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LATE TESTIMONY

January 30, 2008

To: The Honorable Alex Sonson, Chair
and Members of the House Committee on Labor and Public Employment

Date: Friday, February 1, 2008
Time: 10:30 a.m.
Place: Conference Room 309, State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

Testimony in Opposition
to
H.B. 2389 – Relating to Workers' Compensation

I. OVERVIEW OF CURRENT PROPOSED LEGISLATION

House Bill 2389 proposes to amend section 386-94, Hawaii Revised Statutes ("HRS"), by prohibiting the claimant's attorney from entering into agreements with the claimant to obtain higher fees than those approved by the director, the appellate board, or the court. All such agreements to obtain higher fees shall be void.

This bill also requires defense attorneys to be subject to approval of fees by the director.

This bill also lists factors to be considered in approving fee requests.

II. CURRENT LAW

Currently, section 386-94, HRS, requires the director, appeals board, or court to approve attorney's fee requests based on factors, such as the attorney's skill and experience in state workers' compensation matters, the amount of time and effort required by the complexity of the case, the novelty and difficulty of issues involved, the amount of fees awarded in similar cases, benefits obtained for the claimant, and the hourly rate customarily awarded attorneys possessing similar skills and experience. If the claimant disagrees with the attorney's fee request, they may file their written objections to the fees within ten calendar days after the fee request has been filed with the Department. Approved attorney's fees are usually a lien on claimant's award, and if there is no award,

claimant is usually liable for the approved attorney's fees. The director does not currently approve defense attorney fees.

III. HOUSE BILL

The Department of Labor and Industrial Relations ("Department") opposes this bill for the following reasons:

1. Chapter 386, HRS, already protects claimants from entering into agreements with their attorneys for higher fees. Current law requires the Department to approve attorney's fees and notes that the purpose of regulating attorney's fees for injured workers is to protect them from unreasonable attorney's fees, since injured workers are not aware of what is fair relative to the complexity of their workers' compensation case and the skill of the attorney.

   The Department would support clarification and codification of the specific language in this bill that expressly prohibits agreements which allow attorneys to obtain fees that are higher than the fees approved by the director, the appellate board, or the court.

2. In regards to insurance carriers and employers who hire defense attorneys are aware of the current billing rates of defense attorneys and their skill level and normally enter into a mutually agreed upon contract for services with the attorney and, therefore, do not require protection by state regulators. Disputes between the insurance carrier and the attorney would normally be worked out between the parties. The Department does not believe that the director, the appellate board, or the court should regulate defense attorney's fees.

3. The proposed factors to consider in approving attorney's fees listed in subsection (b) already exist in section 386-94, HRS. This proposal lists the factors in numerical sequence.

The Department supports this proposal providing regulation of defense attorney's fees is removed from this section.

TESTIMONY IN OPPOSITION TO H.B. No. 2389
RELATING TO WORKERS' COMPENSATION

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Friday, February 1, 2008, 12:30 a.m.

Mr. Chairman, members of the Committee, I am attorney Wayne Mukaida. I have been in practice since 1978. Since 1989, I have devoted a substantial portion of my legal practice to representing injured workers. I oppose H.B. No. 2389, relating to Workers' Compensation and attorneys' fees.

I. THE BILL IS AMBIGUOUS AS APPLIED TO CURRENT PRACTICE.

A. Past Practice. The Department of Labor's practice, up until about a year ago, was to set a fee rate for each attorney. HRS §386-94 provided that the Department of Labor "may" consider multiple factors, including:

> the attorney's skill and experience in state workers' compensation matters, the amount of time and effort required by the complexity of the case, the novelty and difficulty of issues involved, the amount of fees awarded in similar cases, benefits obtained for the claimant, and the hourly rate customarily awarded attorneys possessing similar skills and experience.

However, rather than consider the various listed factors in each case, the Department of Labor simply set a rate for each individual claimant's attorney which apparently ranged from $75.00--$150.00 per hour. Approximately every 4-5 years, the rate would be increased by $5.00. The rate was kept the same regardless of "the complexity of the case, the novelty and difficulty of issues." It is very apparent that the multiple factors were not being considered because the increases did not even keep up with inflation.

Even more obviously, the Department of Labor did not consider the factor of "the hourly rate customarily awarded attorneys possessing similar skills and experience." The rates being approved by the Department of Labor were approximately 40% below what was regularly being charged in civil matters. The rates also did not correspond with what civil courts were approving as reasonable fees. In other words, when an injured worker walked into an attorney's office, the Department of Labor automatically was assessing the attorney with a 40% discount on fees for services.

It is no small wonder then why injured workers have had such a difficult time finding legal representation.

B. Current Practice. Approximately a year ago, the Department of Labor, in an effort aimed at reducing subjectivity in setting fees, instituted a practice of applying a numerical formula to determine a fee rate for each attorney. The formula was based on two factors: "the attorney's skill and experience in state workers' compensation matters." One-half of the approved fee rate was based on "skill" (up to $80.00), and one-half was based on "experience" (up to $80.00). The scale again failed to consider, "the hourly rate customarily awarded attorneys possessing similar skills and experience." This is apparent because the maximum possible rate for all attorneys as was arbitrarily set at $160.00.

So again presently, injured workers have a difficult time finding legal representation because the Department of Labor was setting fees at unrealistic rates. Just as in other areas of society where there is governmental interference with market forces, supply and demand are artificially affected. There are relatively few claimants' attorneys because the Department of Labor refuses to recognize what reasonable rates are in the community.

C. The language of the bill is ambiguous with respect to current practice. Current Department of Labor practice is that a fee rate is set for each attorney. Does the last sentence in the proposed amendment to §386-94(a) mean that an attorney cannot enter into an engagement agreement which provides for a rate that is higher than his rate currently set by the Department of Labor? For example, if the Department of Labor set a rate of $100.00 per hour for an attorney in 2007, could an attorney in 2008 enter into an engagement agreement with an injured worker which recites a $105.00 per hour rate, subject to Department of Labor approval? Could an attorney enter into an engagement agreement with an injured worker which recites his regular civil hourly rate at $275.00 per hour, subject to Department of Labor approval? The answers should be "yes" in both cases, however, to avoid any confusion, the last sentence in the bill should provide:

After a request for approval of attorney's fees has been reviewed by the director, the appellate board, or the court, in no event shall the claimant's attorney seek to enter into an agreement with the claimant to obtain fees that are higher than those approved, by the director, the appellate board, or the court, and all such agreements to obtain those higher fees shall be void.

II. AS WRITTEN, THE CURRENT STATUTE ALREADY REQUIRES DEFENSE ATTORNEYS TO OBTAIN DEPARTMENT OF LABOR APPROVAL.

As currently written, §386-94 requires approval of all "claims for services." However, as a matter of practice, the Department of Labor has not been reviewing fees and costs of defense attorneys.

If it is the intent in HB 2389 to make it a requirement for defense attorney's fees to be reviewed by the Department of Labor, then additional language should be added to the body of the bill. Merely adding the words "defense attorneys" to the heading of the statute is ineffective since a heading is technically not a part of a statute.

Furthermore, if defense attorney's fees are to be expressly made a part of the statute, then it would be very important to add an additional factor to be considered in approving fee requests. That factor is that defense attorneys and claimant's attorneys have very different considerations in setting rates. The defense attorneys typically have one or just a few insurers as clients. The insurers control the market and therefore wield great influence on what defense attorneys can charge. Defense attorneys typically will be paid for their work in every case, regardless of whether they win or lose a case. On the other hand, if a claimant loses a case, the claimant's attorney quite frequently will not be paid. To compare defense attorneys' fees with claimants' attorneys fees is to compare apples and oranges.

III. THE STATUTE, AS INTERPRETED BY THE DEPARTMENT OF LABOR, UNFAIRLY PROHIBITS RETAINER FEES.

The statute, as written, provides that attorneys cannot "receive" a fee, without approval from the Director. Apparently, this section has been interpreted by some to mean that an attorney cannot accept funds to be deposited into a trust account pending a request to the Director for approval of attorney's fees. This interpretation has made it very difficult for many injured workers to find representation.

A claimant's attorney is typically paid at the end of a case out of benefits for any permanent injury a claimant might sustain. If there is no reasonable expectation of payment, then it is entirely understandable why injured claimants have difficulty in retaining an attorney. There are at least two kinds of cases in which this is especially true: (1) stress cases, and (2) cases in which the employer/carrier is denying that a claim. This is doubly unfortunate for the injured worker because these types of cases are the very cases in which representation is sorely needed.

There is also no clear provision that allows claimant's attorneys to accept a deposit for costs which might be incurred. If an injured worker requires an opinion from a physician, the physician will typically want assurances of payment from the worker's attorney. The attorney would then have to assume the risks of not only not being paid for his time, but also the risk of not being reimbursed for his out of pocket expenses.

§386-94 must be amended to allow claimants' attorneys to accept deposits for fees and costs, subject to .

IV. IT WOULD BE SENSIBLE TO REPEAL §386-94 SINCE ATTORNEYS' COMPENSATION IS ALREADY REGULATED BY THE SUPREME COURT.

Instead of making multiple amendments to §386-94, it would make sense to simply repeal the statute, except for a provision which provides:

Any claim for attorney's fees and costs shall be a lien upon compensation in the manner and to the extent fixed by the director, the appellate board, or the court.

The list of fee considerations in §386-94 are, to a large extent, duplicative of the Hawai'i Rules of Professional Conduct which are promulgated by the Hawaii Supreme Court. The Hawai'i Rules of Professional Conduct provide, in part:

Rule 1.5. FEES.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent, and in contingency fee cases the risk of no recovery and the conscionability of the fee in light of the net recovery to the client;

(9) the relative sophistication of the lawyer and the client; and

(10) the informed consent of the client to the fee agreement.

The regulation of fees is within the province of the Supreme Court. There is no reason why duplicate rules are needed for cases within the Department of Labor, especially since it is apparent that the Department of Labor has no sense of what fee rates are "customarily awarded attorneys possessing similar skills and experience " and since the Department of Labor chooses to ignore the multiple factors listed in §386-94.

V. CONCLUSION.

If §386-94 is to be amended, there must be a full consideration of the practical implications of any amendment. The more serious and real problem is that §386-94 is creating more difficulties for injured works than it is solving because it is preventing injured workers from obtaining needed legal representation. Unless

market forces are allowed to operate, or unless the Department of Labor can be compelled to recognize going rates in the community, many injured workers will continue to be without needed legal representation.

Thank you for considering my testimony.

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Alison Powers
Executive Director

TESTIMONY OF ALISON POWERS

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
Representative Alex M. Sonson, Chair
Representative Bob Nakasone, Vice Chair

Friday, February 1, 2008
10:30 a.m.

HB 2389

Chair Sonson, Vice Chair Nakasone, and members of the committee, my name is Alison Powers, Executive Director of Hawaii Insurers Council. Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately 60% of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **supports** H.B. 2389 **with a technical amendment**. The purpose of this bill is to prevent claimant attorneys from collecting monies from injured workers outside the approved fees by the Director.

We request that the term "defense attorneys" be deleted from the section title because section 386-94 currently does not apply to defense attorneys and would not if the amendments to the bill were enacted.

Thank you for the opportunity to testify.