



**STATE OF HAWAII**  
**DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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March 29, 2012

To: The Honorable David Ige, Chair, Michelle Kidani, Vice Chair, and  
Members of the Senate Committee on Ways and Means

Date: Thursday, March 29, 2012

Time: 9:00 a.m.

Place: Conference Room 211, State Capitol

From: Dwight Y. Takamine, Director  
Department of Labor and Industrial Relations (DLIR)

**Re: H.B. No. 2099 H.D. 1 S.D. 1 Relating to Workers' Compensation**

**I. OVERVIEW OF PROPOSED LEGISLATION**

House Bill 2099 H.D. 1 S.D. 1 clarifies that attorney's fees may be included in costs that may be assessed against a party who brings, prosecutes, or defends a workers' compensation claim without reasonable ground. The department supports this measure as it will help deter frivolous claims and appeals from being filed. This measure is effective July 1, 2050.

**II. CURRENT LAW**

Section 386-93(a), HRS, allows for the whole costs of the proceedings to be assessed against the party who has brought, prosecuted, or defended the proceedings without reasonable ground.

**III. COMMENTS ON THE HOUSE BILL**

This bill clarifies that in addition to whole costs, reasonable attorney's fees may also be assessed against parties that bring, prosecute, or defend proceedings without reasonable grounds. The department hopes this proposal will make parties think twice before initiating baseless claims and appeals proceedings. The department supports this measure.



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**Alison Powers**  
Executive Director

## TESTIMONY OF ALISON POWERS

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SENATE COMMITTEE ON WAYS AND MEANS

Senator David Y. Ige Chair

Senator Michelle N. Kidani, Vice Chair

Thursday, March 29, 2012

9:00 a.m.

### **HB 2099, HD1, SD1**

Chair Ige, Vice Chair Kidani, 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 40% of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **submits comments** on HB 2099, HD1, SD1. We ask that you delete the word "including" and replace it with the word "and" in the bill because attorney costs do not necessarily include attorney fees.

Thank you for the opportunity to testify.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WAM Testimony](#)  
**Cc:** [batfish@hawaii.rr.com](mailto:batfish@hawaii.rr.com)  
**Subject:** Testimony for HB2099 on 3/29/2012 9:00:00 AM  
**Date:** Tuesday, March 27, 2012 10:53:25 AM

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Testimony for WAM 3/29/2012 9:00:00 AM HB2099

Conference room: 211  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Dr. Gary Saito, DC  
Organization: Hawaii State Chiropractic Assn  
E-mail: [batfish@hawaii.rr.com](mailto:batfish@hawaii.rr.com)  
Submitted on: 3/27/2012

Comments:

We support this measure because we believe that frivolous hearings requests waste the time of all the parties concerned, including the DLIR, and result in unnecessary expenses for the opposing parties. This might not be a problem for carriers with deep pockets and attorneys on retainer, but it is a daunting burden on claimants who don't have such resources.

THE SENATE  
THE TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2012

COMMITTEE ON WAYS AND MEANS

Sen. David Y. Ige, Chair  
Sen. Michelle N. Kidani, Vice Chair

Hearing: Thursday, March 29, 2012  
Time: 9:00 a.m.  
Place Conference Room 211

TESTIMONY OF ILWU LOCAL 142

RE: HB 2099, HD 1, SD 1, RELATING TO WORKERS COMPENSATION

Chair Ige, Vice Chair Kidani, Members of the Ways and Means Committee:

Thank you for the opportunity to present testimony regarding HB 2099, HD 1, SD 1. ILWU Local 142 supports this useful and constructive bill.

For perhaps three decades or more, Section 386-93(a)HRS has been interpreted to allow the recovery of both attorneys fees and costs when a party has prosecuted or defended a claim without reasonable grounds. This provision has the salutary effect of deterring frivolous claims from being brought or defended. It also is in keeping with the spirit of workers compensation as a swift and informal means of adjudicating claims. In theory, meritorious claims are promptly honored and the injured worker receives timely and effective medical care. Clear-cut claims that are wrongfully denied face the sanction of paying the attorneys fees and costs of the injured worker, while claims that truly have no merit but are unfairly brought against Employers are deterred by the same potential sanctions. Unnecessary litigation is thus minimized and prevented.

However, since the Court of Appeals ruling in Glen J. Kelly v. Metal-Weld Specialties, Inc. (Nos. 27127 and 27208)(September 30, 2008) only costs and no attorneys fees have been payable under Section 386-93(a) HRS. Ironically, a much older Hawaii Supreme Court case, Ilaga v. Yuen and Commercial Casualty Co. 35 Haw. 591 (1940) recognized that attorneys fees could be awarded under a similar territorial law.

HB 2099, H.D. 1, SD 1 is necessary in light of the Kelly decision to restore the ability for the Department of Labor, the Labor and Industrial Relations Appeals Board, and our courts to award attorneys' fees under Section 386-93(a) HRS and to enforce basic standards in the reasonable prosecution and defense of claims. The bill in its current form is effective July 1, 2050, but this measure ought not be deferred, and should be effective January 1, 2013. We therefore urge passage of this needed measure with this earlier effective date.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WAM Testimony](#)  
**Cc:** [tlccostas@msn.com](mailto:tlccostas@msn.com)  
**Subject:** Testimony for HB2099 on 3/29/2012 9:00:00 AM  
**Date:** Tuesday, March 27, 2012 7:16:35 PM

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Testimony for WAM 3/29/2012 9:00:00 AM HB2099

Conference room: 211  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Terry Costa  
Organization: Individual  
E-mail: [tlccostas@msn.com](mailto:tlccostas@msn.com)  
Submitted on: 3/27/2012

Comments:

I support this bill because it stops the Insurance Carriers Attorneys from submitting and filing frivolous denials of treatment and benefits. This also helps the backlog of cases waiting to be heard by the Disability Compensation Division ( DCD ). I am an injured worker currently going through this nightmare system. False Statement can be filed by Attorneys at the hearings and DCD does not investigate the validity of statements. The current system protects the Insurance Carriers Attorneys to delay, deny and abuse the system because the Injured workers Attorney will not be compensated to defend the denials. The passing of this bill will stop the abuse and the back log of cases waiting to be heard. Aloha and thank you

# DENNIS W. S. CHANG

ATTORNEY-AT-LAW

WORKER'S RIGHTS - LABOR LAW  
WORKER'S COMPENSATION  
SOCIAL SECURITY DISABILITY  
LABOR UNION REPRESENTATION  
EMPLOYEES RETIREMENT SYSTEM  
BODILY INJURIES

March 27, 2012

SUBMITTED VIA ELECTRONIC MAIL

TO: COMMITTEE ON WAYS AND MEANS  
Senator David Y. Ige, Chair  
Senator Michelle N. Kidani, Vice Chair  
Hawaii State Capitol, Room 312

Date: Thursday, March 29, 2012  
Time: 9:00 a.m.  
Place: Conference Room 211  
State Capitol  
415 South Beretania Street

FROM: Dennis W. S. Chang, Esq.  
Labor and Workers' Compensation Attorney

RE: **Strong Supporting Testimony for Passage of HB 2099, HD1, SD1**

Dear Honorable Chair Ige and Vice-Chair Kidani and other Distinguished Members:

## I. Introduction

I have been practicing as a labor attorney with a heavy concentration in workers' compensation cases. For more than three decades, we always had the right to request sanctions as a deterrent to defenseless positions raised by employers and insurance carriers, if we are able to prove this during a hearing. We were required to carry a heavy onerous burden of proof but, if we prevailed, the Director of Labor and Industrial Relations ("Director") was allowed to include the assessment of attorney's fees under the words "whole costs" under HRS §386-93(a). The only other deterrent is to sue insurance carriers for bad faith but, for the most part, this is not feasible in light of the substantial costs and attorney's fees that must be devoted in such a civil lawsuit. HB 2099, which should be amended to be effective immediately, is intended to merely restore the decades of statutory construction which was unwittingly changed by a non-binding decision. We are not asking for anything new, like increasing our attorney's fees and costs, but only reinstating and clarification of what has been clearly understood as the law contained in the workers' compensation field.

## II. Discussion

The law has not changed since I began my practice in 1977 until the Intermediate Court of Appeals issued a non-binding opinion in the *Kelly vs. Metal-Weld Specialties, Inc.*, 118 Haw. 424, 192 P.3d 613 (Haw. App. 2008) which construed HRS §386-93(a) to mean only costs and not attorney's fees. This disregarded decades of consistent application in allowing the assessment of attorney's fees as well as costs by the Director and the Labor and Industrial Relations Appeals Board ("Board"). More notably, as David J. Mikonczyk who handled the *Kelly* appeal before the ICA explicitly testified previously, not only should the decision have been non-

binding, but the point was brought up *sua sponte* by the ICA, without the luxury of having oral argument by the parties, in reversing consistent statutory construction.

In light of the *Kelly* decision, the Board has likewise construed HRS §386-93(a) to limit sanctions to costs. Since then, I can assure you that my practice has been devoted more to unreasonable denials of critical medical treatment plans and medical supplies and challenging other abusive practices, most notably denials of legitimate claims to statutory benefits of injured workers. Even if we proceed to a hearing and secure an assessment of sanctions, the Director and the Board are now constrained to construe HRS §386-93(a) as allowing only the assessment of costs. This is only a pittance and hardly any deterrent to abusive defenseless positions taken by employers and insurance carriers in terms of sanctions since we are now limited to requesting possibly costs for duplication, postage, and the like, but not a real deterrent like the “whole costs of the proceedings,” which prior to *Kelly*, included assessment of attorney’s fees “when proceedings are brought, prosecuted, or defended without reasonable ground.” This recent limitation disregarding the allowance of assessment of attorney’s fees has caused needless delay and undue litigation since there is really no deterrent to prevent employers and insurance carriers from raising frivolous defenses and, in turn, creating a backlog in the calendar before the Disability Compensation Division and delaying hearings on more vital, worthy and legitimate disputes.

I strongly urge that HB 2099 be passed as written in light of the previous testimony in support of this bill, especially the accurate historical account provided by Stanford Matsui, the continuing endorsement of the Director, and this amended testimony. With the passage of HB 2099, we will have a win-win situation for all involved by avoiding needless litigation and getting to the heart of truly disputed claims in the workers’ compensation system. We need to level the playing field and undo the unintentional reversal of the case law. In this regard, it is also noteworthy to stress that the award of “whole costs” cuts both ways since the sanctions can be levied against any party including claimants who take frivolous positions. The clarification which we seek is not limited to employers and insurance carriers.

### **III. Conclusion**

Reinstatement of the crucial deterrent factor is consistent with the underlying public policy of the workers’ compensation statute. We are not asking for a handout or additional attorney’s fees. We are asking your help in preventing frivolous and dilatory tactics so that there will be prompt payments, immediate quality access to medical services and prompt recovery, and return to work as desired by both injured workers and employers. I too am a small businessman with five (5) employees and my view is to care for my needy employees injured on the job, rather than to have the insurance industry and its attorneys make the determination on whether or not to deny a claim while my employees languish for coverage under the workers’ compensation statute, if this should happen in the future. Otherwise, there will be more added costs to run my business by having to secure wage replacements for my injured disabled employee and hiring a temporary replacement.

I thank you very much for embracing HB 2099 to reinstate the time honored practice of allowing sanctions including attorney’s fees for unreasonable defenses under HRS §386-93(a).