HB1973
HD1

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

March 17, 2014

TESTIMONY TO THE
SENATE COMMITTEE ON JUDICIARY AND LABOR

For Hearing on Tuesday, March 18, 2014
10:00 a.m., Conference Room 016

BY

BARBARA A. KRIEG
DIRECTOR

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

TO CHAIRPERSON CLAYTON HEE 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, for the State as an employer 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. Thus, as this committee did in the companion measure, S.B. 2127, S.D. 1, we respectfully recommend that the language for proposed Section 386-92(a) excuse nonpayment of disability benefits 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.

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

Pauahi Tower, Suite 2010
1003 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 525-5877

Alison Powers
Executive Director

TESTIMONY OF ALISON POWERS

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

March 18, 2014
10:00 a.m.

HB 1973, HD1

Chair Hee, Vice Chair Shimabukuro and members of the Committee, my name is Alison Powers, Executive Director of the 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** this bill as we believe it is unnecessary. The bill penalizes the employer in situations out of their control, for instance, where they do not receive timely income verification from the current employer. In addition, temporary total disability is already regulated under Section 386-92, Hawaii Revised Statutes, and temporary partial disability benefits should be treated in a consistent manner.

If the Committee on Judiciary and Labor believes this measure should move forward, we offer the following amendment:

Amendments

§386-92 Default in payments of compensation, penalty. 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 temporary total disability benefits or temporary partial disability 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 temporary total disability benefits or temporary partial disability benefits are terminated in violation of section 386-31, there shall be added to the unpaid compensation an amount equal to twenty per cent 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 therefore owing to the conditions over which the employer or carrier had no control.

Thank you for the opportunity to testify.

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION
THE VOICE OF THE CONSTRUCTION INDUSTRY

TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR
Tuesday, March 18, 2014
10:00 a.m.
Hawaii State Capitol - Conference Room 016

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

Dear Chair Hee, Vice-Chair Shimabukuro, 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 H.D. 1, 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; clarifies that an eligibility determination for disability benefits depends on the attending physician to certify the employee's disability every thirty days; clarifies that the failure of the employee's physician to certify does not disqualify the employee from disability benefits; and allows one-time retroactive certification.

While H.B. 1974 H.D. 1 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 H.D. 1.

We appreciate the opportunity to share with you our views.

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Telephone: (808) 847-4666 Fax: (808) 440-1198 E-mail: info@biahawaii.org; www.biahawaii.org

Twenty-Seventh Legislature
Regular Session of 2014

THE SENATE
Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.K. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Tuesday, March 18, 2014; 10:00 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 1973, HD1
RELATING TO WORKERS' COMPENSATION

The ILWU Local 142 supports H.B. 1973, HD1, 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, clarifies that eligibility determination for disability benefits depends on the attending physician to certify the employee's disability every thirty day, clarifies that the failure of the employee's physician to certify does not disqualify the employee from disability benefits, and allows a one-time retroactive certification. A defective date of July 1, 2300 has been inserted to allow the measure to be more fully discussed.

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, HD1 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 bill clarifies that certification of continuing eligibility for disability benefits may be made by the attending physician every 30 days or by review of the entire file by another physician and further clarifies that certification may be rendered retroactively but failure to provide the certification does not automatically disqualify the employee from benefits. As much as possible, injured workers should be assisted in their quest to return to gainful employment.

The ILWU urges passage of H.B. 1973, HD1 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.

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the Senate Committee on Judiciary and Labor
Tuesday, March 18, 2014 at 10:00 A.M.
State Capitol Conference Room 016

RE: HOUSE BILL 1973 HD1 RELATING TO WORKERS' COMPENSATION

Chair Hee, Vice Chair Shimabukuro, and members of the committee:

The Chamber of Commerce of Hawaii **opposes** HB 1973 HD1, 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; clarifies that an eligibility determination for disability benefits depends on the attending physician to certify the employee's disability every thirty days; clarifies that the failure of the employee's physician to certify does not disqualify the employee from disability benefits; and allows one-time retroactive certification.

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 bill is unnecessary and puts more onerous responsibilities on the employer. 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. Also while the HD addresses some of our concerns from the original draft we do not believe that there should be a separate and revised system of doctor certification.

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. 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 which should be appealable.

We respectfully ask that this bill be held in committee. Should the bill move forward we ask that the bill be re-written so that the bill contains only the changes below. We believe that this makes it fair to both the employer and employee and keeps with the existing system standards. Thank you for the opportunity to testify on this matter.

Amendments

§386-92 Default in payments of compensation, penalty. *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 temporary total disability benefits or temporary partial disability 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 temporary total disability benefits or temporary partial disability benefits are terminated in violation of section 386-31, there shall be added to the unpaid compensation an amount equal to twenty per cent 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.

Property Casualty Insurers
Association of America
Advocacy. Leadership. Results.

To: The Honorable Clayton Hee, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

From: Mark Sektnan, Vice President

Re: **HB 1973 HD1 – Relating to Workers' Compensation**
PCI Position: Oppose

Date: Tuesday, March 18, 2014
10:00 a.m., Conference Room 016

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

The Property Casualty Insurers Association of America (PCI) is opposed to HB 1973 HD1 which would impose new penalties and deadlines on the payment of Temporary Total Disability (TTD). PCI is a national trade association that represents over 1,000 property and casualty insurance companies. In Hawaii, PCI member companies write approximately 34.6 percent of all property casualty insurance written in Hawaii. PCI member companies write 42.2 percent of all personal automobile insurance, 43.5 percent of all commercial automobile insurance and 58.9 percent of the workers' compensation insurance in Hawaii.

PCI does not believe this bill is necessary and may create additional conflicts. The statute already allows for penalties for late payment of Temporary Total Disability and Temporary Partial Disability payments. This bill would impose an additional timeframe which will lead to confusion. This 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.

Existing law already creates a penalty structure for employers who do not make timely payments to injured workers. Existing law provides an important safeguard by insurers by making it clear the penalty would not be imposed without an order from the Director. The bill eliminates this important safeguard and leaves it unclear as to who determines when a penalty should be imposed. Is the decision left to the injured worker to decide? What happens if the employer cannot determine when the employee's customary work week ends?

For these reasons, PCI asks the committee to hold HB 1973 HD1 in committee.

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Hawaii State Legislature
Senate Committee on Judiciary and Labor
Hawaii State Capitol
415 South Beretania Street
Honolulu, HI 96813

March 17, 2014

Filed via electronic testimony submission system

RE: HB 1973, HD 1, Workers' Compensation; Penalty; Temporary Partial Disability - NAMIC's Written Testimony for Committee Hearing

Dear Senator Clayton Hee, Chair; Senator Maile S.L. Shimabukuro, Vice-Chair; and members of the Senate Committee on Judiciary and Labor:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the March 18, 2014, public hearing. Unfortunately, I will not be able to attend the public hearing, because of a previously scheduled professional obligation.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,400 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. NAMIC has 69 members who write property/casualty and workers' compensation insurance in the State of Hawaii, which represents 30% of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

NAMIC's members appreciate the importance of protecting the legal rights and economic needs of injured workers, and commend the bill sponsor for his sincere desire to improve the law on workers' compensation temporary disability benefits. However, NAMIC is opposed to HB 1973, HD1 for the following reasons:

1) The proposed amendment to Section 386-92(a), Hawaii Revised Statutes is confusing and conceptually inconsistent with the other prompt payment requirements enumerated in the current statute.

The proposed amendment states that temporary partial disability benefits must be paid by the employer or insurance carrier "within fourteen calendar days after the *end of the employee's customary work week*" or there will be a twenty percent penalty applied to the unpaid compensation. (Emphasis added).

Section 386-92(a), Hawaii Revised Statutes currently sets forth penalties for non-prompt payment of compensation payable under the terms of a final decision or judgment. The deadline for prompt payment is "thirty-one days *after it becomes due, as provided by the final decision or judgment"*. The statute also states that payment of temporary total disability benefits shall be paid "within ten days, exclusive of Saturdays, Sundays, and holidays, *after the employer or carrier has been notified of the disability*." (Emphasis added).

The current law has a clear and rational starting point for calculating when an employer or insurer has failed to make a prompt payment. For compensation pursuant to a final decision or judgment, the operative deadline calculation date is the date the compensation is payable per the terms of the judgment. For a temporary total disability benefits payment, the operative deadline calculation date is the date of the notice of the disability. Both of these timelines are based upon a clear legal determination that there is a compensable workers' compensation disability, i.e. notification of the disability or a judicial decision on compensation.

However, the proposed provision for payment of a temporary partial disability is merely related to an employee's customary work schedule, which is a variable unrelated to a determination of a compensable workers' compensation disability claim. NAMIC's members do not understand why an employee's work schedule should be the basis for determining when a temporary partial disability payment is due and when a penalty shall be assessed against the employer or insurer. Why should the end of the employee's customary work week be the operative date for a temporary *partial* disability payment, when the date of notice of disability is the operative date for a temporary *total* disability?

2) NAMIC is concerned that the proposed prompt payment provision for temporary partial disabilities is impractical and likely to increase the potential for workers' compensation disability fraud.

Requiring an employer or insurer to pay temporary partial disability benefits within fourteen days of the end of the employee's customary work week will create an unnecessary administrative burden and claims adjusting expense for insurers, who have a legal duty to thoroughly investigate the claim and exam the employee's entire medical record. In fact, the proposed amendment titled Section 386-92(c) specifically states that "an employee's eligibility for disability benefits shall be determined by an examination of the employee's *entire record* . . ." (Emphasis added). How can an employer or insurer reasonably comply with this medical record examination provision and also comply with the requirement that a disability payment be issued for a temporary partial disability within fourteen days of the end of employee's customary work week?

Moreover, by forcing an insurer to rush payment for an alleged temporary partial disability claim before the employer or insurer has had appropriate time to properly evaluate and investigate the facts of the case and the medical validity of the temporary partial disability claim is likely to increase the potential for workers' compensation disability fraud. As studies repeatedly show, worker's compensation fraud increases the cost of insurance for employers and jeopardizes benefits available to workers with legitimate injuries. From a public policy standpoint, why should a temporary *partial* disability claim, which is more easily feigned than a temporary *total* disability, which will generally have more objectively identifiable physical manifestations, be rushed through at a pace that will hinder insurers in their ability to engage in reasonable fraud prevention and detection protocols?

3) NAMIC is concerned that Section 386-92(b) would deny an employer or insurer of appropriate administrative due process.

The proposed amendment states that "the penalty shall be due and payable without the necessity of an order or decision from the director." So in effect, the employer or insurer has no right to contest the imposition of the penalty. This runs afoul of basic procedural and substantive due process rights that all administrative law parties are legally entitled to receive.

This proposed provision is also inconsistent with the current statutory provision in Section 386-92(a) that specifically affords an employer or insurer the right to file with the Director an excuse for non-timely payment of compensation pursuant to a final judgment or payment for a temporary total disability within the enumerated statutory timetable. Specifically, the statute says that nonpayment may be "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 …"

NAMIC believes that it doesn't make sense to grant or deny due process protections to an insurer or employer based solely upon the type of temporary disability payment at issue. Moreover, such a policy is arbitrary in nature and discriminatory in effect, because it penalizes insurers or employers who have a disputed temporary *partial* disability payment at issue by denying them due process rights that are afforded to employers or insurers who have a disputed temporary *total* disability payment at issue.

In closing, NAMIC respectfully requests that the Senate Committee on Judiciary and Labor **"vote no"** on HB 1973, HD 1, because it is an unnecessary insurance rate cost-driver that will not improve the delivery of benefits to injured workers. Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,

Christian John Rataj, Esq.
NAMIC Senior Director – State Affairs, Western Region

TESTIMONY BEFORE THE SENATE

COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 18, 2014
10:00 a.m.

HB 1973, HD1
RELATING TO WORKERS' COMPENSATION

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

Chair Hee, Vice Chair Shimabukuro, 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.

This 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 to be allowed under certain conditions.

We strongly believe this proposal is unnecessary and unreasonable.

- Requiring employers to pay disability benefits upfront or retroactively, even though the information available to may make this assessment is incomplete, or by allowing disability to be certified by an alternate physician who never examined the injured worker, is improper. It will cause overpayments of benefits by employers and become an unwelcome burden on all parties to reconcile, especially the tax implications, on the back-end.
- The current statutes, Section 386-96 HRS, and Section 12-15-80(a)(3)(E) HAR, require the attending physician to provide regular and complete information regarding the covered work injury, including diagnosis, treatment plan, periods of disability, and specific work limitations and their duration. With this information, employers or insurance carriers can then make timely and appropriate benefit payments for the covered work injury.
- Imposing penalties on the employer without a hearing with the DLIR does not provide an employer their due process. Reasons for a delay may be beyond their control.
- This measure will encourage misuse of the workers' compensation system, while unlawfully harming employers and significantly increasing their costs.

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.

THE SENATE
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014
COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

NOTICE OF HEARING

DATE: Tuesday, March 18, 2014
TIME: 10:00 am
PLACE: Conference Room 016
State Capitol
415 South Beretania Street

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

Senator Clayton Hee, Chair and Senator Maile S.L. Shimabukuro, Vice Chair, 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." This in itself could make it extremely difficult if not impossible to issue payment of TPD benefits for those who may be seasonal employees, on call, part time, commission based, Union workers with hours that fluctuate based on "bids," or those who seek subsequent employment with a new employer who is unwilling/unable to provide wage information to the handling adjuster. **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 wage verification report (pay stub) 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 (TDI, sick leave, LTD, ect). The <u>examination</u> 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.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc: regoa@hawaii.rr.com
Subject: Submitted testimony for HB1973 on Mar 18, 2014 10:00AM
Date: Friday, March 14, 2014 8:04:49 PM

HB1973
Submitted on: 3/14/2014
Testimony for JDL on Mar 18, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
ANSON REGO	Individual	Support	No

Comments: I SUPPORT HB1973. As a practicing attorney for over 40 years with many years in the area of workers compensation, I can attest to the fact that employees are almost universally put into a holding status on what should be automatic or timely payments on their claims because they have been injured on the job. Injured workers, however, in fact, often wait months and even up to a year as the Labor Board extends investigation periods. Financial hardship abounds and there is difficulty even getting medically treated which is often delayed or denied by the Employer. If an Employee is disabled due to a compensable claim, he/she should get TTD/TPD benefits. Retroactive certification does not hurt the Employer; the Employer is simply paying what should have been paid in the first place. The present situation which has been going on for years is untenable. I strongly support this Bill. Anson Rego Waianae Attorney

DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

March 17, 2014

To: Senator Clayton Hee, Chair
Maile S.L. Shimabukuro, Vice Chair
And Members of the Committee on Finance

Date: Tuesday, March 18, 2014
Time: 10:00 a.m.
Place: Conference Room 016, 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 a 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 wage loss benefits in a similar fashion as the late payment of temporary partial disability wage loss 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 wage loss benefits are not timely paid under the terms of a final decision or judgment. It also imposes penalties on the employer (in fact the insurance carrier) for the nonpayment of temporary total disability wage loss 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 wage loss 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 wage loss benefits and the late payment of temporary partial disability wage loss 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].

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

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 wage loss

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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. Or, what about a stroke victim? Or, **when a claim is denied** and there is no medical treatment, no certifications, and no wage loss payments. There is a pending case now when the claim was denied and now seven years later, the attorney for the insurance carrier is raising technical issues of the failure to secure proper certifications.

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 partial disability wage loss benefits to encourage an injured worker to promptly transition to a return to work, even if the transition is only for part time work. Statutory entitlement, in particular, wage loss should be paid and by review of the records. The Legislature should not impose a cap or limited period for retroactive payments per claim. This would be unconscionable.

II Strong Support.

Passage of H.B. 1973 H.D. 1 is vital. Most workers already live paycheck by paycheck and the late payment of temporary partial disability wage loss benefits causes more spiraling economic ruin and needless distress for the injured worker and/or his or her family. I have witnessed clients who go homeless and fear for their safety, lose their homes, vehicles get repossessed, and their lives are turn upside down. I previously entered Exhibit 1.

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. The point is be fair and not punish workers when you apply technical rules.

Moreover, denying an employee his or her statutory entitlement to temporary total disability or temporary partial disability wage loss 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 medical records. This prevents 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 or she has no control? And, we have inconsistent decisions on this matter. The Waugh and Troche decisions have never been overruled, and there is also the Wilson decision. They also support a review of the record or when a claim is denied and ultimately reversed, allowing for retroactive temporary total disability wage loss benefits by a review of the whole record.

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.

Opponents wanting their due process rights are misleading the legislature. If they believe they are correct and need not pay, it is our duty to request a hearing. Then, they present their evidence leading to the director's decision. However, they will not tell you that portion of the statute and application of the law is left intact. They are hoping that some of their arguments, which have no basis, will mislead the Legislature.

There should be no limitation on how many times and for how long of a period an injured worker can rightly claim past due wage loss benefits. Why should there be? Because a doctor made a mistake or because he or she failed to follow a form? Worse is the situation of the insurance carrier denying a claim or continuing to interfere or delay medical treatment. There are a sundry of reasons for the failure to secure proper certifications, resulting in the direct cause of the denial of wage loss aside from vital medical care, services, and supplies. **There should be no cap and no limitation on the time for a recovery of back pay. Nor should there be a required monthly reporting of one's disability.**

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

DWSC:mt