21-6907

NO. _____

ORIGINAL

IN THE
SUPREME COURT OF UNITES STATES

Linda Baldwin,

Petitioner,

V.

Zurich American Insurance, Company

Respondent,

APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFITH CIRCUIT

APPLICATION OF WRIT OF CERTIORARI JUSTICE SAMUEL ALITO

Linda Baldwin, *Pro se*
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QUESTIONS PRESENTED

1. Constitution of the United States of America 1789 (rev. 1992). All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Supreme Court held that such claims were viable. Id. At 215. Interpretation the former workers' compensation carrier from the entire field of tort law" and that it could not be read as bar to a claim that is not based on a job-related injuries. "Id. at 214. In Aranda v. Insurance Co. of North America, 748 S.W.2d 210

3. Applying equitable tolling, the Ninth Circuit allowed the untimely petition for permission to appeal the class decertification order, where the plaintiff orally informed the district court of his intent to file a motion for reconsideration, complied with the district court's ordered deadline to file a motion for reconsideration, and acted diligently in seeking permission to appeal the class decertification order after the court ruled on the reconsideration motion. *See id.* at 1178-79.

PARTIES TO THE PROCEEDING

1. Petitioner, Linda Baldwin, *pro se* , individually, on Review. Petitioner was the Plaintiff-Appellant.

2. Respondent Counsel, Blair C. Dancy is the Attorney for the Carrier, Zurich American Insurance Company, is a party to this Appeal. Attorney Dancy is the attorney for the Appellee.

3. Office of Injured Employee Counsel, through their Counsel, Attorney General,for the defendants- respondent is not a party to this Appeal. Respondent was the Appellee.

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IN THE
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Linda Baldwin,
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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To Justice Samuel Alito and Associate Justices of the Supreme Court: Petitioner, Linda Baldwin *pro se,* respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the United States Court of Fifth Circuit, denying certificate of appeal ability.

Petitioner, Linda Baldwin, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Court of Appeals in this case. This case was consolidated under 20-50284, 20-50293 USDC 1:18-CV-996 and 1:19-CV-454

OPINIONS BELOW

On .November 11,, 2021, the opinion of the Fifth Circuit Court of Appeals (Appendix 1)unreported at in Fed. 2021 WL 5105300. On November 16, 2021 the order of the Supreme Court denying rehearing (Appendix 2) is unreported. The memorandum decision and order of the District Court for Austin, Texas, and Motion for Summary Judgment is also unreported. Case: 21-50337 App. 6 a)The opinion of the district courts 2020 WL 7048617 (C.A.5).

JURISDICTION

This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. See, *Hahn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (holding Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appeal ability by a circuit judge or a court of appeals panel.)

PROVISIONS OF LAW INVOLVED

The provisions of constitutional law whose application is disputed in this case is the Fourteenth Amendment to the United States Constitution. It reads, in pertinent part: [N]or shall any person . . .be deprived of life or Liberty. a) **Appeal in a Civil Case**. (1) *Time for Filing a Notice of Appeal:*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from. This notice of Appeal was timely filed on or about April 6, 2020.

(C) An appeal from an order granting or denying an application for a writ of error Coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

INTRODUCTION

On October 20, 2021, Petitioner, Linda Baldwin, was denied as untimely filed appeal motion for reconsideration for a new trial due to her illness with COVID-19 nor did she received a copy of the Court Order denying her due process under the Fourteenth Amendment. The Appellant Rules of Civil Procedure Section 4.5, until after the time had expired for filing, and which she has the right to amend.

This case stems from a Workers' Compensation claim of Ms. Baldwin as she began her employment with Extended Stay American HVM LLC, April 7, 2004, until she became injured and no longer could work standing on a hard concrete floor pacing back and forth causing injuries to her knee and foot and ankle.

On January 17, 2017, Petitioner Baldwin received an untimely notice from the Texas Department of Insurance Workers' Compensation for an injury claim has become final under Section 410.169. Baldwin's appeals were founded untimely by the Office of Injured Employee Counsel under the provision of Section 410.169 or Section 410. 204 for claim number 12—185641 for date of injury August 18, 2006.

Petitioner Baldwin filed her claims within 45 days after she received notice from Texas Department of Insurance. On February 27, 2017, the court clerk incorrectly docketed the case under diversity and the Fair Labor Standards Act, and signed her name, which confused her and was misleading to Baldwin as she followed the docketing sheet. (Case 1:17-cv-00149-RP Document 31 Filed 07/11/17)

The Petitioner Baldwin had raised the claim against Respondent Zurich American Insurance Company for unfair settlement practices in the handling of her claims. The District Court says "this is not the first action she has filed," after Baldwin had encountered several injuries incident to her body and given several notices from Texas Department of Insurance, the District Court went on to say regarding the matter; she has previously filed several lawsuits in Texas state courts complaining of Defendant's denial of benefits. This she will explain below.

On November 9, 2018, Petitioner Baldwin asked the court for a new trial in a letter to the Judge because of the Court's docketing errors noted above wherein the Clerk filled out the docket sheet as diversity and the Fair Labor Standards Act and signed her name and she followed the docketing sheet. (Case 1:18-cv-00996-RP Document 24-1 Filed 03/19/19) [1] The district court filed an order dismissing her claims as Baldwin filled out the docketing sheet as an Insurance claim against the Respondent, Zurich American Insurance Company, for failure to pay her claims. (Appendix 3)

FIRST OMISSION

On February 2, 2019, Petitioner Baldwin Amended Petition and filed for a new trial under FRCP 59. New Trial; Altering or Amending a Judgment. The District Court gave a dismissal and Sanctioned Baldwin. Petitioner Linda Baldwin had filed this complaint within one year of the judge's Order under cause number 1:17-C V-0049 at 49 1-2, the court omission, which she filed a new claim under Cause Number 1:l9—CV-0996 under Section 541.060 of Chapter 541 of the Insurance Code entitled "Unfair Methods of Competition and Unfair or Deceptive Acts." And brought a new claim against Zurich American Insurance Company for violations of Sections 541.060 and 541.061 under section 541.151 which provides a private cause of action after Zurich American Insurance Company accepted her claims to incorporate 12185641 into an agreement, as Baldwin rejected the claims because of the fact that it's a compensable injury for three

[1] Before the Court are Plaintiff Linda Baldwin's ("Baldwin") Motion For Relief Under Rule 60 and Motion to Strike Under Rule 12(f), (Dkt. 42), and Motion for Appointment of Counsel and Declaration of Good Faith Efforts to Obtain Counsel, (Dkt. 45). The Court has already dismissed this action for lack of subject matter jurisdiction because Baldwin's claims fall within the exclusive jurisdiction of the Texas Workers' Compensation Division. (Dkt. 31, at 4-8). Baldwin then filed a motion for reconsideration asking (he Court to exercise supplemental jurisdiction over her claims, (Dkt 32), which the Court denied, (Dkt 41). Baldwin now asks the Court to again reconsider its decision because she believes the Court has diversity jurisdiction over this action. (Second Mot. Reconsider, Dkt. 42, at 2—3). Nothing in Baldwin's motion alters the Court's determination that it lacks jurisdiction over her claims because the' Compensation Division has exclusive jurisdiction over them. (Dkt 31, at 4-8). Baldwin's motion for reconsideration is therefore denied. Baldwin also asks the Court to appoint counsel to represent her. (Mot. Appoint, Dkt 45). Although 28 U.S.C. § 1915(e) authorizes appointment of an attorney to represent an indigent party, there is no right to the automatic appointment of counsel in civil cases. *Salmon v, Corpus Christi ISD,* 911 F.2d 1165, 1166 (Sth Or. 1990). A court is not required to appoint counsel for an indigent. (Case: 20-50284 App. 13 a).

into one claim, and to accept it will affect recordkeeping of her claims.

The Fifth Circuit affirmed the District Court ruling after hearing the argument between the Respondent Appellee, Zurich American Insurance Company, and the Petitioner Appellant, Linda Baldwin, granting Jurisdiction in Appellee's favor, after Respondent, Zurich American Insurance Company denied her claims in state court, but they accepted her claims August 9, 2016. The Respondent acted deceptive under the Texas Deceptive Trade Practices Act. See cases listed below: (EXHIBIT A)

See, *Baldwin v. Zurich Am. Ins. Co.*, No. D–1–GN–12–003139 (353rd Civ. Dist. Ct., Travis County, Tex. 2012);
Baldwin v. Zurich Am. Ins. Co., D–1–GN–13–001281 (261st Civ. Dist. Ct., Travis County, Tex. 2013);
Baldwin v. Zurich Am. Ins. Co., D–1–GN–13–00245 53rd Civ. Dist. Ct., Travis County Tex. 2013)

On March 4, 2020, Petitioner Baldwin filed an objection with the Court's ruling to vacate the order under Rule 60 (a) (6) and motion to reopen the Court's omission which was abuse which prevented Petitioner Baldwin from a fair trial. The Appellee Respondent Defendant Zurich American Insurance Company filed a motion to Vex Baldwin as to a security deposit dated January 29, 2019, and the district signed an order on March 24, 2020 as to a vexatious litigant immediately succeeding the denial March 24, 2020. (Case 1:18-cv-00996-RP App. 46 a). The District Court dismissed her claims and the Appellant Court affirmed Texas Workers' Compensation has exclusive jurisdiction over claims on December 11, 2020 (Appendix 4).

COURT'S HISTORY

On April 15, 2019 the District Court entered, denying motion for Summary Judgement as Premature. On June 26, 2019, District Judge granting Zurich Motion to dismiss. Plaintiff Petitioner Linda Baldwin, filed her for Appeal July 18, 2019. On August 18, 2019, denying Baldwin's notice of Appeal, which pursuant to Federal Rule of Appellate Procedure 4(a) (4) ((B) (i), became effective on the date the order disposing of the Motion was entered. On August 26, 2019, Petitioner Baldwin gave notice of her appeal and later asked the court to dismiss her notice of Appeal without prejudice August 26, 2019. Petitioner Baldwin asked the court to dismiss her Appeal as to a defect without prejudice pending resolution in *Linda Baldwin vs. Office of Injured*

Employee Counsel until she received those subpoena of records after Zurich had accepted her three claims. Petitioner Baldwin has a Constitutional right to dismiss and to re-file and which violated her due process in the Fourteenth Amendment.

On July 18, 2019, Baldwin properly gave her notice of Appeal filed by Linda Baldwin. On August 13, 219, District denying Baldwin notice of Appeal. On August 26, 2019, Baldwin filed a motion to dismiss her notice of Appeal. On September 11, 2019, Baldwin received a mandate/ judgement dismissing her notice of appeal by the Fifth Circuit court of appeal disposing of cases, warrants of prosecution. On January 7, 2020, Baldwin found the district court mooting her notice of appeal. See, Supreme Court 435 N.E.2d 480 (Ill. 1982), 54685, *Flores v. Dugan* (order stating cause is dismissed "without prejudice" is not a final and appealable order).

The case was heard in the Fifth Circuit Court and affirmed in the District Court for Lack of Subject Matter on December 11, 2020, as to a mooted dismissal of Notice of Appeal without prejudice by the Court and warrant of and issued mandate of Prosecution on September 11, 2019, (Case 1:18-cv-00996-RP Document 45 Filed 09/11/19 Page 1 of 2) and disposed of Baldwin's claims after she filed a motion to dismissal of her notice of appeal without prejudice on August 26, 2019. (Case 1:18-cv-00996-RP Document 43 Filed 08/26/19 Page 1 of 3) giving Petitioner Baldwin no-Jurisdiction over her Claims. See, *City Bank v. Saje Ventures II.* under Article III, Moot is unconstitutional, denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them, which confines them to resolving 'real and substantial controversy[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See, *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990) (internal citations omitted).

The Court's emphasis upon Mootness as a constitutional limitation mandated by Article III is long stated in the cases. E.g., *Liner v. Jafco*, 375 U.S. 301, 306 n.3 (1964); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *Sibron v. New York*, 392 U.S. 40, 57 (1968). See, *Honig v. Doe*, 484 U.S. 305, 317 (1988), and Id. at 332 (Justice Scalia dissenting). But compare *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 756 n.8 (1976) (referring to mootness as presenting policy rather than constitutional considerations).

On January 19, 2021, Petitioner Baldwin filed an omission motion to correct Nunc Pro Tunc Order in District Court for a new trial to go back and correct its order against her. On March 25, 2021, the Court denied Baldwin's request to re-instate her case and denied Baldwin a new trial of a Summary Judgment against the Defendant, Zurich American Insurance Company, to correct clerical error by the court under Federal Rule of Civil Procedure 60(a), wherein a party can ask a district court to correct clerical errors in a judgment caused by mistake, oversight, or omission. *In re West Tex. Mktg. Corp.*, 12 F.3d 497, 503 (5th Cir. 1994). Because Baldwin "has a colorable constitutional claim for violation of her due process" after the Appellant Court disposed of her case. As the Fifth Circuit denied Baldwin Lack of Subject Matter under Texas Tort Claims Misrepresentation of its policy Section 541.060 and Texas Deceptive Trade Practices Act after the Respondent Zurich American Insurance Company accepted Baldwin's Claims and later denying her claims when she refused to accept all three claims into one claim. 1). Unfair claims settlement practice prohibited by the Respondent, Zurich American Insurance Company. (4) Not tempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear; in which defendant has denied. (Case: 20-50284 : App. 38 a).

The Respondent Zurich American Insurance Company's doctors have confirmed Linda Baldwin's injuries, timely pay medical, and income benefits with exercise of minimal effort, but instead Respondent, Zurich American Insurance Company has accepted Ms. Baldwin's claims on or about August 9, 2016, and denied all Ms. Baldwin's claims on or about October 16, 2016, and wrongfully and unreasonably denied all medical care and treatment of Ms. Baldwin's injuries and necessary income benefits were delayed, resulting in substantial financial hardship and continued medical problems from her long-untreated medical condition. The Respondent, Zurich American Insurance Company's, failure to disclose why they accepted Ms. Baldwin claims on August 9, 2016 after she reported her injuries within a timely manner to her former employer and later denied her claim in violation of Texas Insurance Code § 541.061 (a) (1), (2), (3) , (4), (5). (Case: 20-50284 App. 38 a).

The Fifth Circuit further Affirmed District Court ruling under Federal Rule of Civil Procedure 60(a), after Baldwin asked the court to correct clerical errors in a judgment caused by mistake, oversight, or omission. *In re West Tex. Mktg. Corp.*, 12 F.3d 497, 503 (5th Cir. 1994). In addition, this case is not timed barred after

Baldwin asked for a New Trial January 11, 2021, or a Nunc Pro Tunc Order. See equitable toll, *Bowles v. Russell* (551 U. S. 2050). Also, Baldwin's attached Partial Summary Judgment was denied. The Fifth Circuit heard the case in *Linda Baldwin vs. Zurich American Insurance Company* and dismissed Petitioner Baldwin's causes of Action under Misrepresentation of the Insurance Policy, Texas Deceptive Trade Practices Act.

SECOND OMISSION

On June 12, 2012, the Contested Case Hearing Officer for Texas Department of Insurance heard Baldwin's request for benefits but denied her request as well as her untimely appeal by the ombudsman of the Office of Injured Employee Counsel as the hearing officer's error, August 18, 2006 for March 1, 2006, which are two different types of injuries. See (Exhibit B) August 18, 2006 deals with the heel, plantar fascia, crepitus knee and arthritis of the ankle. The March 1, 2020 injuries deal with extreme Achilles tendinitis, an overuse injury of the Achilles tendon, the band of tissue that connects calf muscles at the back of the lower leg to your heel bone. (Case: 20-50284 App. 48 a) These are two types of injuries with different symptoms. (App. 20a) (: 20-50284 App. 28 a) Thus, Baldwin asked the District Court to correct the clerical mistake pursuant to Federal Rule of Civil Procedure 60(a). See, *Puckett* v. *United States*, 556 U. S. 129, 135, in the New trial. To establish eligibility for plain-error relief, must show (i) that there was an error, (ii) that the error was plain, and (iii) that the error affects "substantial rights," *i.e.*, that there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles* v. *United States*, 585 U. S. (: 20-50284 App. 27. a).

The hearing officer failed to determine that the issues involved were the compensable injury of August 20, 2007, extends to an injury consistent of plantar fasciitis of the left ankle and left anterior tab fibular ligament, osteoarthritis of the left knee and lower extremities, left knee crepitus, left shoulder impingement syndrome, osteoarthritis of the left forearm. And the extent of injuries deals with August 20, 2007 radiocapitellar joint of the right elbow. To support relatedness, Plaintiff Petitioner provided documentation from her treating doctors explaining how the disputed diagnoses are related to the conmpensable injury as well as to her employer, Extended Stay Hotel, after dismissal of her claims. Petitioner Baldwin was given 45 days to seek a Judicial

review of workers' compensation claims. The Appeal Panel no longer has Jurisdiction over her claims.

STATEMENT OF THE CASE

Petitioner Linda Baldwin is entitled to seek damages from the insurance carrier's breach of a duty of good faith and fair dealing under misrepresentation of the insurance policy. Petitioner Baldwin became unable to work and sued her former employer, Extended Stay American HVM LLC, under the discrimination Title II of the Americans with Disabilities Act, for termination her of employment and failure to report injuries to the Division of Workers' Compensation in a timely manner inequitable. Petitioner toll *in Linda Baldwin v. Extended Stay America Co., HVM L.L.C. 08-17-2016* and *Linda Baldwin vs. Zurich American Company*, the compensation carrier for the employer. Petitioner Baldwin sued that the carriers had breached the duty of good faith and fair dealing by failing to pay promptly her claims for workers' compensation benefits.

The District court dismissed the case for failure to state a cause of action. The court of appeals affirmed the judgment of the trial court. In *Aranda*, the Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court for further proceedings. Petitioner Baldwin began to experience the first symptoms of a repetitious traumatic injury on March 1, 2006. On August 20, 2007, Baldwin became unable to work. At that time, she was employed by Extended Stay America HVM LLC which Zurich American Insurance Company carried a policy of workers' compensation carried a policy of workers' compensation.

The Petitioner Baldwin filed a claim for workers' compensation benefits, naming the compensation carriers. Zurich American Insurance Company investigated the claim and determined that Baldwin was employed; that her injuries were the result of her work for her employer on August 19, 2016; and that her injuries were compensable. However, Baldwin was unable to agree with three claims into one claim which the carrier bore primary responsibility. Consequently, the carrier refused to pay weekly disability benefits or medical expenses until the claim could be resolved by Texas workers' compensation which omitted the act of omission. Baldwin brought suit against Zurich American Insurance Company. Baldwin said that the carriers had breached their duty of good faith and fair dealing by failing to settle her claims promptly and equitably when the liability of the carrier was

clear. Baldwin also claimed intentional misconduct on the part of the carriers. Zurich American Insurance Company filed Sanction and barring from further filing against them after the allegation that the carriers had breached the duty of good faith and fair dealing failed to state a cause of action. Zurich American Insurance Company also contended that Baldwin's causes of action for intentional misconduct were barred by the exclusivity provision of the Workers' Compensation Act. The trial district court granted the dismissal of the cause. The court of appeals affirmed the trial court's judgment, holding that the allegations that Zurich American Insurance Company breached the common law duty of good faith and fair dealing under Misrepresentation did not state a cause of action.

The court of appeals also held that Baldwin's causes of action for intentional misconduct were barred because the remedies available to an injured worker are limited to those expressly enumerated in the Workers' Compensation Act. *212 The Duty of Good Faith and Fair Dealing. It is well established under Texas law that "accompanying every contract is a common law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract." *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (emphasis added). The same duty of care and faithfulness that arises under common law contracts applies equally to insurance contracts. *Burroughs v. Bunch*, 210 S.W.2d 211, 214-15 (Tex.Civ. App.El Paso 1948, writ ref'd); *American Standard Life Ins. Co. v. Redford*, 337 S.W.2d 230, 231 (Tex.Civ.App.Austin 1960, writ ref'd n.r.e.). Specifically, this court has recognized the duty of an insurer to deal fairly and in good faith with its insured in the processing and payment of claims. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987); *English v. Fischer*, 660 S.W.2d 521, 524 (Tex.1983) (Spears, J., concurring). This duty of good faith and fair dealing arises out of the special trust relationship between the insured and the insurer. As this court stated in *Arnold*: In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of the insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of the claims....Id. The duty of good faith and fair dealing is thus imposed on the insurer because of the disparity of bargaining power and the exclusive control that the insurer exercises over the processing of claims.

The Workers' Compensation Act sets forth a compensation scheme that is based on a three-party agreement entered into by the employer, the employee, and the compensation carrier. *Southern Casualty Co. v. Morgan*, 12 S.W.2d 200, 201 (Tex. Comm'n App. 1929, judgm't adopted). The constitutionality of the Workers' Compensation Act rests on the contractual nature of this agreement. Id.; *Huffman v. Southern Underwriters*, 133 Tex. 354, 359, 128 S.W.2d 4, 6 (1939). As between the compensation carrier and the employee, there is a promise for a promise: the carrier agrees to compensate the employee for injuries sustained in the course of employment, and the employee agrees to relinquish his common law rights against his employer. *Southern Casualty Co.*, 12 S.W.2d at 201.

The employee is thus a party to the contract and therefore entitled to recover in that capacity. The contract between a compensation carrier and an employee creates the same type of special relationship that arises under other insurance contracts. The purpose of the Workers' Compensation Act is to provide speedy, equitable relief to an employee injured in the course of his employment. *Texas Employers' Insurance Ass'n v. Wright*, 128 Tex. 242, 97 S.W.2d 171, 172 (1936). The injured employee, from the date of his disability, relies on the compensation carrier for weekly disability benefits and payment of medical expenses. He is dependent on the carrier for protection from the economic calamity of disabling injuries. An arbitrary decision by the carrier to refuse to pay a valid claim or to delay payment leaves the injured employee with no immediate recourse. Contrary to the contentions of Zurich American Insurance Company, the mechanisms provided by the Workers' Compensation Act after accepting her claims and their doctor affirmed Baldwin's injuries caused by work repetitive trauma.

Therefore, this court should hold that there is a duty on the part of workers' compensation carriers to deal fairly and in good faith with *213 injured employees in the processing of compensation claims. This court should reject Zurich American claims and disapprove of those appellate decisions that reject such a duty, *Fidelity & Casualty Co. of New York v. Shubert*, 646 S.W.2d 270 (Tex.App.Tyler 1983, writ ref'd n.r.e.) and *Cantu v. Western Fire & Casualty Ins. Co., Ltd.*, 716 S.W.2d 737 (Tex.App. Corpus Christi 1986), writ ref'd n.r.e. per curiam, 723 S.W.2d 668 (Tex.1987). The next issue to be addressed is the standard of care that applies to claims that the compensation carrier breached its duty of good faith and fair dealing. A workers' compensation claimant who asserts that a carrier has breached the duty of good faith and fair dealing by refusing to pay or delaying payment of a claim must establish (1) the absence of a reasonable basis for

denying or delaying payment of the benefits of the policy and (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim. See, *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1272 (Colo.1985); *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368, 376 (1978).

The first element of this test requires an objective determination of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits. The second element balances the right of an insurer to reject an invalid claim and the duty of the carrier to investigate and pay compensable claims. This element will be met by establishing that the carrier actually knew there was no reasonable basis to deny the claim or delay payment, or by establishing that the carrier, based on its duty to investigate, should have known that there was no reasonable basis for denial or delay. Under the test, carriers will maintain the right to deny invalid or questionable claims and will not be subject to liability for an erroneous denial of a claim. Carriers that breach the duty of good faith and fair dealing, however, will be subject to liability for their tortious conduct.

The trial court's action in sustaining the carriers' dismissal to Baldwin's cause of action for breach of the Misrepresentation duty of good faith and fair dealing was tantamount to a dismissal of Baldwin's cause of action. This court should, in reviewing the trial court's action, as affirmed by the court of appeals, accept as true all of the factual allegations set forth in Baldwin's (20-50284 App 19 a) pleadings. *Jones v. Sun Oil Co.*, 137 Tex. 353, 356, 153 S.W.2d 571, 573 (1941). A review of Baldwin's pleadings reveals that there is a factual basis to support her claim that the carriers breached the duty of good faith and fair dealing. Baldwin has suffered from a repetitious traumatic injury.

To recover workers' compensation benefits, Baldwin has proved causation by activities occurring on a job; she was not required to prove that the injury was caused by an event occurring at a definite time and place. *Davis v. Employers Ins. of Wausau*, 694 S.W.2d 105, 107 (Tex.App. Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Standard Fire Ins. Co. v. Ratcliff*, 537 S.W.2d 355, 360 (Tex.Civ.App.Waco 1976, no writ). Upon proof that job-related activity caused the injury, the insurer carrying the compensation policy on the date that the disability occurred is required to pay compensation benefits. Tex.Rev.Civ.Stat. Ann. art. 8306, § 20 (Vernon Supp.1988). In Baldwin's pleadings, she said that she proved that she was employed by Extend Stay America HVM LLC on March 1, 2006, the date of disability. Petitioner Baldwin further showed and she provided proof of the causal connection to work by presenting both carriers with the report of

Dr. Prant's which indicated that Baldwin's condition, Knee, ankle and foot injuries carpal tunnel syndrome, resulted from her work. Under these facts, Zurich American Insurance Company and Extended Stay America HVM LLC were each fully liable to Baldwin for compensation benefits. Baldwin's claims provide a sufficient factual basis for both parties to pay her claims and neither Zurich nor Extended Stay American Hotel had a reasonable basis for refusing to pay Baldwin's compensable claim and injuries. Baldwin further determined that her claim is compensable and the carriers are to pay her claims. The Respondent Zurich has actual knowledge of Baldwin's employment and actual knowledge that her injuries originated out of her employment, made the conscious decision not to pay the claims. The Petitioner's claims presented a factual evidence basis to support her claims that the carriers knew there was no reasonable basis for denying benefits to Baldwin's claims.

GRANTING PETITION FOR A WRIT OF CERTIORARI

The action against a carrier for breach of the duty of good and fair dealing and misrepresentation for an intentional tort is precluded by the exclusivity provision of the Workers' Compensation Act (the Act). Respondent Zurich American Insurance Company contends that the Act provides the exclusive remedies for injured employees and, therefore, precludes any cause of action against a carrier for Misrepresentation or intentional misconduct in the processing of compensation claims. (Case: 20-50284 App. 61 a) The Workers' Compensation Act provides a compensation scheme for "personal injuries sustained by an employee in the course of his employment." Tex. Rev. Civ. Stat. Ann. art. 8306, § 1 (Vernon 1967) (emphasis added). The exclusivity provision of the Act states: The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employer of said employer for damages for personal injuries.... Tex.Rev.Civ. Stat.Ann. art. 8306, § 3 (Vernon Supp.1988) (emphasis added). (Case: 20-50284 App. 38-61)

The Act thus provides that the remedies afforded by the statute are exclusive only if the injury complained of is an injury contemplated by the Act, a personal injury sustained in the course of employment. The Act was not intended to shield compensation carriers from the entire field of tort law. *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739 (Tex.1980). The exclusivity provision thus cannot be read as a bar to a claim that is not based on a job-related injury. (Case: 20-50284 App. 61) The liability as a result of a carrier's breach of the duty of good faith and fair dealing or

intentional misconduct and misrepresentation in the processing of a compensation claim is distinct from the liability for the injury arising in the course of employment. Injury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury. *Savio*, 706 P.2d at 1265. This court has recognized that an employee may have one claim against his employer under the Act and another claim at common law for an intentional tort. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 933 (Tex. 1983), rev'g 635 S.W.2d 596 (Tex. App. Houston [14th Dist.] 1982). Accordingly, the exclusivity provision of the Workers' Compensation Act does not bar a claim against a carrier for breach of the duty of good faith and fair dealing or intentional misconduct in the processing of a compensation claim. A claimant is permitted to recover when he shows that the carrier's breach of the duty of good faith and fair dealing or the carrier's intentional act is separate from the compensation claim and produced an independent injury. *Massey*, 652 S.W.2d at 933. In Baldwin's pleadings she revealed that she had evidence in both a breach of the duty of good faith and fair dealing and misrepresentation intentional torts by Zurich American Insurance Company Extended Stay American HVM LLC Disability Act Title II that are separate from her compensation claims for her work-related disability. She further states that damages from the carriers' failure to pay compensation benefits: loss of home, credit reputation, and the ability to maintain a job when her credit was a matter of consideration for her employer. Thus, Baldwin has pleaded a sufficient factual basis to enable her to go forward on these claims.

THE PENALTY PROVISIONS

The Respondent Zurich American Insurance Company also asserts that the penalty provisions of the Workers' Compensation Act preclude the imposition of separate tort duties on compensation carriers. Of the penalty provisions cited by the carriers, however, only two provide direct benefits to claimants. Under Article *215 8306, § 18a, a carrier is subject to a 15% penalty if the carrier fails to pay benefits or file a notice of controversial within twenty days of receiving notice of the claim. Under Article 8307, § 5a, a 12% penalty and attorney's fees may be imposed as a sanction against a carrier who fails to pay promptly the proceeds of a settlement, IAB award, or agreed judgment. Neither provision affords relief to the claimant when a carrier breaches the duty of good faith and fair dealing by refusing to pay benefits for a compensable claim until ordered to do so by the Industrial Accident Board. Even if these provisions addressed

such misconduct, the Act does not contemplate that the failure of a carrier to act in good faith or the carrier's intentional tort can be meaningfully redressed by the mere addition of 12% or 15% to the past due compensation. Such nominal penalties are of questionable value as an incentive for the carrier to act reasonably in processing an employee's claim. See, *Martin v. Traveler's Ins. Co.*, 497 F.2d 329, 331 (1st Cir.1974) (applying Maine law); *Coleman v. American Universal Ins. Co.*, 86 Wis.2d 615, 273 N.W.2d 220, 224 (1979). In summary, this court should hold that compensation carriers are subject to a duty of good faith and fair dealing in the processing of compensation claims. A worker's claim against the carrier for breach of the duty of good faith and fair dealing or intentional misconduct in the processing of claims is not precluded by the exclusivity provision or the penalty provisions of the Workers' Compensation Act. A cause of action for breach of the duty of good faith and fair dealing is stated against a carrier when it is alleged that: (1) there is not a reasonable basis for denying the benefits; (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim; (3) the carrier's lack of good faith, separate and independent from the original job-related injury, proximately caused damages; and (4) the employee sustained damages as result of the carrier's action. As this court recognized in Arnold, ordinary tort damages, including exemplary damages, are recoverable for a breach of the duty of good faith and fair dealing upon a showing of the same elements that permit a recovery of those damages in other tort actions. 725 S.W.2d at 168. The Supreme Court of Texas has concluded that the liability as result of the carrier's breach of duty of good faith and fair dealing or intentional misconduct in the proceeding of a compensation claim is distinct from the liability for the injuries arising in the course of employment. 21. The Supreme Court held that such claims were viable. Id. at 215. Interpretation the former workers' compensation carrier from the entire field of tort law"and that it could not be read as bar to a claim that is not based on job-related injuries." Id. at 214. In *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted

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