

HB2099

HD1



NEIL ABERCROMBIE
GOVERNOR

DWIGHT Y. TAKAMINE
DIRECTOR

AUDREY HIDANO
DEPUTY DIRECTOR

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

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March 19, 2012

To: The Honorable Clayton Hee, Chair, Maile Shimabukuro, Vice Chair, and
Members of the Senate Committee on Judiciary and Labor

Date: Monday, March 19, 2012
Time: 10:00 a.m.
Place: Conference Room 016, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

House Bill 2099HD1 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, 2112.

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

S.B. 0000
January 28, 2010
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parties think twice before initiating baseless claims and appeals proceedings. The department supports this measure.

THE SENATE
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

COMMITTEE ON JUDICIARY AND LABOR

Sen. Clayton Hee, Chair
Sen. Maile S.L. Shimabukuro, Vice Chair

Hearing: Monday, March 19, 2012
Time: 10:00 a.m.
Place Conference Room 016

TESTIMONY OF ILWU LOCAL 142

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

Chair Hee, Vice Chair Shimabukuro, Members of the Committee:

Thank you for the opportunity to present testimony regarding HB 2099, HD 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 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 Committee on Economic Revitalization and Business has made this measure effective July 1, 2012, but the bill should not be deferred, and should effective January 1, 2013. We therefore urge passage of this needed measure with this earlier effective date.



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Alison Powers
Executive Director

TESTIMONY OF ALISON POWERS

SENATE COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Monday, March 19, 2012
10:00 a.m.

HB 2099, HD1

Chair Hee, Vice Chair Shimabukuro, 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. 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.

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 16, 2012

SUBMITTED VIA ELECTRONIC MAIL

To: The Honorable Senator Clayton Hee, Chair. Maile S.L. Shimabukuro, Vice Chair,
and Members of the Committee

Date: Monday, March 19, 2012

Time: 10:00 a.m.

Place: Conference Room 016, State Capitol

From: Dennis W.S. Chang
Labor and Workers' Compensation Attorney

Re: HB 2099, HD 2 Relating to Workers' Compensation

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 (ICA) issued a non-binding opinion in the decision *Kelly v. Metal-Weld*

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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

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testified previously, not only should the decision have been non-binding, but the point was brought up *sua sponte* by the ICA, without luxury of having argument by the parties.

In light of the *Kelly* decision, the Board subsequently 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 dilatory practices, mostly denials of legitimate claims of injured workers and treatment. 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. They are allowed to act frivolously with impunity when raising frivolous defenses and creating a backlog in the calendar 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.

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 only ask that you help prevent frivolous and dilatory tactics so that there will be prompt payments, immediate quality access to medical services and recovery and a return to work as desired by most employers. I too am a

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small businessman with five (5) employees and my view is to care for my needy employees injured on the job, rather than have the insurance industry 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 get wage loss payments to my 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).

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: toneho@yahoo.com
Subject: Testimony for HB2099 on 3/19/2012 10:00:00 AM
Date: Friday, March 16, 2012 10:18:11 AM

Testimony for JDL 3/19/2012 10:00:00 AM HB2099

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: Anthony Ho
Organization: Individual
E-mail: toneho@yahoo.com
Submitted on: 3/16/2012

Comments:

This bill will help people to close cases in a more timely fashion. My case took over 3 years to get closed. It seems things could have been done and over in a matter of months without the hassle. It will also save employers and employees alot of time and money. Sincerely

To: The Honorable Clayton Hee, Chair of the Senate Committee on Judiciary and Labor
Date: Monday, March 19, 2012
Time: 10:00 a.m.
Place: Conference Room 016
State Capitol
From: Derrick Ishihara

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

Position: Support

Dear Chair Hee 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, prosecutes, or defends frivolous and groundless claims 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. 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