



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

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January 31, 2014

To: The Honorable Mark M. Nakashima, Chair,
The Honorable Kyle T. Yamashita, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Tuesday, February 4, 2014
Time: 9:00 a.m.
Place: Conference Room 309, State Capitol

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

Re: H.B. 1973 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 1973 amends section 386-92, Hawaii Revised Statutes (HRS), by requiring the employer or insurance carrier to pay temporary partial disability benefits within fourteen calendar days after the end of the employee's work week. Non-payment will result in a penalty on the employer, which is to be payable without an order or decision from the director. The bill also proposes to clarify that an employee's eligibility for disability benefits is based on the employee's entire record and that an attending physician's failure to certify dates of disability in an interim report will not disqualify an employee from receiving temporary total and temporary partial disability benefits.

II. CURRENT LAW

Section 386-92, HRS, imposes a penalty on the self-insured employer or carrier if compensation payable under the terms of a final decision or judgment is not paid. It also imposes penalties on the employer or carrier for non-payment of temporary total disability benefits within a specified time period and for temporary total disability benefits terminated in violation of section 386-31, HRS. It does not impose penalties on non-payment of temporary partial disability benefits.

Section 386-96, HRS requires the attending physician to submit an interim report

to the employer within seven calendar days of service indicating the dates of disability or the date of release to work.

III. COMMENTS ON THE HOUSE BILL

The department supports this bill to provide for timely payments of temporary partial disability benefits. One of the underlying policies in workers' compensation is to encourage an employee to promptly return to work, but the current law discourages a return to work because a worker is never sure if he or she will be timely paid temporary partial disability benefits. Compensation, whether temporary total disability or temporary partial disability benefits, should be treated equally.

Promoting a return to work such as even half-time work and ensuring the payment of temporary partial disability benefits to make the employee whole also serves as a method to transition him to return to full-time work. Studies have shown that a prompt return to work prevents a long-term disability of an employee. Inherent cost drivers such as the need to enroll an employee in a work simulation program before a return to work can also be reduced.

Denying an employee 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. By allowing a determination of whether an employee is truly disabled through a review of the whole record, and consequently some limited discretion, the injustice of depriving a truly disabled employee their wage loss can be corrected.

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

However, the DLIR notes that the attending physician must submit "disability certificates" or dates of disability on the Physician's Reports (WC-2) for the employee to receive either temporary total or partial disability. This minimizes overpayment of temporary total or partial disability benefits.

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 1, 2014

**TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT**

For Hearing on Tuesday, February 4, 2014
9:00 a.m., Conference Room 309

BY

BARBARA A. KRIEG
DIRECTOR

House Bill No. 1973
Relating to Workers' Compensation

TO CHAIRPERSON MARK NAKASHIMA AND MEMBERS OF THE COMMITTEE:

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

The purposes of H.B. 1973 are to impose a penalty on an employer who does not pay an employee temporary partial disability (TPD) benefits within fourteen (14) calendar days after the end of the employee's customary work week; and to clarify that an eligibility determination for disability benefits depends on the employee's entire record and the failure of the attending physician to certify the dates of disability on a specialized form provided by the employer or the department does not disqualify the employee from disability benefits.

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.

DHRD respectfully opposes this bill.

First, Section 386-96, HRS, and Section 12-15-80, HAR, require providers treating workers 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 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 note that the injured workers’ eligibility for such disability benefits is usually not an issue at this stage of the claims process, but the specific dates of disability are absolutely necessary and critical to calculate how much to pay in TPD or TTD benefits. If physicians are not required to certify the dates of disability, DHRD would still have to contact each provider for the information, thereby adding another layer of delay to an already complex process and making the penalty contemplated by this bill virtually automatic.

Second, 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 to meet the 14-day deadline in TPD cases.

Based on the foregoing, we respectfully request that this measure be held.

NEIL ABERCROMBIE
GOVERNOR



Dean H. Seki
Comptroller

Maria E. Zielinski
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
DEAN H. SEKI, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT
ON
February 4, 2014

H.B. 1973

RELATING TO WORKERS' COMPENSATION

Chair Nakashima and members of the Committee, thank you for the opportunity to submit written testimony on H.B. 1973.

The Department of Accounting and General Services does not support H.B. 1973.

H.B. 1973 requires payment of temporary partial disability benefits within fourteen days after the end of the employee's customary work week. Section 78-13, Hawaii Revised Statutes, established the fifth and twentieth of every month as pay days for all state employees. Because the current payroll system is limited to processing payroll on two scheduled pay days, extensive manual processing will be required to meet the fourteen days payment requirement. Once the State's Enterprise Resource Planning (ERP) system has been implemented and is fully

functional, the provisions of this bill will require substantially less manual intervention to administer. However, since the full functionality of the State's contemplated ERP is several years away, we respectfully request that H.B. 1973 be held.

Thank you for the opportunity to submit written testimony on this matter.

**Testimony to the House Committee on Labor and Public Employment
Tuesday, February 4, 2014 at 9:00 A.M.
State Capitol - Conference Room 309**

RE: HOUSE BILL NO. 1973 RELATING TO WORKERS' COMPENSATION

Chair Nakashima and Vice Chair Yamashita, and members of the committee:

The Chamber of Commerce of Hawaii **opposes** H.B. No. 1973. This bill proposes to amend HRS 386 by imposing a penalty on an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's customary work week. The bill further clarifies that an eligibility determination for disability benefits depends on the employee's entire record and the failure of the attending physician to certify a specialized form provided by the employer or the department does not disqualify the employee from disability benefits.

The Chamber is the largest business organization in Hawaii, representing more than 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber disagrees with the bill and believes that the 14 day period should run not from the injured workers' pay period, but from when the employer/carrier receives a copy of the injured workers' wage statement so they can calculate and process the temporary disability payment. Oftentimes, the injured worker and/or their part-time employer (which may differ from employer for which injury was sustained) do not provide this information timely. Then the carrier is unable to calculate the difference the injured worker is due from actual wages received and this is the cause of the delay.

With respect to disability certification, the Labor Appeals Board has long upheld that employers must have contemporaneous disability certification by the physician noting the date of injury, diagnosis, period of disability, etc. We do not support changing this aspect of the law. It is unreasonable to require the carrier to dig through massive amounts of medical records to try to piece together an injured worker's period of disability, and then risk penalty for delay in paying. Furthermore, we do not support such a large penalty on employers or carriers where they are not the only part of the process. Physicians regularly certify disability in a timely manner on other work related issues like sick leave. We should expect the same in worker's compensation. Lastly, we do not support the penalty being automatic without an order from the Director.

We respectfully ask that this bill be held in committee. Thank you for the opportunity to testify on this matter.

TESTIMONY OF JANICE FUKUDA

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Representative Mark M. Nakashima, Chair
Representative Kyle T. Yamashita, Vice Chair

February 4, 2014
9:00 a.m.

HB 1973

Chair Nakashima, Vice Chair Yamashita, and members of the Committee, my name is Janice Fukuda, Assistant Vice President, Workers' Compensation Claims at First Insurance, testifying on behalf 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 one third of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** HB 1973, which amends Section 386-92, Default in payments of compensation, penalty.

The statute already allows for penalties for late payment and the establishment of different requirements for Temporary Total Disability and Temporary Partial Disability does not improve the delivery of benefits or services.

The bill requires Employers to pay TPD benefits "within 14 calendar days after the end of the employee's customary work week". There is no statutory definition of 'customary work week' and this requirement will unfairly penalize the employer or insurer if the injured worker returns to modified duty with another employer and the wages earned or hours worked is unavailable.

Furthermore, imposing penalties without the necessity of an order or decision from the Director also prohibits due process for the Employer. Injured workers should not be compensated when they refuse to return to work when released to modified duty and modified duty is available. Employers should be allowed to adjudicate Temporary Partial Disability benefits when the injured worker does not return to work as released by their treating physician or when their treating physician refuses to certify disability for an indefinite period.

The proposed language requires the employer to pay disability benefits regardless of whether the treating physician certifies the employee's ongoing disability. This will create a moral hazard and increase cost of the claim as employers will be required to pay for benefits for an indefinite period during which the injured worker may not be disabled. Employers should not have to pay disability benefits when the injured worker fails to seek medical treatment and the treating physician is unable to make a determination regarding disability status.

For these reasons, we respectfully request that HB 1973 be held.

Thank you for the opportunity to testify.

BIA-HAWAII

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THE VOICE OF THE CONSTRUCTION INDUSTRY

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simplicityHR by ALTRES

Testimony to the House Committee on Labor & Public Employment

Tuesday, February 4, 2014

9:00 a.m.

Hawaii State Capitol - Conference Room 309

SUBJECT: H.B. 1973, RELATING TO WORKERS' COMPENSATION

Dear Chair Nakashima, Vice-Chair Yamashita, and members of the Committee,

My name is Gladys Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii **opposes** H.B. 1974, which would impose a penalty on an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's customary work week. The bill also clarifies that an eligibility determination for disability benefits depends on the employee's entire record and the failure of the attending physician to certify a specialized form provided by the employer or the department does not disqualify the employee from disability benefits.

While H.B. 1974 finds that disabled workers are often unfairly denied disability benefits because their physicians do not complete and sign a specialized form that certifies the injured worker is entitled to compensation, **the employer has no control over such payments** since the responsibility of completing the necessary paperwork for temporary disability compensation lies with the disabled employee and his or her doctor. Failing to do so prevents payment from the insurance carrier. To penalize the employer for a process he or she has no control over, or participation in, is unfair, extremely troublesome, and increases the costs of conducting business.

Based on the foregoing reasons, BIA-Hawaii **opposes** H.B. 1974.

We appreciate the opportunity to share with you our views.

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 3, 2014

To: Representative Mark M. Nakashima, Chair
Representative Kyle T. Yamashita, Vice Chair
and Members of the Committee

Date: Tuesday, February 4, 2014
Time: 9:00 a.m.
Place: Conference Room 309, State Capitol

From: Dennis W.S. Chang

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

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 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. Currently, the section imposes a penalty if temporary total disability benefits is 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 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 and to encourage an injured worker to promptly transition to a return to work, even if the transition is only for part time work.

Passage of H.B. 1973 is vital and will clearly treat the late payment of temporary total disability benefits and temporary partial disability benefits in a similar manner. There is absolutely no cogent reasoning to not 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 stress for the injured worker and/or his or her family. In my practice I have

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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 a self-insured employer or insurance carrier to make timely payments. Exhibit I. 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. The transition to return to work will also reduce costs by avoiding the need to enter into work hardening programs which simulate an injured workers' actual work.

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 also 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. If an employee is disabled and entitled to wage loss benefits, he 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 should be embraced by the 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 5/24/2010

JUL 29 2010

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 2010

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

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

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, nor 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.

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.

Ryder S. Kaito

For / 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.

LABOR DIVISION
JUL 29 09:43 '11

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

DISABILITY DIVISION
DEC-4 10:40

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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Brandvold Ku Inc.

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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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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Brandvold Ku Inc.

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.

Ryden K. Kaito
Administrator
AK

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

'08 DEC -4 A8:40

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DEC 05 2008

Brandvold Ku Inc.

yamashita1

From: mailinglist@capitol.hawaii.gov
Sent: Friday, January 31, 2014 9:33 AM
To: LABtestimony
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for HB1973 on Feb 4, 2014 09:00AM*

HB1973

Submitted on: 1/31/2014

Testimony for LAB on Feb 4, 2014 09:00AM in Conference Room 309

| Submitted By | Organization | Testifier Position | Present at Hearing |
|-----------------------|---------------------|---------------------------|---------------------------|
| Javier Mendez-Alvarez | Individual | Support | No |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Twenty-Seventh Legislature
Regular Session of 2014

HOUSE OF REPRESENTATIVES
Committee on Labor & Public Employment
Rep. Mark M. Nakashima, Chair
Rep. Kyle T. Yamashita, Vice Chair
State Capitol, Conference Room 309
Tuesday, February 4, 2014; 9:00 a.m.



**STATEMENT OF THE ILWU LOCAL 142 ON H.B. 1973
RELATING TO WORKERS' COMPENSATION**

The ILWU Local 142 supports H.B. 1973, which imposes a penalty on an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's customary work week and clarifies that eligibility determination for disability benefits depends on the employee's entire record and the failure of the attending physician to certify a specialized form provided by the employer or the Department does not disqualify the employee from disability benefits.

Temporary partial disability (TPD) benefits are provided to injured workers who are able to return to work on a part-time basis with payment of wages by their employers for hours worked and additional benefits from the workers' compensation insurer for the remainder of the compensation. This arrangement benefits both the employer, who wants a productive employee, and the employee, who wants to return to gainful employment as soon as possible.

However, some insurance carriers, not fully recognizing the importance of TPD benefits in the overall plan to return a worker to gainful employment, delay TPD payments to the worker. This poses a severe financial hardship for the injured worker who may already be suffering a drastic cut in income. The delay may very well be unintentional, but the worker suffers the loss nonetheless.

A penalty as proposed by H.B. 1973 will serve as an incentive for carriers to promptly pay TPD benefits just as they do Temporary Total Disability (TTD) payments, which already has a similar penalty.

The other provision of this bill clarifies that determination for eligibility for disability benefits should not depend on use of a specialized form to certify that the injured worker is being treated by a physician. Instead, the injured worker's entire file should be considered. We believe this to be fair.

The ILWU urges passage of H.B. 1973 in the interest of assisting injured workers to return to work and in the interest of employers seeking productivity from their employees. Thank you for the opportunity to share our views on this matter.