NEIL ABERCROMBIE
GOVERNOR

DWIGHT Y. TAKAMINE
DIRECTOR

AUDREY HIDANO
DEPUTY DIRECTOR

STATE OF HAWAII
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February 16, 2012

To: The Honorable Angus L.K. McKelvey, Chair, Isaac W. Choy, Vice Chair, and Members of the House Committee on Economic Revitalization & Business

Date: Thursday, February 16, 2012
Time: 8:30 a.m.
Place: Conference Room 312, State Capitol

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

Re: H.B. No. 2099 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

House Bill 2099 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.

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.

HOUSE OF REPRESENTATIVES
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
Rep. Angus L.K. McKelvey, Chair
Rep. Issac W. Choy, Vice Chair

Hearing: Thursday, February 16, 2012
Time: 8:30 a.m.
Place Conference Room 312

TESTIMONY OF ILWU LOCAL 142
RE: HB 2099 RELATING TO WORKERS COMPENSATION

Chair McKelvey, Vice Chair Choy, Members of the Committee:

Thank you for the opportunity to present testimony regarding HB 2099. 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 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. We therefore urge passage of this needed measure.

HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

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1003 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 525-5877

Alison Powers
Executive Director

TESTIMONY OF ALISON POWERS

HOUSE COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
Representative Angus L.K. McKelvey, Chair
Representative Isaac W. Choy, Vice Chair

Thursday, February 16, 2012
8:30 a.m.

HB 2099

Chair McKelvey, Vice Chair Choy, 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. 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.

THE LAW OFFICES OF DOUGLAS THOMAS MOORE
Over 23 years serving the People of Hawai'i

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February 14, 2012

VIA EMAIL: ERBTestimony@Capitol.hawaii.gov

TO: House Economic Revitalization and Buisness
Hon. Rep. Angus L.K. McKelvey, Chair
Hon. Rep. Isaac W. Choy, Vice Chair

Re: TESTIMONY IN SUPPORT OF HB 2099
TO BE HEARD 2/16/2012 @ 8:30 a.m

Dear Rep. McKelvey and Committee Members:

I support HB 2099 to amend HRS § 386-93(a) to clarify that the term "whole costs" includes reasonable attorney's fees. The intent of HRS 386-93(a) is to deter parties who bring, prosecute, or defend workers' compensation proceedings without reasonable ground. Such deterrence is necessary and appropriate to discourage frivolous workers' compensation claims, unreasonable claims handling, and improper appeals. As an attorney representing our injured workers for over 20 years, I have seen many and repeated instances of unreasonable conduct in denying legitimate claims, denying proper medical treatment, forcing injured workers to bad medical exams, forcing injured workers to unnecessary hearings, and the filing of frivolous appeals. Until 2008, injured workers were able to deter such unreasonable conduct at both the DCD and the LIRAB levels by obtaining as sanctions the awards of reasonable attorney's fees under HRS 386-93(a) "whole costs". Such deterrence was good public policy. In 2008, the Hawai'i Intermediate Court of Appeals in the *Kelly vs. Metal-Weld* case changed decades of such public policy deterrence which goes back to the Hawai'i Supreme Court's 1940 decision in *Ilaga v. Yuen Lin Ho.*

The 2008 *Kelly* decision changed long-held public policy precedent to the detriment of injured workers. The LIRAB, as a direct result of *Kelly* no longer awards to injured workers reasonable attorneys fees to deter parties who bring, prosecute, or defend workers' compensation proceedings without reasonable ground. In my work comp practice, this result has had a negative ability for my injured workers to obtain an award of reasonable attorney's fees at the DCD level, and even if they are able, then to enforce the awards at the LIRAB. Without this fee shifting to the injured workers, they are forced to pay attorney's fees to fight the unreasonable conduct of other parties which they can ill afford unlike insurance carriers and large employers. And unfortunately as a result, I believe I see much more unreasonable conduct being committed. This situation begs to be changed so that unreasonable conduct will not go without sanction and sound public policy will again be followed.

I am happy to see that the Director of the DLIR, the Hon. Dwight Takamine, supports HB 2099.

Help deter unreasonable conduct by supporting HB 2099. Please pass this bill. Thank you. Should you have any questions or need further information from me, please do not hesitate to contact me.

Very Truly Yours,

Douglas Thomas Moore

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

February 15, 2012

SUBMITTED VIA ELECTRONIC MAIL

TO: COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
Rep. Angus McKelvey, Chair
Hawaii State Capitol, Room 312

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

RE: **Testimony in Support of HB 2099**
(Hearing: 02/16/12 @ 8:30 a.m.)

Dear Honorable Chair McKelvey and Members of Committee:

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.

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* decision 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").

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 treatment plans and medical supplies and challenging other abusive practices, most notably denials of legitimate claims of injured workers. Even if we proceed to a hearing and secure 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 in terms of sanctions since we can only request possibly costs for duplication, postage, and the like, but not any real deterrent like the assessment of attorney's fees. 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

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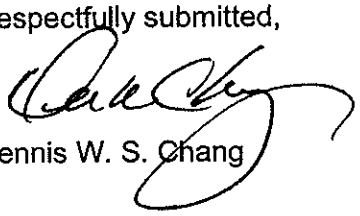
from raising frivolous defenses and creating a backlog in the calender before the Disability Compensation Division and delays hearings on more worthy, vital and legitimate disputes.

I strongly urge that HB 2099 be passed as written in light of the previous testimony in support of this bill, especially the 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.

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).

Respectfully submitted,



Dennis W. S. Chang

DWSC:ty

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February 14, 2012

VIA EMAIL: ERBT@Capitol.hawaii.gov and **FACSIMILE: 586-6501**

TO: House Committee on Economic Revitalization & Business
Honorable Angus L.K. McKelvey, Chair
Honorable Isaac W. Choy, Vice Chair

Re: TESTIMONY IN SUPPORT OF HB 2099
Hearing Date: February 16, 2012
Hearing Time: 8:30 a.m.

Dear Honorable Chair McKelvey and Committee Members:

Thank you for allowing me to present my **testimony in support of HB 2099**, which seeks to amend HRS§386-93(a) to clarify that the term "whole costs" includes reasonable attorneys' fees. As you may be aware, the intent of HRS§386-93(a) is to deter parties who bring, prosecute, or defend workers' compensation proceedings without reasonable ground. The deterrent effect of HRS§386-93(a) was greatly diluted in 2008 following the Hawaii Intermediate Court of Appeals' summary disposition order in Kelly v. Metal-Weld Specialties, which prevented the award of reasonable attorneys' fees to an injured worker who had prevailed against the unreasonable conduct of a workers' compensation carrier.

As an attorney licensed since 1983, I have helped many injured workers with their workers' compensation claims for over 25 years. Occasionally, I have been personally successful in requesting sanctions, including reasonable attorneys' fees, against workers' compensation carriers who have shown unreasonable conduct as proscribed in HRS§386-93(a). Since Kelly v. Metal-Weld Specialties, however, the occasions during which I was recently successful against the unreasonable conduct of carriers yielded only the award of costs of the litigation, not the attorneys' fees that my clients had incurred, which truly exemplifies, first hand, the lack of deterrent effect against the carriers involved. I strongly urge all committee members to vote for passage of this important bill, which will properly and effectively sanction carriers who have shown unreasonable conduct.

Thank you again for your kind attention and consideration.

Very truly yours,

Gilbert C. Doles

GILBERT C. DOLES
Attorney at Law

To: The Honorable Angus McKelvey, Chair of the House Committee on Economic Revitalization and Business

Date: Thursday, February 16, 2012

Time: 8:30 a.m.

Place: Conference Room 312

State Capitol

From: Derrick Ishihara

RE: H.B. 2099 Relating to Worker's Compensation

Position: Support

Dear Chair McKelvey and Committee Members,

I support this bill which would reverse a recent change to the long-held precedent that attorney's fees are included as penalties against any party who brings frivolous and groundless appeals before the Labor Appeals Board. Currently attorney fees are not included in "whole cost of the proceeding".

Returning to the previous interpretation of the statute would make a party think twice about filing appeals which may have dubious merit if attorney fees are part of the sanctions for filing such appeals. This would reduce the work load on the LAB and allow more pressing issues to be heard and decided upon sooner and having cases resolved quicker.

In cases where employers and insurance carriers bring forth meritless cases for appeal, the injured worker is liable for the costs of his/her attorney's assistance no matter the outcome. This is simply wrong!

Please give back "teeth" to the sanctions by passing HB 2099.

Thank you for considering this testimony,

Derrick Ishihara

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 14, 2012 1:39 PM
To: ERBtestimony
Cc: mukaida88@aol.com
Subject: Testimony for HB2099 on 2/16/2012 8:30:00 AM

Testimony for ERB 2/16/2012 8:30:00 AM HB2099

Conference room: 312
Testifier position: Support
Testifier will be present: No
Submitted by: Wayne Mukaida
Organization: Individual
E-mail: mukaida88@aol.com
Submitted on: 2/14/2012

Comments:

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 15, 2012 12:54 PM
To: ERBtestimony
Cc: mikonczyk@hawaii.rr.com
Subject: Testimony for HB2099 on 2/16/2012 8:30:00 AM

Testimony for ERB 2/16/2012 8:30:00 AM HB2099

Conference room: 312
Testifier position: Support
Testifier will be present: Yes
Submitted by: David J. Mikonczyk
Organization: Law Office of David J. Mikonczyk
E-mail: mikonczyk@hawaii.rr.com
Submitted on: 2/15/2012

Comments:
Legislative Testimony

Please let this letter serve as support of HB 2099 providing for an award of attorney fees. I am the attorney that was involved in the Kelly case which resulted in the LAB utilizing a non-precedential intermediate court of appeals decisions to desist from utilizing attorney fees. Generally the attorney fees are awarded if there are frivolous cases or non-meritorious defenses. I support this bill but would suggest a friendly amendment to include when Claimants are unreasonably denied "Compensation" which includes but are not limited to, medical care or TTD benefits, that the Claimant be awarded a $5,000.00 penalty in addition to attorney fees if it is determined that compensation benefits have been unreasonably withheld.

As to the Kelly decision, this was an unfortunate situation in that no party had argued that the whole cost of proceedings did not include attorney fees, but essentially the ICA sua sponte decided that attorney fees should not be awarded as part of the "whole cost of the proceedings". In this particular case, the claim was filled with certain errors. The employer had actually filed two WC-1s and prior to filing the WC-1 by the employer, Metal Welds and the Insurance Carrier, HEMIC, the date was altered so that it resulted in two separate case claims for the same injury being filed with the Department of Labor. The Employer actually knew the date of injury and actually took the Claimant to the hospital but had crossed out the date on the WC-1 and made it one day later. The Department of Labor utilizes date of injury for filing purposes, therefore that is why two claims originated for the same injury. Claimant had only filed a WC-5 with the correct date of injury, but in that there was two cases created various papers were going into each of the different two files at the DCD in Maui.

Getting back to the point of this legislation, it is often times that Claimants are denied benefits and although they may be able to get TDI, they are sometimes unreasonably withheld needed medical care and compensation for an alleged pending investigation or a deficient treatment plan. Most doctors will not provide medical services unless they are paid and often needed medical care is being withheld because of the non-acceptance of the Employer/Insurance Carrier of the claim even though the claim may be clear on its face. That is the claim arose out of the course of employment. The Employer has received the benefits of having a fraud statute HRS 386-98 enacted and therefore, I would even suggest further as an amendment that the attorney fees should be awarded only to Claimant's attorney or Claimant and not the employer. It is also requested that you give due consideration to the purpose of an award of attorney fees and/or a $5,000.00 penalty payable to claimant, as suggested supra, so that the Employer/Insurance Carrier will carefully consider denial of workers' compensation benefits to injured workers. When this is looked at objectively, provided

needed medical care and compensation benefits could be a win-win situation by all parties. For an injured worker to be restored to good health as soon as possible after sustaining an injury and to be compensated while injured so that the worker and his family do not suffer any undue hardship is imperative.. This would clearly be in the interest of all in moving injured workers through the system in an expedited fashion. This would also be conducive to reducing the workers' compensation case load necessitated by having to have hearings by chilling the inappropriate and questionable behavior of the Employer/Insurance Carrier in not providing compensation benefits. It is reiterated for emphasis that it is in the best interest of both the Employer/Insurance Carrier and the injured worker to receive medical benefits as quickly as possible after an injury and to be restored to some gainful and meaningful employment. This is clearly a win-win situation for both the Employer/Insurance Carrier and the injured worker. However, this is not often viewed as such. The Employer/Insurance Carrier often employs tactics of stall and delay in providing benefits, forcing injured workers, due to financial hardships, to accept unreasonable settlement offers and to endure diminished capacity by not receiving needed care. I say this is especially true of pro se Claimants. They do not have an attorney nor do they understand the system as much as the Employer/Insurance Carriers who deal with it day in and day out and who also nit-pick the injured worker by compelling the doctors to dot their I's and cross their T's in submission of Medical Treatment Plans care rather than to basically look at the facts and ask themselves the question; "Does the injured worker need the medical treatment?" Currently exorbitant financial fees are being paid to biased medical examiners by the Insurance Carrier pursuant to HRS 386-79 to down play or even find there is no injury or impairment or that it is not work related or disingenuously indicate that the injury is not work related. These dilatory tactics and denials of workers' compensation benefits should be deterred and it is suggested it would be deterred if there was some award of attorney fees for those represented by counsel and a penalty for pro se Claimants for unreasonable denial of their needed medical care and any and all other workers' "compensation" benefits as defined by the legislature in the definition of HRS 386-1.