

JAN 24 2007

A BILL FOR AN ACT

RELATING TO WORKERS' COMPENSATION LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Hawaii adopted its first workers' compensation
2 law in 1915. The coverage of the Hawaii law even then was
3 intended to be broad, compulsory, and exclusive, barring all
4 remedies by the employee, the employee's personal
5 representatives, dependents, and next of kin against the
6 employer for all accidents and injuries that arise out of and in
7 the course of employment.

8 As the law was revised over the years, its reach and
9 benefits were continuously expanded, and Hawaii courts, when
10 claims were challenged, regularly expressed the opinion that the
11 provisions of the law were to be "liberally construed, and by
12 authority the construction must be a broad one so as to
13 effectuate the purposes on the act." *In re Ikoma*, 23 Haw. 291,
14 295 (1916). In this same decision, the supreme court further
15 explained that "[t]he act, taking from the employee the right to
16 sue for injuries received, certainly did not intend that his
17 right to look to his employer should be frittered away and the



1 beneficent provisions of the act taken from him by devices and
2 subterfuges" *Id.* at 300. In recent years, however, the
3 noble intent and purpose of the workers' compensation law have
4 been frittered away at the expense of the beneficent provisions
5 intended and to the detriment of injured workers and those
6 families and dependents who rely upon the law and the department
7 of labor and industrial relations for relief.

8 Ten years ago, the State enacted workers' compensation
9 reform that was clearly designed to limit the resort of
10 employers and their carriers to repetitive "employer-requested
11 medical exams" that were being abused to such an extent that
12 claimants were experiencing harassment and non-health related
13 costs were being added to the workers' compensation system. But
14 recently, decisions of the director of labor and industrial
15 relations to waive the statutory restrictions have resulted in a
16 de facto veto of the legislative intent.

17 A recent study of employer-requested examinations in Oregon
18 documented comparable bias and abuse of the uncontrolled and
19 unbalanced power of employers and revealed that "there are
20 credible and unbiased [independent medical examination]
21 physicians in the system" and there is "no effective process for
22 injured worker complaints regarding their [independent medical



1 examination] experience[s]" *Workers' Compensation*
2 *Insurer Medical Examination Study*, Oregon Department of Consumer
3 and Business Services (Dec. 2, 2004). In Hawaii, despite clear
4 statutory language to the contrary, claimants are routinely
5 threatened with termination of benefits if they do not comply
6 with the order of an insurance carrier instead of the director
7 of labor and industrial relations to attend an examination.

8 The purpose of this Act is to recommit this law and the
9 department of labor and industrial relations to the historic,
10 humane, and proper purpose of chapter 386, Hawaii Revised
11 Statutes, whereby the welfare of the injured workers shall be of
12 paramount concern, so that injured workers shall expeditiously
13 and without insult or harassment receive compensation and
14 medical services designed to mitigate injuries and, where
15 possible, rehabilitate to the greatest extent every injured
16 worker.

17 SECTION 2. Section 386-31, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "**§386-31 Total disability.** (a) Permanent total
20 disability. Where a work injury causes permanent total
21 disability the employer shall pay the injured employee a weekly
22 benefit equal to sixty-six and two-thirds per cent of the



1 employee's average weekly wages, subject to the following
2 limitation:

3 Beginning January 1, 1975, and during each succeeding
4 twelve-month period thereafter, not more than the state average
5 weekly wage last determined by the director, rounded to the
6 nearest dollar, nor less than \$38 or twenty-five per cent of the
7 foregoing maximum amount, rounded to the nearest dollar,
8 whichever is higher.

9 In the case of the following injuries, the disability
10 caused thereby shall be deemed permanent and total:

- 11 (1) The permanent and total loss of sight in both eyes;
- 12 (2) The loss of both feet at or before the ankle;
- 13 (3) The loss of both hands at or above the wrist;
- 14 (4) The loss of one hand and one foot;
- 15 (5) An injury to the spine resulting in permanent and
16 complete paralysis of both legs or both arms or one
17 leg and one arm; or
- 18 (6) An injury to the skull resulting in incurable
19 imbecility or insanity.

20 In all other cases the permanency and totality of the
21 disability shall be determined on the facts. No adjudication of



1 permanent total disability shall be made until after two weeks
2 from the date of the injury.

3 (b) Temporary total disability. Where a work injury
4 causes total disability not determined to be permanent in
5 character, the employer, for the duration of the disability, but
6 not including the first three calendar days thereof, shall pay
7 the injured employee a weekly benefit at the rate of sixty-six
8 and two-thirds per cent of the employee's average weekly wages,
9 subject to the limitations on weekly benefit rates prescribed in
10 subsection (a), or if the employee's average weekly wages are
11 less than the minimum weekly benefit rate prescribed in
12 subsection (a), at the rate of one hundred per cent of the
13 employee's average weekly wages.

14 If an employee is unable to complete a regular daily work
15 shift due to a work injury, the employee shall be deemed totally
16 disabled for work for that day.

17 The employer shall pay temporary total disability benefits
18 promptly as they accrue to the person entitled thereto without
19 waiting for a decision from the director, unless this right is
20 controverted by the employer in the employer's initial report of
21 industrial injury. The first payment of benefits shall become
22 due and shall be paid no later than on the tenth day after the



1 employer has been notified of the occurrence of the total
2 disability, and thereafter the benefits due shall be paid weekly
3 except as otherwise authorized pursuant to section 386-53.

4 The payment of these benefits shall only be terminated upon
5 order of the director or if the employee is able to resume work.
6 When the employer is of the opinion that temporary total
7 disability benefits should be terminated because the injured
8 employee is able to resume work, the employer shall notify the
9 employee and the director in writing of an intent to terminate
10 the benefits at least two weeks prior to the date when the last
11 payment is to be made. The notice shall give the reason for
12 stopping payment and shall inform the employee that the employee
13 may make a written request to the director for a hearing if the
14 employee disagrees with the employer. Upon receipt of the
15 request from the employee, the director shall conduct a hearing
16 as expeditiously as possible and render a prompt decision as
17 specified in section 386-86. If the employee is unable to
18 perform light work, if offered, temporary total disability
19 benefits shall not be discontinued based solely on the inability
20 to perform or continue to perform light work.

21 No employer shall suspend, deny, or discontinue benefits to
22 an injured employee without an order from the director. The



1 order shall only be issued after a full and fair hearing at
2 which the injured employee shall be provided the opportunity to
3 review the employer's evidence and present rebuttal.

4 An employer or insurance carrier who fails to comply with
5 this section shall pay not more than \$2,500 into the special
6 compensation fund upon the order of the director, in addition to
7 attorney's fees and costs to the employee for enforcement of
8 this section and other penalties prescribed in section 386-92.

9 (1) If the director determines, based upon a review of
10 medical records and reports and other relevant
11 documentary evidence, that an injured employee's
12 medical condition may be stabilized and the employee
13 is unable to return to the employee's regular job, the
14 director shall issue a preliminary decision regarding
15 the claimant's entitlement and limitation to benefits
16 and rights under Hawaii's workers' compensation laws.
17 The preliminary decision shall be sent to the affected
18 employee and the employee's designated representative
19 and the employer and the employer's designated
20 representative and shall state that any party
21 disagreeing with the director's preliminary findings
22 of medical stabilization and work limitations may



1 request a hearing within twenty days of the date of
2 the decision. The director shall be available to
3 answer any questions during the twenty-day period from
4 the injured employee and affected employer. If
5 neither party requests a hearing challenging the
6 director's finding the determination shall be deemed
7 accepted and binding upon the parties. In any case
8 where a hearing is held on the preliminary findings,
9 any person aggrieved by the director's decision and
10 order may appeal under section 386-87.

11 A preliminary decision of the director shall
12 inform the injured employee and the employer of the
13 following responsibilities, benefits, and limitations
14 on vocational rehabilitation benefits that are
15 designed to facilitate the injured employee's early
16 return to suitable gainful employment:

- 17 (A) That the injured employee may invoke the
18 employee's rights under section 378-2, 378-32, or
19 386-142, or all of them, in the event of unlawful
20 discrimination or other unlawful employment
21 practice by the employer; and



1 (B) That after termination of temporary total
2 disability benefits, an injured employee who
3 resumes work may be entitled to permanent partial
4 disability benefits, which if awarded, shall be
5 paid regardless of the earnings or employment
6 status of the disabled employee at the time.

7 (2) If the rehabilitation unit determines that an injured
8 employee is not a feasible candidate for
9 rehabilitation and that the employee is unable to
10 resume the employee's regular job, it shall promptly
11 certify the same to the director. Soon thereafter,
12 the director shall conduct a hearing to determine
13 whether the injured employee remains temporarily
14 totally disabled, or whether the employee is
15 permanently partially disabled, or permanently totally
16 disabled.

17 (c) An injured employee shall be entitled to receive a
18 weekly benefit equal to seventy per cent of the injured
19 employee's average weekly wages, or a maximum weekly income
20 benefit based on the state average weekly wage applicable on the
21 date compensation was first received when:



- 1 (1) A work injury causes permanent or temporary
- 2 disability; and
- 3 (2) Payment of compensation due under this chapter was not
- 4 begun within thirty days of or within the same year as
- 5 the date of injury, whichever is later."

6 SECTION 3. Section 386-79, Hawaii Revised Statutes, is
7 amended to read as follows:

8 **"§386-79 Medical examination by employer's physician.**
9 After an injury and during the period of disability, the
10 employee, whenever ordered by the director [~~of labor and~~
11 ~~industrial relations~~], shall submit to examination, at
12 reasonable times and places, by a duly qualified physician or
13 surgeon designated and paid by the employer. [The] Physicians
14 selected to perform medical examinations as provided by this
15 section shall be licensed in Hawaii and members of the Hawaii
16 medical association, subject to peer review. The first medical
17 examination in any claim shall be selected by mutual agreement
18 between the claimant and the employer; provided that if no
19 mutual agreement is reached, the director, pursuant to section
20 386-80, shall appoint a duly qualified physician or surgeon from
21 a rotating list of duly qualified physicians and surgeons
22 established and maintained by the department. Examiners



1 performing subsequent medical examinations as ordered by the
2 director in any claim, with the exception of final impairment
3 examinations, may be selected solely by the employer. For these
4 examinations, the employee shall have the right to have a
5 physician or surgeon designated and paid by the [employee]
6 employer present at the examination, which right, however, shall
7 not be construed to deny to the employer's physician the right
8 to visit the injured employee at all reasonable times and under
9 all reasonable conditions during total disability.

10 An order to attend the examination shall be issued only by
11 the director. The employee so ordered shall be contacted in
12 advance of the order by the director to arrange a reasonable
13 time and place for the examination. The employer shall
14 reimburse the employee for any lost wages or expenses incurred
15 by attending the examination. It shall constitute fraud for an
16 employer or insurance carrier to order an examination or
17 threaten to suspend or controvert an employee's pending claim or
18 right to compensation.

19 If an employee unreasonably refuses to submit to, or in any
20 way obstructs [such] the examination, the employee's right to
21 claim compensation for the work injury [~~shall~~] may be suspended,
22 upon order of the director, until the refusal or obstruction



1 ceases and no compensation shall be payable for the period
2 during which the refusal or obstruction continues. The employee
3 and the employee's physician may record the examination and ask
4 reasonable questions relating to the examining physician's
5 experience, education, certification, and qualifications.
6 Exercising these rights shall not be construed as obstruction.

7 In cases where the employer is dissatisfied with the
8 progress of the case or where major and elective surgery, or
9 either, is contemplated, the employer may appoint a physician or
10 surgeon of the employer's choice who shall examine the injured
11 employee and make a report to the employer. If the employer
12 remains dissatisfied, this report may be forwarded to the
13 director. No employer shall suspend, deny, or discontinue
14 benefits to an injured employee without an order from the
15 director. The order shall only be issued after a full and fair
16 hearing at which the injured employee shall be provided the
17 opportunity to review the employer's evidence and present
18 rebuttal.

19 Employer requested examinations under this section shall
20 not exceed more than one per case unless, after a hearing and
21 upon written order of the director, good and valid reasons exist
22 with regard to the medical progress of the employee's treatment.



1 The cost of conducting the ordered medical examination shall be
2 limited to the complex consultation charges governed by the
3 medical fee schedule established pursuant to section 386-21(c).

4 Any employer or insurer found in violation of this section
5 shall pay a fine of \$500 per violation to the injured employee,
6 plus attorney's fees and costs to the employee in addition to
7 any other penalties prescribed in section 386-92."

8 SECTION 4. Section 386-94, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "§386-94 Attorneys, physicians, other health care
11 providers, and other fees. Claims for services shall not be
12 valid unless approved by the director or, if an appeal is had,
13 by the appellate board or court deciding the appeal. Any claim
14 so approved shall be a lien upon the compensation in the manner
15 and to the extent fixed by the director, the appellate board, or
16 the court.

17 In approving fee requests, the director, appeals board, or
18 court may consider factors such as the attorney's skill and
19 experience in state workers' compensation matters, the amount of
20 time and effort required by the complexity of the case, the
21 novelty and difficulty of issues involved, the amount of fees
22 awarded in similar cases, benefits obtained for the claimant,



1 and the hourly rate customarily awarded attorneys possessing
2 similar skills and experience. Claims for attorney's services
3 shall be presumed valid if the represented injured employee
4 approves in writing the fees for the attorney's services. In
5 all cases, reasonable attorney's fees shall be awarded.

6 Any person who receives any fee, other consideration, or
7 gratuity on account of services so rendered, without approval,
8 in conformity with the preceding paragraph, shall be fined by
9 the director not more than \$10,000."

10 SECTION 5. Section 386-96, Hawaii Revised Statutes, is
11 amended by amending subsection (a) to read as follows:

12 "(a) Any physician, surgeon, or hospital that has given
13 any treatment or rendered any service to an injured employee
14 shall make a report of the injury and treatment on forms
15 prescribed by and to be obtained from the department as follows:

16 (1) Within seven days after the date of first attendance
17 or service rendered, an initial report shall be made
18 to the department and to the employer of the injured
19 employee in the manner prescribed by the department;

20 (2) Interim reports to the same parties and in the same
21 manner as prescribed in paragraph (1) shall be made at
22 appropriate intervals to verify the claimant's current



1 diagnosis and prognosis, that the information as to
2 the nature of the examinations and treatments
3 performed is complete, including the dates of those
4 treatments and the results obtained within the current
5 reporting period, the execution of all tests performed
6 within the current reporting period and the results of
7 the tests, whether the injured employee is improving,
8 worsening, or if "medical stabilization" has been
9 reached, the dates of disability, any work
10 restrictions, and the return to work date. When an
11 injured employee is returned to full-time, regular,
12 light, part-time, or restricted work, the attending
13 physician shall submit a report to the employer within
14 seven calendar days indicating the date of release to
15 work or medical stabilization; and

- 16 (3) A final report to the same parties and in the same
17 manner as prescribed in paragraph (1) shall be made
18 within seven days after termination of treatment.

19 No physician, surgeon, or hospital that has given any treatment
20 or rendered any service to an injured employee shall be required
21 to provide any additional reports or treatment plans not
22 otherwise mandated by this section."



1 SECTION 6. Section 431:14-110.5, Hawaii Revised Statutes,
2 is amended to read as follows:

3 "[+]§431:14-110.5[+] Disclosure of workers' compensation
4 premium information. (a) All policies issued to employers for
5 workers' compensation insurance shall disclose clearly to
6 employers as separate figures the portion of the premium charged
7 for:

- 8 (1) Medical care, services, and supplies;
- 9 (2) Wage loss benefits including temporary total,
10 temporary partial, and permanent total disability
11 benefits and their related benefits;
- 12 (3) Indemnity benefits for permanent partial disability;
- 13 and
- 14 (4) Death benefits.

15 In addition, a disclosure statement shall indicate to the
16 employer both the portion of the premium and the monetary costs
17 attributable to loss control and administrative costs,
18 attorney's fees of the insurer, the cost of employer requested
19 medical examinations, and private investigation costs.

20 (b) When a policy is issued to employers for workers'
21 compensation insurance, it shall be accompanied by a statement
22 disclosing the percentages of premiums expended during the



1 previous year by the insurer for claims paid in the categories
2 specified in subsection (a), including loss control and
3 administrative costs, attorney's fees of the insurer, the cost
4 of employer requested medical examinations, and private
5 investigation costs.

6 (c) All denials of claims shall be reported to the
7 employer on an annual basis, the employer shall also provide
8 information on the dates of injuries or alleged injuries, the
9 dates employers' reports were filed, the dates of denials or the
10 dates compensability was accepted, and the dates of subsequent
11 appeals and the status of the appeals.

12 [~~e~~] (d) The information provided to employers by
13 insurers pursuant to this section shall be provided on an annual
14 basis to the director of labor and industrial relations and to
15 the commissioner.

16 [~~d~~] (e) Any insurer found in violation of this section
17 shall pay a fine of \$5,000 per violation to the insured, plus
18 attorney's fees and costs to the insured for enforcing this
19 section."

20 SECTION 7. Act 11, Special Session Laws of Hawaii 2005, is
21 amended by amending section 14 to read as follows:



1 "SECTION 14. This Act shall take effect upon its approval;
2 provided that sections 2, 3, and 7 of this Act shall take effect
3 on January 1, 2005 [~~7 provided further that section 7 shall be~~
4 ~~repealed on July 1, 2007, and section 386-72, Hawaii Revised~~
5 ~~Statutes, shall be reenacted in the form in which it read on~~
6 ~~December 31, 2004]~~."

7 SECTION 8. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 9. This Act shall take effect upon its approval.

10

INTRODUCED BY: *Therese Chun Oakland*



Report Title:

Workers' Compensation Law

Description:

Amends workers' compensation law, including limiting an employer's ability to terminate benefits, authorizing the recovery of attorney's fees and costs by the injured employee, specifying procedures for medical examinations by the employer's physician, establishing fines for violations, requiring the reporting of denials of claims and relevant information, and further restricting the director of labor and industrial relations' rulemaking authority.

