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COURT

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

9	LIBRADO P. BERNAL,)	Civil Action No. 93-890
)	
10	Plaintiff,)	
)	
11	v.)	<u>ORDER GRANTING</u>
)	<u>SUMMARY JUDGMENT</u>
12	J.C. TENORIO ENTERPRISES, INC.,)	
	et al.,)	
13)	
	Defendants.)	
14	_____)	

This matter came before the Court on December 10, 1993, on the motion of Defendants J.C. Tenorio Enterprises ("J.C. Tenorio"), Willie Caranzo, and Pacifica Insurance Underwriters, Inc. ("Pacifica Insurance"), for summary judgment pursuant to Com. R. Civ. P. 56. The motion is premised upon the contention that the exclusivity provision of the Commonwealth Worker's Compensation Law, 4 CMC § 9305, bars Plaintiff Librado Bernal's personal injury claim. Plaintiff claims that Defendants failed to "secure compensation" and thus lost the protection of the exclusivity provision. Alternatively, plaintiff argues that the statute denies him due process of law.

FOR PUBLICATION

1 I. FACTUAL AND LEGAL BACKGROUND

2 According to the parties, on May 1, 1993, Plaintiff was
3 working on the premises of J.C. Tenorio when he was hit by a van
4 driven by Defendant Willie Caranzo, who was also an employee of
5 J.C. Tenorio at the time of the accident. The parties agree that
6 both Plaintiff and Mr. Carranzo were acting within the scope of
7 their employment at the time of the accident. As a result of his
8 injuries, Plaintiff's right leg was amputated.

9 Mr. Bernal has brought this lawsuit for negligence against
10 Defendants in an effort to receive compensation for mental and
11 physical pain, and for loss of wages. In addition to suing Mr.
12 Caranzo, the Plaintiff has named as defendants J.C. Tenorio
13 because it owned the van driven by Mr. Caranzo, and Pacifica
14 Insurance because Mr. Bernal alleges J.C. Tenorio is insured by
15 Pacifica Insurance.

16 To date, Pacifica Insurance, as general agent for and on
17 behalf of Tokio Marine & Fire Insurance Company,^{1/} has tendered
18 worker's compensation payments to Mr. Bernal. Affidavit of Joanne
19 Guerrero, ¶ 5 (Oct. 22, 1993). Pacifica Insurance has also
20 authorized payment for Mr. Bernal's medical care and services.
21 Id. However, Plaintiff alleges that these payments were neither
22 timely made nor sufficient to compensate Plaintiff under the terms
23 of the Commonwealth's Workers' Compensation Law (4 CMC §§ 9301 et

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26 _____
27 ^{1/} Pacifica Insurance Underwriters is not an insurance
28 carrier, but rather an underwriting company that serves as general
agent for Tokio Marine. Affidavit of Joanne Guerrero, ¶ 2 (Oct.
22, 1993). J.C. Tenorio entered into a worker's compensation
insurance policy with Tokio Marine, covering the employees of J.C.
Enterprises. Id. at 3.

1 seq.). See Plaintiff's Opposition Memorandum at 6-7, Exhibits 1-
2 8. Defendants deny these claims.

3
4 **II. ISSUE**

5 Two issues are presented:

6 1. Does the exception contained in 4 CMC § 9305, allowing
7 an employee to maintain an action at law when an employer "fails
8 to secure compensation," apply when an employer has failed to pay
9 Worker's Compensation on time and in full?

10 2. Does 4 CMC § 9305 violate Plaintiff's right to due
11 Process under the Commonwealth Constitution, Article I, Section 5?
12

13 **III. ANALYSIS**

14 **A. SUMMARY JUDGMENT STANDARD**

15 Summary judgment is entered against a party if, viewing the
16 undisputed facts in the light most favorable to the non-moving
17 party, the Court finds as a matter of law that the moving party is
18 entitled to the relief requested. *Cabrera v. Heirs of De Castro*,
19 1 N.M.I. 172 (1990). Here, Defendants deny Plaintiff's
20 allegations that compensation payments were untimely or deficient.
21 However, Defendants argue that they are entitled to judgment even
22 if Plaintiff's allegations are true. The Court therefore treats
23 the allegations as true for the purposes of the motion.
24

25 **B. FAILURE TO SECURE COMPENSATION**

26 Title 4, CMC § 9305 provides in part:

27 Where the conditions of compensation exist, the right to
28 recover such compensation, pursuant to the provisions of
this chapter, is the exclusive remedy for injury or
death of an employee against the employer or against any

1 other employee of the employer acting within the scope
2 of such other employee's employment; provided that, **if**
3 **an employer fails to secure payment of compensation as**
4 **required by this chapter**, an injured employee, or his
5 legal representative in case death resulted from the
6 injury, may elect to claim compensation under this
7 chapter, or to maintain an action at law or for damages
8 on account of such injury or death.

9 (Emphasis added.) The parties dispute the meaning of the
10 highlighted phrase.

11 Defendants assert that the phrase "fails to secure
12 compensation" refers to an employer's failure to carry workers'
13 compensation insurance at all, not its failure to make individual
14 payments. The California courts have taken this position. *Pecor*
15 *v. Norton-Lilly Co.*, 295 P. 582 (Cal. App. 1931) ("failure to
16 secure compensation" means failure to carry workers' compensation
17 insurance); see also *Phillips v. Crawford & Co.*, 248 Cal. Rptr.
18 371, 374 (Cal. App. 1988) (where claim administrator delayed or
19 denied payment, "the exclusive remedy lies with the Worker's
20 Compensation Appeals Board"); *Depew v. Hartford Accident &*
21 *Indemnity Co.*, 135 Cal. Rptr. 472, 474 (Cal. App. 1982) (only
22 "outrageous conduct" by an insurer or employer entitles an
23 employee to an action outside workers' compensation system);
24 *Neville v. Wichita Eagle, Inc.*, 294 P.2d 248, 251 (Kan. 1956).

25 Plaintiff points out that none of this authority is binding
26 in this jurisdiction. He argues that any default by a workers'
27 compensation carrier in paying compensation -- in the amounts and
28 on the schedule provided by the statute -- should render the
exclusivity provision of §9305 inapplicable and entitle an injured
employee to sue for damages. Plaintiff provides no authority for
this proposition.

1 The Court is not persuaded by Plaintiff's view. The phrase
2 "fails to secure compensation" is somewhat ambiguous; however, the
3 use of the word "secure" rather than the word "pay" indicates that
4 the drafters intended for the employer's "failure" to be something
5 more than a delay in making payments or an incorrect calculation
6 of benefits. This interpretation is buttressed by the fact that
7 the Workers' Compensation Law provides administrative remedies for
8 collection of defaults (§ 9327), for review of compensation
9 orders, (§§ 9330-9337), and for civil and criminal penalties in
10 the case of an employer's noncompliance (§ 9347). Indeed, the
11 penalty provisions of § 9347(b) (1) distinguish failure "to **secure**
12 **compensation** under this chapter" from failure "to **make payment of**
13 **such compensation** under this chapter"² (emphasis added).

14 In sum, the Court finds that an employer's failure to make
15 timely and full payments does not constitute "failure to secure
16 compensation" by the terms of 4 CMC § 9305.^{2/} By its terms, this
17 statute applies to Plaintiff and bars this action.

18 19 C. DUE PROCESS VIOLATION

20 Plaintiff's second defense against Defendants' motion is that
21 § 9305, even if applicable, denies Plaintiff's right to due
22 process, in violation of the Fourteenth Amendment to the U.S.
23 Constitution and Article I, Section 5 of the Commonwealth
24 Constitution.

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26
27 ^{2/} The facts presented here do not require the Court to
28 decide whether outrageous conduct on the part of an insurer or
employer will entitle an employee to an action at law. Therefore,
no view is expressed on that question.

1 As to the U.S. Constitution, Plaintiff's contention is easily
2 disposed of. Defendants have cited a series of cases affirming
3 the constitutionality of various types of workers' compensation
4 systems. See U.S. v. *Demko*, 87 S.Ct. 382, 384 (1966) ("where
5 there is a compensation statute that reasonably and fairly covers
6 a particular group of workers, it presumably is the exclusive
7 remedy to protect that group"). Indeed, the U.S. Supreme Court
8 has cited with approval California's interpretation of its
9 exclusivity provision. *Tipton v. Atchison, T. & S.F. Ry. Co.*, 56
10 S.Ct. 715, 720 n.18 (1936) (citing *Pecor*, supra).

11 As to the due process provision of the Commonwealth
12 Constitution, Plaintiff cites no authority for the proposition
13 that Art. I, § 5 extends greater due process protection than its
14 federal counterpart. Indeed, the reverse is true. According to
15 the Analysis of the Constitution of the Commonwealth of the
16 Northern Marianas Islands (1976) at 20, Art. I, § 5:

17 is taken directly from section 1 of the Fourteenth
18 Amendment to the U.S. Constitution [...]. No
19 substantive change from section 1 of the Fourteenth
United States Supreme Court is intended.

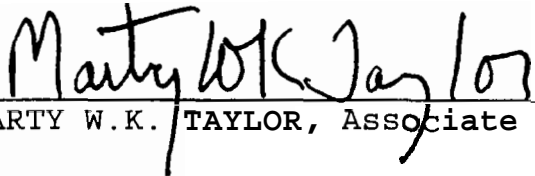
20 See also *In re "C.T.M."*, 1 N.M.I. 405, 413 (1990). The Court thus
21 finds no basis for striking down a provision the constitutionality
22 of which has been firmly established by the U.S. Supreme Court.

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IV. CONCLUSION

For all the foregoing reasons, Defendant's motion for summary judgment is GRANTED. Judgment as a matter of law is rendered in favor of DEFENDANTS.

So ORDERED this 25TH day of May, 1994.


MARTY W.K. TAYLOR, Associate Judge