



NEIL ABERCROMBIE
GOVERNOR



BARBARA A. KRIEG
DIRECTOR

LEILA A. KAGAWA
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

February 18, 2014

**TESTIMONY TO THE
HOUSE COMMITTEE ON FINANCE**

For Hearing on Wednesday, February 19, 2014
3:00 p.m., Conference Room 308

BY

BARBARA A. KRIEG
DIRECTOR

House Bill No. 1973, H.D. 1
Relating to Workers' Compensation

TO CHAIRPERSON SYLVIA LUKE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on H.B. 1973, H.D. 1.

The purposes of H.B. 1973, H.D. 1 are to impose a penalty on an employer who does not pay an employee temporary partial disability (TPD) benefits within fourteen calendar days after the end of the employee's customary work week; clarify that an eligibility determination for disability benefits depends on the attending physician to certify the employee's disability every thirty days; clarify that the failure of the employee's physician to certify does not disqualify the employee from disability benefits; and allow a one-time retroactive certification.

The Department of Human Resources Development (DHRD) has a fiduciary duty to administer the State's self-insured workers' compensation program and its expenditure of public funds. **It is in this capacity that DHRD respectfully opposes this bill in its current form. In the alternative, DHRD suggests an amendment to the proposed Section 386-92(a) and deletion of the proposed Sections 386-92(b) and (c).**



First, as set forth in Section 386-32, HRS, TPD benefits require a complicated calculation taking into account the employee's earnings in a given partial duty week, the employee's weekly earnings before the work injury, and a percentage of the difference between the two. DHRD relies upon the employing department of an employee on TPD to provide the earnings information, which we then use to determine the amount of TPD benefits to authorize. Our authorization is then transmitted back to the department to calculate if any vacation or sick leave supplement is due to the employee before the Department of Accounting and General Services (DAGS) ultimately issues payment through semimonthly payroll.

The realities of these processes would make it very challenging, if not impossible, to meet the 14-day deadline in TPD cases. As a result, the State would inevitably be subject to the proposed penalty, thereby increasing our claims costs. If the committee is intent on moving this bill, we respectfully recommend that it adapt the language for proposed Section 386-92(a) in the companion measure, S.B. 2127, S.D. 1, whereby a nonpayment of disability benefits is excused if the employer or insurance carrier is unable to make payment due to conditions over which the employer or insurance carrier had no control, including compliance with public employment pay periods (specifically, Section 78-13, HRS). Requiring the Director to hold a hearing before any penalties are imposed provides an employer with due process to show a late payment meets these conditions.

Second, Section 386-96, HRS, and Section 12-15-80, HAR, already require attending physicians to submit, at a minimum, monthly WC-2 Reports that include, among, other things, "periods of temporary disability". Under Section 12-15-80(a)(3)(E), HAR, such reporting must also indicate "the dates of disability, any work restrictions, and the return to work date." DHRD relies on these attending physician reports and medical certificates to determine the amount of indemnity benefits to authorize in a given pay period, whether they are temporary total disability or temporary partial disability benefits. We do not understand how this bill's provision for "another physician" to certify periods of disability would work, particularly where a medical provider for an injured worker is a solo practitioner. However, adding another physician into the claims



mix would add a further layer of delay to an already complex process and make the penalty contemplated by this bill virtually automatic.

Finally, allowing an attending or another physician to retroactively certify disability benefits would overturn legions of Disability Compensation Division and Labor and Industrial Relations Appeals Board decisions which require that such medical certifications be contemporaneous and require the attending physician to certify that a claimant's absence from work is due to disability attributed to a specific work injury or condition. These cases hold that without such certification, an award of disability benefits is not proper. This requirement for contemporaneous certifications helps to ensure that employers are paying only for disability periods that are attributable to a compensable work injury and minimize the risk of benefit overpayments (i.e., where the time off from work is due to a non-industrial illness which should properly be charged to the employee's sick leave).

Based on the foregoing, we respectfully request that this measure be held or amended as suggested above.

COMMITTEE ON FINANCE

Rep. Sylvia Luke, Chair
Rep. Scott Y. Nishimoto, Vice Chair
Rep. Aaron Ling Johanson, Vice Chair

DATE: Wednesday, February 19, 2014
TIME: 3:00 P.M.
PLACE: Conference Room 308
State Capitol
415 South Beretania Street

RE: HB 1973 H.D. 1, RELATING TO WORKERS' COMPENSATION

From: Milia Leong, Vice President-Claim Manager, John Mullen & Co., Inc.

I would like to thank you for the opportunity to comment on HB 1973 H.D. 1, relating to workers' compensation. My name is Milia Leong and I am Vice President-Claim Manager of the Workers' Compensation Department at John Mullen & Co., Inc. ("JMCO"), Hawaii's largest Third Party Administrator ("TPA"). We have been handling multi-line insurance claims for 55 years in this State and I have personally adjusted, supervised, and managed workers' compensation claims for over 20 years on behalf of hundreds of Insureds, Self Insureds, State, City and County, and Captive Employers.

As licensed adjusters in the State of Hawaii, JMCO processes medical/indemnity benefits for over a thousand revolving claims daily in compliance with Section 386 Hawaii Revised Statutes (H.R.S).

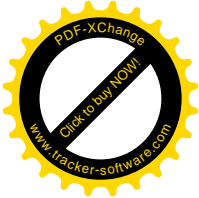
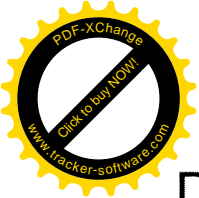
JMCO **opposes** HB 1973 H.D. 1, which seeks to amend H.R.S. 386-92.

We offer the following in support of our opposition:

- H.R.S 386 provides no definition for "customary work week." **If the intent is to ensure timely payment of TPD benefits to injured workers, we propose amending Section 386-32 (b) to state in part, benefits shall be paid within 14 days of receipt of a valid wage verification report and associated disability certification.**
- HB 1973 H.D. 1 seeks to add language to Section 386-92 H.R.S, specifically, (b) "in addition to the compensation owed by the employer, the penalty shall be due and payable without the necessity of an order or decision from the director." **Adding this language violates Employers due process rights in presenting a valid argument to the Director as to any perceived untimely payment of TPD/TTD benefits. The proposed addition of (b) should be stricken.** It is contrary to the existing language left in 386-92 (a), wherein, "there shall be added to the unpaid compensation an amount equal to twenty percent thereof payable at the same time as, but in addition to, the compensation, unless the nonpayment is excused by the director after a showing by the employer or insurance carrier that the payment of the compensation could not be made on the date prescribed therefor owing to the conditions over which the employer or carrier had no control."
- HB 1973 H.D. 1 proposes to allow an employee's eligibility for temporary total disability or temporary partial disability benefits to be determined by certification from the employee's attending physician every thirty days or by an examination of the entirety of the employee's available medical records by another physician, if the employee's attending

physician is not available. Failure of an employee's attending or treating physician to certify the dates of disability in an interim report, as required under section 386-96, shall not automatically disqualify the employee from receiving TTD or TPD benefits. HB 1973 H.D. 1 further proposes contemporaneous certification of an employee's disability status may be waived and retroactive certification of disability once per claim, and not for a period exceeding twelve months prior to the date of the request by a previous attending physician, or if the previous attending physician is not available, another physician who has the opportunity to examine the employee's previous medical records with regard to the current pending claim." **If the treating/attending physician is not required to provide the diagnosis, work status (light duty/full duty), dates of disability (if totally or partially disabled) and other relevant information, there is no way for the adjuster to determine what periods of disability are due Claimant. There are many instances where an injured worker may seek treatment for unrelated health conditions, wherein their disability status changes. These periods would not be covered by workers compensation and other due benefits may be available. The examination of an injured worker by a qualified physician is essential in processing disability benefits. Although we recognize there are times when a treating physician is not available, these instances should be far and few between and any physician "stepping in" should be required to comply with Section 386-96. This section provides for a checks and balance system that has worked for many years. Retroactive disability is a serious concern. We believe this will open Pandora's Box, creating a loop hole for those injured employees who do not comply with treatment plans, follow up visits, or return to work programs offered by the Employers, resulting in financial gain incentives for those who choose to exploit the workers compensation system.**

For the reasons stated above, we respectfully request HB 1973 H.D. 1 be held.



DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

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

February 18, 2014

To: Representative Sylvia Luke, Chair
Representative Scott Y. Nishimoto, Vice Chair
Representative Aaron Ling Johanson, Vice Chair
And Members of the Committee on Finance

Date: Wednesday, February 19, 2014
Time: 3:00 p.m.
Place: Conference Room 308, State Capitol

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

Re: Strong Support for Passage of H.B. 1973, HD 1, Relating to Workers' Compensation

I. Discussion.

I am submitting this as an individual labor attorney with the heavy concentration handling workers' compensation claims in my practice since 1977. I strongly encourage the passage of H.B. 1973 H.D. 1 which amends section 386-92, Hawaii Revised Statutes (HRS). The bill treats the late payment of temporary total disability benefits in a similar fashion as the late payment of temporary partial disability benefits. This is consistent with equal protection of the law, and provides an incentive for injured workers to promptly return to work.

Currently, the section only imposes a penalty if temporary total disability benefits are not timely paid under the terms of a final decision or judgement. It also imposes penalties on the employer or carrier for the nonpayment of temporary total disability benefits within ten days when due or when such benefits are terminated in violation of section 386-31, HRS.

There is a clear anomaly by the explicit failure to impose penalties for the late payment of temporary partial disability benefits. *Yamashita v. J.C. Penney*, AB 2001-393 (2/21/2003) [2005-075]. There is absolutely no logical basis to treat the late payment of temporary total disability benefits and the late payment of temporary partial disability benefits differently. In light of the sparse language contained in the current section, decision-makers have also found it impossible to determine what was the intention for the onset date for the imposition of penalties for the late payment of temporary total disability benefits. *Sauveur v. J. James Sogi*, AB 2000-077 (WH) (11/28/2001) [2001-158].

The current statutory provision also provides that negligent oversight or a highly inflexible technical rule can be used to deny the payment of temporary total disability benefits even though the injured work is clearly totally disabled for all work. An illustration is an employee who is recovering from low back surgery, but there is no certification of his or her disability. This and the foregoing inconsistencies and ambiguities contained in the present section 386-31, HRS, require the intervention of the Legislature to clarify and amend section 386-31, HRS, to conform with the underlying humanitarian purposes of the workers' compensation statute by imposing penalties for delayed temporary total disability benefits to encourage an injured worker to promptly transition to a return to work, even if the transition is only for part time work.

DILLINGHAM TRANSPORTATION BUILDING

735 BISHOP STREET ● SUITE 320 ● HONOLULU, HAWAII 96813 ● TELEPHONE: (808) 521-4005



II Strong Support.

Passage of H.B. 1973 H.D. 1 is vital and will clearly treat the late payment of temporary total disability benefits and temporary partial disability benefits in a similar manner, consistent with equal protection of the law. There is absolutely no cogent reasoning not to treat both equally with the imposition of penalties for the late payment of critical wage loss replacement benefits. Most workers already live paycheck by paycheck and the late payment of temporary partial disability benefits undoubtedly causes more spiraling economic ruin and needless distress for the injured worker and/or his or her family.

In my practice I have witnessed the late payment of temporary partial disability benefits for months and as much as nearly two years because there is no deterring factor to force an employer to make timely payments. Exhibit 1. And, consistent with the underlying humanitarian policy of the workers' compensation law, the prompt return to any form of work decreases the costs of the workers' compensation system in paying wage loss payments. The transition to return to work will also avoid the need to enter into work hardening programs, which simulate an injured workers' actual work, another major cost savings to the system.

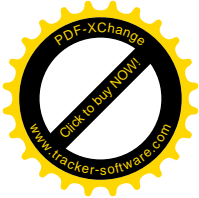
Moreover, denying an employee his or her statutory entitlement to temporary total disability or temporary partial disability benefits as a result of negligent oversight by an attending physician's failure to certify dates of disability or other innocuous technicality is inconsistent with the underlying policy of the workers' compensation statute. H.B. 1973 H.D. 1 allows a determination of whether an employee is truly disabled through a review of the whole record, and consequently prevent the injustice of depriving a truly disabled employee his wage loss. Why should an injured worker be deprived of wage loss benefits by technicalities over which he has no control?

Keep in mind that it is incumbent on the injured worker or his or her representative to prove unreasonable delay and an entitlement to non-payment of wage loss replacement benefits as well as penalties. By use of artificial rules under the current provision, injured workers have been denied millions and millions in wage loss replacement benefits. All we ask is a chance to correct such injustice.

If an employee is disabled and entitled to wage loss benefits, he or she should be paid. To deprive a disabled employee his rightful wage loss replacement benefits as a direct result of a negligent oversight or the application of a highly technical failure is simply wrong.

Passage of H.B. 1973 H.D. 1 should be wholly embraced by the entire Legislature.

DWSC:mt



D. Chang

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
830 PUNCHBOWL STREET, ROOM 209
HONOLULU, HAWAII 96813

Claimant
[REDACTED]

Employer
[REDACTED]

Insurance
Carrier
[REDACTED]

D E C I S I O N

SUPPLEMENTAL TO AWARD
DATED 5/14/2010

JUL 29 10:43

Case No: 20804162
D/A: 4/7/2008

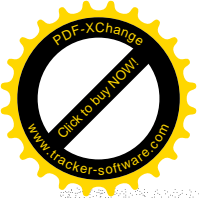
INTRODUCTION

Pursuant to an Order of the Director dated 5/24/2010, it was determined that the claimant had suffered a personal injury to the neck, back, left shoulder, head, teeth, temporomandibular joint (TMJ) by an accident arising out of and in the course of employment with the above-named employer on 4/7/2008. Said Order provided benefits pursuant to Chapter 386, Hawaii Revised Statutes. Specifically, said Order provided for such medical care, services and supplies as the nature of the injury may require, temporary partial disability benefits beginning 8/2/2009 through 4/7/2010 and additional temporary partial disability, if any, to be paid upon receipt of medical certification. The employer was not assessed attorney's fees and costs for the hearing. Nor were they assessed a penalty for reporting an incorrect average weekly wage of the claimant on the Employer's Report of Industrial Injury (Form WC-1). The matters of permanent disability and disfigurement, if any, were left to be determined at a later date. The average weekly wages of the claimant were \$520.88.

On 6/8/2010, said Decision was appealed by the employer to the Labor and Industrial Relations Appeals Board.

On 6/9/2010, a Reconsideration or Alternatively an Appeal was received by the claimant. The reconsideration request was denied on 6/28/2010 and the case was transmitted to the Labor & Industrial Relations Appeals Board on 6/29/2010.

JUL 29 2011



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On 9/10/2010, the Labor and Industrial Relations Appeals Board temporarily remanded the matter to the Director to address vocational rehabilitation, continuing temporary total disability benefits, and for determination of any other issue the Director deems appropriate.

A hearing presided over by Hearings Officer Nishida was held on 4/6/2011.

ISSUES

Is the claimant entitled to further temporary disability benefits?

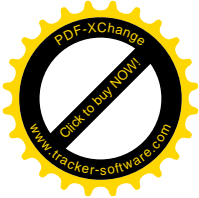
Should the employer be assessed a penalty against temporary disability benefits paid?

PARTIES' POSITIONS

The claimant's representative and the employer's representative reported that vocational rehabilitation is not an issue for this hearing. The claimant's representative reported that the claimant started his vocational rehabilitation program on 10/10/2010.

The employer's representative reported that the claimant was temporarily totally disabled: 3-day waiting period 4/7/2008 through 4/9/2008, from 4/10/2008 through 12/10/2008; 4/26/2009 through 6/6/2009; 7/19/2009 through 8/1/2009; 7/12/2010 ongoing to present. Claimant was temporarily partially disabled 12/11/2008 through 4/25/2009; 6/7/2009 through 7/18/2009; 8/2/2009 through 7/11/2010. The employer's representative contended that the employer has paid the claimant appropriate temporary disability benefits and therefore should not be assessed any penalty. The representative stated that he wanted it noted that the remand from the Labor Appeals Board did not include temporary partial disability as an issue. He also stated that Section 386-92, HRS, does not pertain to temporary partial disability benefits and in addition, the Director's Order for payment of the 8/2/2009 period didn't contain a specific amount to be paid. For those reasons he did not believe that awarding of penalties was appropriate. The representative also noted that although the claimant's representative believed the claimant was entitled to temporary total disability benefits from 4/11/2009 through 10/10/2009, that the claimant did have earnings during this period and payment of temporary partial disability benefits was appropriate.

The claimant's representative reported that the claimant in addition to working for the employer of injury, also worked as a parking lot attendant for Propark and had "on-campus" employment. The claimant's representative believes claimant should be paid temporary total disability benefits for 4/11/2009 through 10/10/2009 as the claimant was forced to find work because the employer did not pay him. He also stated that the claimant should have been paid temporary total disability benefits for the period 8/16/2009 through 10/10/2009 as the last day he worked for the employer of injury was



[REDACTED]

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8/15/2009. He contended that he should have been paid temporary total disability benefits and due to non-payment by the employer is also entitled to a 20% penalty. The claimant's representative reported that the claimant didn't begin working for Propark until 10/15/2009. The claimant's representative reported that the temporary partial disability amount in dispute for this hearing is for the period 8/2/2009 through 4/7/2010. The claimant received \$2,500.00 in temporary partial disability for this period. The representative contends that as he should have been paid temporary total disability benefits for part of the time and then temporary partial disability benefits, that the \$2,500.00 he was paid is incorrect. He contends that this was also paid late on 8/4/2010, and not within ten days, as the employer's request for a partial stay of payments was denied by the Labor Appeals Board on 7/21/2010. He also stated again that it was not the full amount that he should have been paid. For these reasons he stated that the employer should pay a 20% penalty for late and incorrect payment for temporary partial disability benefits for the period 8/2/2009 through 4/7/2010. The claimant's representative also reported that they provided the employer with Propark's Summary of Earnings for various periods after 4/7/2010, but that the temporary partial disability benefit payments were late and therefore a penalty for this should also be assessed.

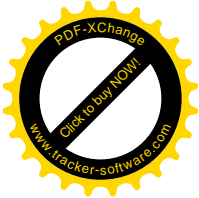
FINDINGS OF FACT

Although the issue of entitlement to vocational rehabilitation was to be heard at the 4/6/2011 hearing, both parties acknowledged that the claimant was already enrolled in a vocational rehabilitation program, which began on 10/10/2010.

Although the employer's representative noted that the Labor and Industrial Relations Appeals Board's 9/10/2010 remand does not identify temporary partial disability as an issue, it does include any other issue the Director deems appropriate. As the Director determines that the issue of temporary partial disability is appropriate for this hearing, this issue will be addressed in the decision.

Although the claimant's representative believed that the claimant should have been paid temporary total disability benefits as of 4/11/2009 as the reason he had earnings was because he was forced to find work because the employer did not properly pay him, the claimant nevertheless did have earnings and payment of temporary partial disability benefits is appropriate. As there was no information provided to the contrary, the Director is awarding temporary total disability benefits and temporary partial disability benefits up through 8/1/2009 based on the employer's information.

The claimant's representative is contending that the claimant should have been paid temporary total disability benefits for the period 8/15/2009 through 10/10/2009. He is also contending that the employer did not pay the proper temporary disability benefits for the period 8/2/2009 through 4/7/2010. However, as the 5/24/2010 Order of the Director that awarded temporary partial disability benefits for this period 8/2/2009 through

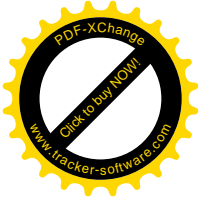


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4/7/2010 is presently on appeal with the Labor and Industrial Relations Appeals Board, no decision can be rendered on the amount paid for this period, whether claimant should have been paid temporary total disability for a portion of this period, npr penalties for this period.

Although the employer's representative indicated that they paid temporary total disability as of 7/12/2010, evidence of earnings up to at least 10/31/2010 has been provided. Also, although claimant's representative noted that there is no dispute as to the amount of temporary disability benefits paid after 4/7/2010, as some of the temporary partial disability payment estimates as provided by the claimant's representative does not appear correct, this decision will be awarding temporary partial disability benefits for the periods outside of the Order dated 5/24/2010. In addition, as additional information regarding the employer's payment to the claimant and the claimant's earnings, were required for an appropriate decision to be rendered, the parties executed an extension agreement to provide this information. Claimant is entitled to temporary partial disability benefits as follows: \$174.00 for 4/11/2010 through 4/17/2010; \$184.53 for 4/18/2010 through 4/24/2010; \$179.94 for 4/25/2010 through 5/1/2010; \$174.00 for 5/2/2010 through 5/8/2010; \$174.00 for 5/9/2010 through 5/15/2010; \$174.00 for 5/16/2010 through 5/22/2010; \$174.00 for 5/23/2010 through 5/29/2010; \$194.05 for 5/30/2010 through 6/5/2010; \$203.48 for 6/6/2010 through 6/12/2010; \$204.34 for 6/13/2010 through 6/19/2010; \$204.98 for 6/20/2010 through 6/26/2010; \$174.00 for 6/27/2010 through 7/3/2010; \$174.00 for 7/4/2010 through 7/10/2010; \$174.00 for 7/11/2010 through 7/17/2010; \$174.00 for 7/18/2010 through 7/24/2010; \$174.00 for 7/25/2010 through 7/31/2010; \$299.80 for 8/1/2010 through 8/7/2010; \$308.02 for 8/8/2010 through 8/14/2010; \$249.87 for 8/15/2010 through 8/21/2010; \$199.80 for 8/22/2010 through 8/28/2010; \$199.80 for 8/29/2010 through 9/4/2010; \$244.03 for 9/5/2010 through 9/11/2010; \$200.62 for 9/12/2010 through 9/18/2010; \$199.94 for 9/19/2010 through 9/25/2010; \$200.91 for 9/26/2010 through 10/2/2010; and \$243.11 for 10/3/2010 through 10/9/2010. According to the claimant's representative, the claimant began his vocational rehabilitation program on 10/10/2010, therefore the following temporary disability benefits are calculated pursuant to Section 386-25, HRS: \$329.55 for 10/10/2010 through 10/16/2010; \$ 258.86 for 10/17/2010 through 10/23/2010; and \$297.07 for 10/24/2010 through 10/30/2010. The claimant had earnings of \$15.44 for 10/31/2010. Insufficient information was provided as to whether the claimant was employed and receiving earnings after 10/31/2010. Therefore, this Hearings Officer is unable to make further calculations for continued temporary disability benefits. Claimant would remain entitled to temporary total disability benefits pursuant to Section 386-25, HRS, for so long as the claimant continues to participate in vocational rehabilitation and remains otherwise eligible for such benefits.

Although the claimant's representative has requested penalties for late and/or incorrect payment of temporary disability benefits for the time period 8/2/2009 through 4/7/2010. As this is again the time period for which benefits were awarded in the 5/24/2010 Order which is being appealed, the issue of penalties for this time period will not be addressed in this decision. In addition, although the claimant's representative indicated that



other temporary partial disability benefits were paid late, as the Statute does not address penalties for late payment of temporary partial disability benefits versus temporary total disability benefits, no penalties are assessed against the employer.

PRINCIPLES OF LAW

Sections 386-21 and 386-26, HRS, provide that a liable employer shall pay for such medical care, services and supplies as the nature of the injury may require.

Section 386-25(d), HRS, provides that an injured employee's enrollment in a rehabilitation plan or program shall not affect the employee's entitlement to temporary total disability compensation if the employee earns no wages during the period of enrollment. If the employee receives wages for work performed under the plan or program, the employee shall be entitled to temporary total disability compensation in an amount equal to the difference between the employee's average weekly wages at the time of injury and the wages received under the plan or program.

Section 386-31(b), HRS, provides that a liable employer shall pay to a claimant weekly compensation for temporary total disability from work.

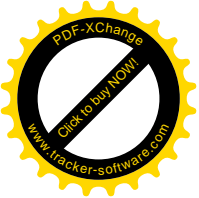
Section 386-32(b), HRS, provides that a liable employer shall pay to a claimant weekly compensation for temporary partial disability from work.

Section 386-92, HRS, provides that if any compensation payable under the terms of a final decision or judgment is not paid within thirty-one days after it becomes due, as provided by the final decision or judgment, or if any temporary total disability benefits are not paid by the employer or carrier within ten days, after the employer or carrier has been notified of the disability, there shall be added to the unpaid compensation an amount equal to twenty percent thereof payable at the same time, but in addition to, the compensation, unless the nonpayment is excused by the director after a showing by the employer or insurance carrier that the payment of the compensation could not be made on the date prescribed.

CONCLUSIONS OF LAW

The Director finds, based upon the Findings of Fact and Principles of Law, the claimant is entitled to temporary partial disability benefits as noted above. The Director credits the earnings information provided by the claimant.

The Director also finds, based upon the Findings of Fact and Principles of Law, the claimant is entitled to additional temporary total disability benefits pursuant to Section 386-25, HRS. The Director credits the claimant's enrollment in vocational rehabilitation as of 10/10/2010.

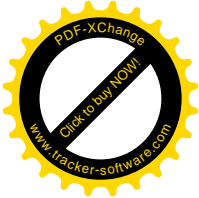


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The Director further finds, based upon the Findings of Fact and Principles of Law, the employer is not assessed any penalties for non-payment or incorrect payment of temporary disability benefits. The Director determines that there are no appropriate penalties to be assessed against the employer for temporary partial disability payments.

DECISION AND ORDER

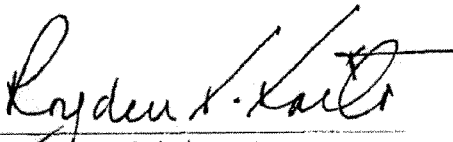
1. Pursuant to Sections 386-21 and 386-26, HRS, said employer shall pay for such medical care, services and supplies as the nature of the injury may require.
2. Pursuant to Section 386-31(b) and Section 386-25, HRS, said employer shall pay to claimant weekly compensation of \$347.27 for temporary total disability beginning (waiting period: 4/7/2008 through 4/9/2008) 4/10/2008 through 12/10/2008; 4/26/2009 through 6/6/2009; and 7/19/2009 through 8/1/2009, for a total of \$14,932.61. Additional temporary total disability benefits to be paid pursuant to Section 386-25, HRS, for as long as the claimant participates in vocational rehabilitation and is otherwise eligible for such benefits.
3. Pursuant to Section 386-32(b), and Section 386-25, HRS, said employer shall pay to claimant weekly compensation of varied amounts for temporary partial disability from work beginning 12/11/2008 through 4/25/2009 and 6/7/2009 through 7/18/2009; the amount of \$174.00 for 4/11/2010 through 4/17/2010; \$184.53 for 4/18/2010 through 4/24/2010; \$179.94 for 4/25/2010 through 5/1/2010; \$174.00 for 5/2/2010 through 5/8/2010; \$174.00 for 5/9/2010 through 5/15/2010; \$174.00 for 5/16/2010 through 5/22/2010; \$174.00 for 5/23/2010 through 5/29/2010; \$194.05 for 5/30/2010 through 6/5/2010; \$203.48 for 6/6/2010 through 6/12/2010; \$204.34 for 6/13/2010 through 6/19/2010; \$204.98 for 6/20/2010 through 6/26/2010; \$174.00 for 6/27/2010 through 7/3/2010; \$174.00 for 7/4/2010 through 7/10/2010; \$174.00 for 7/11/2010 through 7/17/2010; \$174.00 for 7/18/2010 through 7/24/2010; \$174.00 for 7/25/2010 through 7/31/2010; \$299.80 for 8/1/2010 through 8/7/2010; \$308.02 for 8/8/2010 through 8/14/2010; \$249.87 for 8/15/2010 through 8/21/2010; \$199.80 for 8/22/2010 through 8/28/2010; \$199.80 for 8/29/2010 through 9/4/2010; \$244.03 for 9/5/2010 through 9/11/2010; \$200.62 for 9/12/2010 through 9/18/2010; \$199.94 for 9/19/2010 through 9/25/2010; \$200.91 for 9/26/2010 through 10/2/2010; and \$243.11 for 10/3/2010 through 10/9/2010. According to the claimant's representative, the claimant began his vocational rehabilitation program on 10/10/2010, therefore the following temporary disability benefits are calculated pursuant to Section 386-25, HRS: \$329.55 for



10/10/2010 through 10/16/2010; \$ 258.86 for 10/17/2010 through 10/23/2010; and \$297.07 for 10/24/2010 through 10/30/2010. Additional temporary disability benefits to be paid pursuant to Section 386-25, HRS, for as long as the claimant participates in vocational rehabilitation and is otherwise eligible for such benefits.

- 4. The matters of permanent disability and disfigurement, if any, shall be determined at a later date.
- 5. This case is hereby transmitted to the Labor & Industrial Relations Appeals Board for a hearing and determination of all issues on appeal.

BY ORDER OF THE DIRECTOR, JULY 29, 2011.


 Administrator
 For /

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or the Director's county representative within twenty days after a copy of this decision has been sent.

It is the policy of the Department of Labor and Industrial Relations that no person shall on the basis of race, color, sex, marital status, religion, creed, ethnic origin, national origin, age, disability, ancestry, arrest/court record, sexual orientation, and National Guard participation be subjected to discrimination, excluded from participation, or denied the benefits of the department's services, programs, activities, or employment.

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STATE OF HAWAII
 DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
 DISABILITY COMPENSATION DIVISION
 830 PUNCHBOWL STREET, ROOM 209
 HONOLULU, HAWAII 96813

Claimant [REDACTED]

Employer [REDACTED]

Insurance Carrier [REDACTED]

D E C I S I O N

DEC 05 2008 4:48:40

Case No: 20609869
 D/A: 7/24/2006

INTRODUCTION

On 7/24/2006, claimant sustained a personal injury to the back by accident arising out of and in the course of employment. The claimant was employed by Oahu Transit Services, Inc., who was represented by Brandvold Ku Inc. A hearing presided over by Hearings Officer Davidson was held on 10/16/2008.

ISSUES

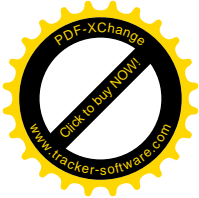
Is the claimant entitled to penalties for late payment of temporary total disability (TTD) benefits paid beginning 7/28/2006 through 6/4/2008?

Is the claimant entitled to penalties for late payment of temporary partial disability (TPD) benefits paid beginning 9/6/2006 through 6/4/2008?

PARTIES' POSITIONS

The claimant contends, based upon his testimony, that he is entitled to penalties for late payment of TTD benefits beginning 7/28/2006 through 6/4/2008 and late payment of TPD benefits beginning 9/6/2006 through 6/4/2008 as claimant's was incorrectly paid a compensation rate of \$585.63 instead of a correct rate of \$624.21 during said periods.

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 DEC 05 2008
 Brandvold Ku Inc.



Page 2

The employer contends, based upon their testimony and the Director's decision Bornios v. Daiichiya Love's Bakery, Inc., that the claimant is not entitled to any penalties for late payment of TTD benefits or TPD benefits, as there is no statutory basis for penalties when benefits were paid on an incorrect compensation rate.

FINDINGS OF FACT

The employer's testimony at hearing affirms that claimant's correct weekly compensation rate is \$624.21.

The employer's testimony at hearing affirms that claimant's TTD benefits paid beginning 7/28/2006 through 6/4/2008 were paid at an incorrect compensation rate of \$585.63.

Section 386-92, HRS, affirms that temporary disability benefits must be paid with a weekly compensation rate that is based upon claimant's correct average weekly wage (AWW). Subsequently, any temporary disability benefits paid with a less than due compensation rate will result in a partial payment that leaves a balance that is late.

Chapter 386, HRS, is lacking a provision for a penalty related to late payment of TPD benefits.

The AWW of the claimant were \$936.27.

PRINCIPLES OF LAW

Sections 386-21 and 386-26, HRS, provide that a liable employer shall pay for such medical care, services and supplies as the nature of the injury may require.

Section 386-31(b), HRS, provides that a liable employer shall pay to a claimant weekly compensation for TTD from work.

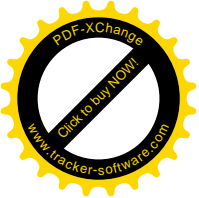
Section 386-32(b), HRS, provides that a liable employer shall pay to a claimant weekly compensation for TPD from work.

Section 386-92, HRS, provides that if any compensation payable under the terms of a final decision or judgment is not paid by a self-insured employer or an insurance carrier within thirty-one days after it becomes due, as provided by the final decision or judgment, or if any TTD benefits are not paid by the employer or carrier within ten days, exclusive of Saturdays, Sundays, and holidays, after the employer or carrier has been notified of the disability, and where the right to benefits are not controverted in the employer's initial report of industrial injury or where TTD benefits are terminated in violation of Section 386-31, there shall be added to the unpaid compensation an amount equal to twenty percent thereof

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DEC 05 2008

Brandvold Ku Inc.



payable at the same time as, but in addition to, the compensation, unless the nonpayment is excused by the Director after a showing by the employer or insurance carrier that the payment of compensation could not be made on the date prescribed, therefore owing to the conditions over which the employer or carrier had no control.

CONCLUSIONS OF LAW

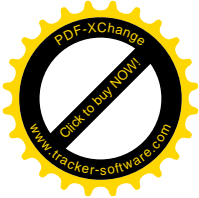
The Director finds, based upon the above Findings of Fact and Principles of Law, that the claimant is entitled to a twenty percent penalty in the amount of \$3,373.00 for late payment of TTD benefits beginning 7/28/2006 through 9/5/2006; 9/25/2006 through 9/28/2006; 10/6/2006 through 10/12/2006; 10/31/2006 through 10/31/2006; and 11/23/2006 through 6/4/2008. The Director credits Section 386-92, HRS, and the employer's testimony as confirming that due to employer's error in using an incorrectly low weekly compensation rate of \$585.63, (instead of the correct weekly compensation rate of \$624.21) claimant did not receive the full weekly benefits due beginning 7/28/2006 through 6/4/2008.

✓ The Director further finds, based upon the above Findings of Fact and Principles of Law, that claimant is not entitled to a penalty for incorrectly paid TPD benefits paid beginning 9/6/2006 through 6/4/2008. The Director credits a lack of statutory support in Chapter 386, HRS, for such a penalty.

DECISION AND ORDER

1. Pursuant to Sections 386-21 and 386-26, HRS, said employer shall pay for such medical care, services and supplies as the nature of the injury may require.
2. Pursuant to Section 386-31(b), HRS, said employer shall pay to claimant weekly compensation of \$624.21 for temporary total disability beginning 7/28/2006 through 9/5/2006; 9/25/2006 through 9/28/2006; 10/6/2006 through 10/12/2006; 10/31/2006 through 10/31/2006; 11/23/2006 through 10/16/2008; for 106.5714 weeks, for a total of \$66,522.96. Additional temporary total disability, if any, shall be paid upon receipt of medical certification.
3. Pursuant to Section 386-32(b), HRS, said employer shall pay to claimant weekly compensation of \$402.70 for temporary partial disability from work beginning 9/6/2006 through 9/24/2006; 9/29/2006 through 10/5/2006; 10/13/2006 through 10/30/2006; 11/1/2006 through 11/22/2006; for 9.4286 weeks, for a total of \$3,796.85.

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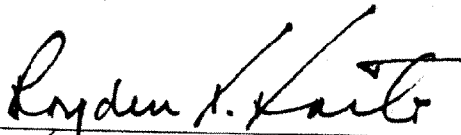


[REDACTED]

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4. Pursuant to Section 386-92, HRS, the employer shall pay claimant \$3,373.00 for late payment of full temporary total disability benefits beginning 7/28/2006 through 9/5/2006; 9/25/2006 through 9/28/2006; 10/6/2006 through 10/12/2006; 10/31/2006 through 10/31/2006; and 11/23/2006 through 6/4/2008.
5. The matters of permanent disability and/or disfigurement, if any, shall be determined at a later date.

BY ORDER OF THE DIRECTOR, DECEMBER 4, 2008.


Royden A. Kaito
 Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or the Director's county representative within twenty days after a copy of this decision has been sent.

It is the policy of the Department of Labor and Industrial Relations that no person shall on the basis of race, color, sex, marital status, religion, creed, ethnic origin, national origin, age, disability, ancestry, arrest/court record, sexual orientation, and National Guard participation be subjected to discrimination, excluded from participation, or denied the benefits of the department's services, programs, activities, or employment.

DISABILITY COMPENSATION DIVISION

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DEC 05 2008

Brandvold Ku Inc.

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES

COMMITTEE ON FINANCE

Wednesday, February 19, 2014
3:00 p.m.

HB 1973, HD1
RELATING TO WORKERS' COMPENSATION

By Marleen Silva
Director, Workers' Compensation
Hawaiian Electric Company, Inc.

Chair Luke, Vice Chairs Nishimoto and Johanson, and Members of the Committee:

Hawaiian Electric Co. Inc., its subsidiaries, Maui Electric Company, LTD., and Hawaii Electric Light Company, Inc. **strongly oppose H.B. 1973, HD1.** Our companies represent over 2,000 employees throughout the State.

The intent of this bill is to provide an incentive for injured workers to return to part-time work by requiring employers to make timely payment of temporary partial disability (TPD) benefits. The measure adds new language imposing a penalty on employers or insurance carriers who do not pay for an employee's TPD benefits within fourteen calendar days after the end of the employee's customary work week, and without an order or decision from the Director of the DLIR. It requires disability certification from the employee's attending physician every thirty days, or by an alternate physician if the attending physician is unavailable, provided they have examined the employee's medical records in its entirety. It allows contemporaneous certification of disability to be waived and retroactive certification of disability to be allowed under certain conditions.

We believe this measure is unfair to employers by requiring payment of disability benefits upfront, even though there may be incomplete information available to make an accurate assessment of benefits due. This will likely cause overpayments of benefits by employers and become an unnecessary burden on all parties to reconcile on the back-end.

Timely and complete documentation of diagnosis and all services provided, including periods of disability and specific work limitations and their duration are the statutory responsibility of the treating physician to provide to the employer or insurance carrier. Secondary wage information is the responsibility of the disabled employee to provide to the employer. Failing to meet their statutory obligation timely prevents employers or insurance carriers from being able to compute and disperse the appropriate disability payments when due.

For these reasons, we strongly oppose H.B. 1973, HD1 and respectfully request this measure be held.

Thank you for this opportunity to submit testimony.

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

850 SOUTH KING STREET, 10TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8500 • FAX: (808) 768-5563 • INTERNET: www.honolulu.gov/hr

KIRK CALDWELL
MAYOR



CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

February 19, 2014

The Honorable Sylvia Luke, Chair
and Members of the
Committee on Finance
House of Representatives
State Capitol, Room 308
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Luke and Members of the Committee:

SUBJECT: House Bill No. 1973, HD1, Relating to Workers' Compensation

The purposes of H.B. 1973, HD1, are to (1) require that temporary partial disability payments be paid within fourteen days after the end of the employer's customary work week, (2) create a penalty for late payments of disability benefits absent any hearing by the Department of Labor and Industrial Relations and (3) enable both temporary total and temporary partial disability benefits to be paid absent any contemporaneous certification by the treating physician. As fully set forth below, the City and County of Honolulu strongly opposes the portions of the bill that seeks to add subsections (b) and (c) to Hawaii Revised Statutes (HRS) Section 386-92.

It is axiomatic that a physician needs to examine a claimant in order to determine the extent of the individual's disability. In that regard, Hawaii Administrative Rule Section 12-15-80(a)(3)(E) requires that an attending physician submit monthly reports indicating "the dates of disability, any work restrictions, and the return to work date" of his or her patient. This reporting requirement ensures the integrity of the payments that are provided to the injured worker based on his or her absence from work.

However, proposed subsection (c) would authorize a physician chosen by the employee to retroactively certify that the claimant has been disabled for up to a year prior to the date of the request. No examination of the patient would be required. To

LATE TESTIMONY

The Honorable Sylvia Luke, Chair
and Members of the
Committee on Finance
February 19, 2014
Page 2

the contrary, the claimant could be certified as disabled based solely on an examination of previous medical records with regard to the claim. The City strongly opposes this portion of H.B 1973, HD1. Eliminating the requirement for a contemporaneous disability certificate will lead to manipulation and abuse of workers' compensation benefits and significantly increase costs for self-insured workers' compensation employers such as the City. Even though the bill limits the retroactive disability period to one year, this alone could end up costing the City up to \$44,404 per each claim.

The City also opposes proposed subsection (b). Requiring a penalty for late temporary total and temporary partial disability payments without the necessity of an order or decision by the Director of Labor is in conflict with existing law. HRS Section 386-92 provides that nonpayment of disability payments may be excused upon a showing that the payment of compensation could not be made due to conditions over which the employer or carrier had no control.

Based on the foregoing, the City respectfully requests that H.B. 1973, HD1, be held. Thank you for the opportunity to testify.

Sincerely,



Carolee C. Kubo
Director