised Statutes ("HRS") "(i)f an employee suffers personal injury . . . by accident arising out of and in the course of the employment"

The Hawai'i Supreme Court has stated clearly and repeatedly:

In all compensability cases, we are guided by the unitary test, which considers whether there is a sufficient work connection to bring the accident within the scope of the statute. First articulated in *Royal State National Insurance Co. v. Labor and Industrial Relations Appeal Board*, 53 Haw. 32, 487 P.2d 278 (1971), the work connection approach simply requires the finding of a causal connection between the injury and any incidents or conditions of employment.

Tate v. GTE Hawaiian Telephone, 77 Hawai'i 100, 103, 881 P.2d 1246, 1249 (1994)

(emphasis added).

In *Costa v. Able Distributors, Inc.*, 3 Haw.App. 486, 490, 653 P.2d 101, 105 (1982), the Court stated that for an employee's act to be "within the scope of employment, there usually must be some direct benefit to the employer" and a showing "that the employee intended to act in the employer's interest." The *Costa* tests fall within the Restatement rule that an employee's act or conduct must be "actuated, at least in part, by a purpose to serve" the employer.

In addition, HRS Section 386-85 expressly provides a presumption in favor of employees that a claim for worker's compensation is compensable. Thus, to rebut the claim, an employer must provide "substantial evidence" that the injury is not work-related. *Royal State Nat. Ins. Co. v. Labor and Indus. Relations Appeal Bd.*, 53 Hawai'i 32, 34-35, 487 P.2d 278, 280 (1971); *Acoustic, Insulation & Drywall, Inc. v. Labor & Industrial Relations Appeal Board*, 51 Hawai'i 312, 316, 459 P.2d 541, 544, *rehearing denied*, 51 Hawai'i 632, 466 P.2d 439 (1970).

The legislature indeed has cast a heavy burden on the employer in workmen's compensation cases. In its wisdom in formulating public policy in this area of the law, the legislature has decided that work injuries are among the costs of production which industry is required to bear; and if there is reasonable doubt as to whether an injury is work-connected, the humanitarian nature of the statute demands that doubt be resolved in favor of the claimant.

Akamine v. Hawaiian Packing & Crating Co. 53 Hawai'i 406, 409, 495 P.2d 1164, 1166 (1972).

In spite of these well established principles, HEMIC refused to accept compensability in this claim, and proceeded as if the circumstances of Mayra Rodriguez's death created a question of compensability.

HRS Section 386-41(d) (covering death claims) requires payment to nondependent parent or parents (or, if none, the Special Compensation Fund ("SCF")) if there are no dependents entitled to benefits. If a *dependent* of a deceased wishes to pursue a claim, a WC-5a form should be used. Hawai'i Administrative Rules Section 12-10-30(c). Nothing in the Hawai'i Workers Compensation statutory and administrative scheme requires a specific claim form to be filed before the obligation to pay non-dependent benefits exists. However, the filing of the WC-5a on May 20, 2005 was clear notice to HEMIC of Plaintiff's intent to pursue the claim. HEMIC unreasonably and in bad faith failed to recognize its obligation to pay non-dependent benefits under this provision of Hawai'i law, and improperly intended to avoid its obligation to Ms. Ordonez and to the SCF.

The nine months of delay before the hearing in this case was unnecessary and unreasonable and caused significant hardship to Esmeralda Ordonez, at a time

when she was suffering desperate financial difficulties. Thus, Ordonez has met the standards for a verdict in her favor.

We believe that the appropriate test to determine bad faith is the general standard set forth in *Gruenberg* and its progeny. Under the *Gruenberg* test, the insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. An unreasonable delay in payment of benefits will warrant recovery for compensatory damages under the *Gruenberg* test.

Best Place, Inc. v. Penn America Ins. Co. 82 Hawai'i 120, 133, 920 P.2d 334, 347 (1996) (Emphasis Added).

The Court concludes that HEMIC was improperly motivated to avoid payments to both Ordonez and the Special Compensation Fund, as further shown by Ms. Miller's claim notes of January 17, 2005. In those entries Ms. Miller conceded her belief that the claim was compensable, but that HEMIC could avoid paying the SCF if HEMIC denied the claim.

Punitive damages are appropriate if the Defendant acted "wantonly or oppressively or with such malice that implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences." *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 138, 839 P.2d 10, 37 (1992). That standard was met in this case by evidence of HEMIC's efforts to deliberately avoid and delay payment when it knew early in the claim that if a claim was filed they would be unlikely to prevail. The evidence indicates that HEMIC attempted to evade its responsibility to make payments to either a claimant or the SCF.

HEMIC required the claim to proceed to hearing despite no reasonable question that Ms. Rodriguez's death was covered by the Workers Compensation statute.

Viewing all of the claim conduct as a whole, the Court concludes there is ample evidence to support its finding that HEMIC acted improperly and with willful misconduct and entire want of care which raises the presumption of a conscious indifference to and reckless disregard for the serious consequences to Ms. Ordonez.

As Ms. Tamashiro testified, well trained claims employees will look for ways to pay a claim if it's legitimate under the terms of the policy. She also agreed that it would be improper to focus an investigation on ways to avoid paying a claim. However, this trial established HEMIC did in fact conduct their investigation in this matter. While such sharp adversarial tactics might have a place in litigation against a third party, they cannot be ratified by this Court in the context of a workers compensation beneficiary who rightfully held a compensable claim and was denied benefits.

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JUDGMENT

The Court, therefore, finds in favor of the Plaintiff, and awards damages to Ms. Ordonez as follows:

General damages in the amount of \$75,000.00

Punitive damages in the amount of \$250,000.00

DATED: Līhu'e, Hawai'i, April 9, 2009.

 *Randal G. B. Valenciano*

THE HONORABLE RANDAL G. B. VALENCIANO
Judge of the Above-Entitled Court

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

ESMERALDA ROJAS ORDONEZ,

Plaintiff,

v.

HAWAII EMPLOYERS' MUTUAL
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Defendants.

CIVIL NO. 06-1-0138
(Non Motor Vehicle Tort)


CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on April 9, 2009, copies of the Court's Findings of Fact, Conclusions of Law and Judgment were served upon the following:

	U.S. Mail	Court Jacket
David M. Robinson Daniel E. Chur Robinson & Chur Gentry Pacific Design Center, Suite 219 560 N. Nimitz Highway Honolulu, Hawai'i 96817 Attorneys for Plaintiff Esmeralda Rojas Ordonez	X	
Jeffrey S. Portnoy Christian K. Adams Cades Schutte, LLLP 1000 Bishop Street, Suite 1200 Honolulu, Hawai'i 96813 Attorneys for Hawai'i Employers' Mutual Insurance Company, Inc.	X	

DATED: Līhu'e, Hawai'i, April 9, 2009.



Clerk of the Above-Entitled Court