

HB1973

HD1

LATE

TESTIMONY



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

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March 18, 2014

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

Date: Tuesday, March 18, 2014
Time: 10:00 a.m.
Place: Conference Room 016, State Capitol

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

Re: H.B. 1973, H.D.1 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 1973, H.D. 1 amends section 386-92, Hawaii Revised Statutes (HRS), as follows:

- Imposes a penalty on the employer or insurance carrier who fails to pay temporary partial disability benefits within fourteen calendar days after the end of the employee's work week.
- An employee's eligibility to temporary total or temporary partial disability benefits shall be based on certification from the attending physician every thirty days or by an examination of the employee's entire available medical records by another physician if the attending physician is not available.
- Contemporaneous certification of an employee's disability status may be waived and retroactive certification may be allowed, providing if the employee's attending physician has served as the employee's previous attending physician, or if the previous attending physician is not available, allowing another physician the opportunity to examine the employee's previous medical records with regards to the current claim.
- Allows only one request for retroactive disability certification and shall not be for a period that exceeds twelve months prior to the date of request.

This section will only apply if the employee's condition has not reached medical stabilization or employee is enrolled in vocational rehabilitation.

- The effective date of this Act is changed to July 1, 2300.

The DLIR prefers the SD1 with clarifying amendments.

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 measure that returns the treatment of temporary partial disability benefits to the manner in which they were treated for decades up to the 2000s. It should be noted that treating temporary partial disability payments as if the two sides were of equal economic and legal capacity is obviously not the intent of the workers' compensation laws. This measure, if enacted, simply returns policy to the way it used to be before the appointed Appeals Board began ruling differently earlier this century.

One of the underlying policies in workers' compensation is to encourage an employee to promptly return to work. Compensation to temporary total disability or temporary partial disability benefits should be treated equally and should be consistent with the application of equal protection under the law.

Promoting a return to work, 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 the employee 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.

Section 386-92, HRS, states that any non-payment can be excused by the director if it shows that payment could not be made owing to conditions over which the

employer/carrier had no control. There is no due process issue as the employer or carrier can request a hearing, litigate and wait for a decision before paying. The burden of proof is on the employee to prove the disability under the proposed section (b).

Denying an employee statutory entitlement to temporary total disability or temporary partial disability benefits because 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, may help to correct this.

- ✓ The department recognizes the concerns raised pertaining to other physicians allowed to review the whole record in order to permit a common sense review of the record and eligibility. Therefore, the DLIR suggests that the other physician is serving in the employee's care and be approved by the director. The DLIR offers the following revised subsection (c):

(c) An employee's eligibility to temporary total disability or temporary partial disability benefits shall be determined by certification of the employee's primary care physician every thirty days or by an examination of the employee's available medical records by another physician who has been involved in the employee's treatment and approved by the director if the employee's primary care physician is not available. The failure of an employee's primary care physician to certify the dates of disability in an interim report as provided in section 386-96, shall not disqualify the employee from temporary total disability or temporary partial disability benefits. Contemporaneous certification of an employee's disability status may be waived, and retroactive certification of disability may be allowed, provided the employee's primary care physician certifies the disability or if the primary care physician is not available another physician who has served in the employee's care and approved by the director has an opportunity to examine the employee's previous medical records

in the current pending claim. Retroactive certification of disability may be requested only once for the entire claim and shall be made within twelve months of the date of the request. This subsection shall apply only during the period that an employee's injuries have not reached medical stabilization or the employee is enrolled in the vocational rehabilitation process.

✓ The DLIR also recommends amending the section 2 as follows:

SECTION 2. Section 386-92, Hawaii Revised Statutes, is amended to read as follows:

"§386-92 Default in payments of compensation, penalty. (a) 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 temporary partial disability benefits are not paid by the employer or insurance carrier within fourteen calendar days after the end of the employee's workweek as defined under section 12-10-1, Hawaii Administrative Rules, 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, including sanctions under 386-92(a) 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[.], including compliance with section 78-13.

DLIR also suggests the addition of the following in the purpose section.

The legislature further finds that currently temporary total disability and temporary partial disability benefits are unfairly treated under the law though both are deemed compensation under section 386-1. Enactment of this measure will ensure both forms of temporary disability benefits are treated consistent with the application of equal protection under the law. Enactment of this measure is also an attempt to ensure more uniform application of the case law and to provide statutory entitlements due and owing to truly disabled employees.

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
SENATE COMMITTEE
ON
JUDICIARY AND LABOR
ON
March 18, 2014

H.B. 1973, H.D. 1

RELATING TO WORKERS' COMPENSATION

Chair Hee and members of the Committee, thank you for the opportunity to submit written testimony on H.B. 1973, H.D. 1.

The Department of Accounting and General Services does not support H.B. 1973, H.D. 1.

H.B. 1973, H.D. 1 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

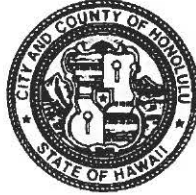
implemented and is fully functional, the provisions of this bill will require substantially less manual intervention to administer. However, since the full functionality of the State's contemplated ERP is several years away, we respectfully request that H.B. 1973, H.D. 1 be held.

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

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

March 18, 2014

The Honorable Clayton Hee, Chair
and Members of the Committee
on Judiciary and Labor
The Senate
State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Members of the Committee:

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

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

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

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

The Honorable Clayton Hee, Chair
and Members of the Committee
on Judiciary and Labor
March 18, 2014
Page 2

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

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

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

Sincerely,



Carolee C. Kubo
Director



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Testimony to the Senate Committee on Judiciary and Labor
Tuesday, March 18, 2014
10 a.m.
Conference Room 016, State Capitol

Re: HB 1973 HD1 Relating to Workers' Compensation

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

My name is Vivian Landrum, and I am the President/CEO of the Kona-Kohala Chamber of Commerce (KKCC). KKCC represents over 525 business members and is the leading business advocacy organization on the west side of Hawai'i Island. KKCC also actively works to enhance the environment, unique lifestyle and quality of life in West Hawai'i for both residents and visitors alike.

The Kona-Kohala Chamber of Commerce opposes HB 1973 HD1. This bill amends HRS 386 by adding a penalty to employers who do not pay temporary partial disability benefits within 14 calendar days after the end of the employees customary work week. Further, this bill states the penalty shall be due and payable without the necessity of an order or decision from the Director and clarifies that the failure of the employee's physician to certify does not disqualify the employee from disability benefits.

While we support timely and fair compensation for work related injuries, we do not support placing such an untimely and unfair penalty completely on the shoulders of the employer. This process has many factors. Without due diligence and informed communication between all parties, including the Director and knowledgeable physicians, the process fails to meet reasonable due process rights of the employer.

Mahalo for the opportunity to submit testimony.

Sincerely,

A handwritten signature in cursive script that reads 'Vivian Landrum'.

Vivian Landrum
President/CEO

GILBERT C. DOLES

ATTORNEY AT LAW
A LAW CORPORATION

CENTURY SQUARE
1188 BISHOP ST., SUITE 1405
HONOLULU, HAWAII 96813

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March 17, 2014

To: Senator Clayton Hee, Chair
Senator 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

**Re: TESTIMONY IN SUPPORT OF H.B. 1973, HD 1
RELATING TO WORKERS' COMPENSATION**

H.B. 1973, HD 1 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. It clarifies that an eligibility determination for disability benefits depends on the attending physician to certify the employee's disability every thirty days. It further clarifies that the failure of the employee's physician to certify does not disqualify the employee from disability benefits. It also allows one-time retroactive certification.

Since 1983, I have been licensed to practice law in Hawaii. For the past 25 years, I have represented many of Hawaii's injured workers and have personal knowledge of cases where the injured worker, not represented by an attorney or unaware of the need for medical certification of off work status, has not received temporary partial disability ("TPD") benefits. 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 TPD benefits in a similar fashion as the late payment of Temporary Total Disability ("TTD") benefits. Currently, the section only imposes a penalty if TTD benefits are not timely paid under the terms of a final decision or judgment. It also imposes penalties on the employer or carrier for the nonpayment of TTD benefits within ten days when due or when such benefits are terminated in violation of Section 386-31, HRS. There is, however, no similar provision for sanctions where TPD benefits are not timely paid.

Furthermore, the current statute also provides that inadvertent oversight or lack of knowledge of the law can be used to deny the payment of TTD benefits even though the injured worker is clearly totally disabled for all work. This is usually the case where an unrepresented claimant who is seriously injured, in a coma, incapacitated, or recovering from surgery has not yet filed a workers' compensation claim or if the claim has been filed, the claimant has not presented medical certification of his or her disability.

For example, if the unrepresented claimant is in a coma, incapacitated, or recovering from surgery for a year but has not presented a disability certificate, it would clearly be an injustice to disallow the payment of TTD benefits. Similarly, if the unrepresented claimant has not presented a disability certificate requesting TPD benefits, he or she should not be disallowed, at the very least, the payment of TPD benefits, on a timely basis.

Therefore, based upon the above-described scenario, the provision in H.B. 1973, HD 1 for waiver of contemporaneous certification of the injured worker's disability status while allowing retroactive certifications of disability would certainly help in solving the current problem of missing disability certifications. There should not, however, be a limit to allowing retroactive certifications to less than 12 months. Furthermore, to be fair to the injured worker, retroactive certification of disability should not be limited to just one request.

Based upon the foregoing, I strongly support and urge the passage of H.B. 1973 H.D. 1, which would clearly apply sanctions for the late payment of TTD and TPD benefits in a similar manner and ensures the application of the constitutional right of equal protection of the law.

For your information, attached is a copy of a Decision that was filed on March 14, 2014 in a case that I am currently handling in which the Director recently assessed a 20% penalty (representing \$4,125.71 of TTD benefits not timely paid to claimant) against the Employer/Carrier, along with an award of claimant's attorney's fees and costs based upon the Employer/Carrier's unreasonable defense pursuant to Section 386-92, HRS, and Section 386-93(a), respectively. The passage of H.B. 1973 H.D. 1 would allow similar sanctions to be assessed against Employer/Carrier for late payment of TPD benefits in the manner that was just allowed in the attached Decision.

Thank you for considering my testimony in support of Passage of H.B. 1973 H.D. 1.

Respectfully submitted,



GILBERT C. DOLES

Attorney at Law

Enclosure

Albert Jones

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

Case No: 912 [REDACTED]
D/A 11/15/2011

DISABILITY COMPENSATION DIVISION
14 MAR 13 09:33

INTRODUCTION

On 11/15/2011, claimant sustained a personal injury to the low back by accident arising out of and in the course of employment. The claimant was employed by [REDACTED], who was represented by [REDACTED]. A hearing presided over by Hearings Officer Fujii was held on 2/10/2014.

ISSUE

Is the claimant entitled to temporary total disability benefits?

Should the employer be assessed a penalty for the late payment of temporary total disability benefits?

Should the employer be assessed the claimant's attorney's fees and costs?

PARTIES' POSITIONS

The claimant's attorney contends the employer did not timely pay the claimant her temporary total disability benefits from 6/2/2012 through 4/25/2013. The claimant's attorney stated that he wrote to the employer on numerous occasions, requesting that the employer comply with the workers

compensation law and pay the claimant her temporary total disability benefits. The claimant eventually received her temporary total disability benefits. The claimant's attorney relied on his letters in support of this contention.

The claimant's attorney contends the employer should be assessed a penalty for the late payment of the claimant's temporary total disability benefits.

The claimant's attorney contends the employer should be assessed his attorney's fees and costs for prosecuting this matter. The claimant's attorney relied on his letters in support of this contention.

The employer's attorney contends that the claimant was entitled to temporary total disability benefits beginning (waiting period: 5/30/2012 through 6/1/2012) 6/2/2012 through 4/25/2013.

The employer's attorney stated that they have no position on the issue of penalties for the late payment of temporary total disability benefits or on the assessment of the claimant's attorney's fees and costs.

FINDINGS OF FACT

The parties agreed that the claimant's average weekly wage was \$506.40 and the claimant was entitled to temporary total disability benefits beginning (waiting period: 5/30/2012 through 6/1/2012) 6/2/2012 through 4/25/2013.

The employer submitted a Carrier Case Report (WC-3) dated January 21, 2014. In the report, the employer stated the claimant's weekly compensation rate was \$566.58. Carrier Case Report (WC-3) also indicates that the claimant was paid additional temporary total disability benefits from April 26, 2013 through January 2, 2014. The Director credits the Carrier Case Report (WC-3) dated January 21, 2014.

The file contains a letter dated March 20, 2013 from Gilbert C. Doles, Esq., attorney for the claimant. The letter states, "This confirms as of today, March 20, 2013, [REDACTED]'s TTD benefits have not been paid since September 1, 2012 to the present." The Director credits Gilbert C. Doles, Esq., letter dated March 20, 2013.

The file contains a second letter dated May 3, 2013 from Gilbert C. Doles, Esq., stating that the claimant received a check for temporary total disability benefits in the amount of \$20,628.54 and that he is requesting a twenty percent penalty of \$4,125.71, payable to the claimant, for the late payment of temporary total disability. The Director credits Gilbert C. Doles, Esq., letter dated May 3, 2013.

At the hearing, the employer's attorney took no position on the issue of penalties for the late payment of temporary total disability.

Based on Gilbert C. Doles, Esq.'s letter dated May 3, 2013, the Director determines that the employer shall be assessed a penalty of \$4,125.71, payable to the claimant.

The Director further determines that the employer shall be assessed the claimant's attorney's fees and costs as the employer did not have reasonable grounds to defend the covered issue.

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 temporary total disability from work.

Section 386-32(a), HRS, provides that a liable employer shall pay to a claimant weekly compensation for an award for permanent partial disability benefits.

Section 386-32(a), HRS, provides that a liable employer shall pay to a claimant one lump sum for an award for disfigurement(s) suffered.

Section 386-92, HRS, provides that if the employer does not pay any temporary total disability benefits within ten calendar days, exclusive of Saturdays, Sundays, and holidays, there shall be added to the unpaid compensation an amount equal to twenty percent of the amount payable, unless the director excuses the non-payment.

Section 386-93(a), HRS, provides that a party may be assessed attorney's fees and costs should it be found that proceedings were brought, prosecuted, or defended without reasonable grounds, subject to the approval of the Director.

CONCLUSIONS OF LAW

The Director finds, based upon the Findings of Fact and Principles of Law, the claimant is entitled to temporary total disability benefits beginning (waiting period: 5/30/2012 through 6/1/2012) 6/2/2012 through 1/2/2014. The Director credits the agreement of the parties and the Employer's Carrier Case Report (WC-3) dated 1/21/2014.

The Director finds, based upon the Findings of Fact and Principles of Law, the employer did not timely pay the claimant his temporary total disability benefits. The Director finds that a twenty percent penalty, payable to the claimant, shall be assessed against the employer. The Director credits Gilbert C. Doles, Esq.'s letter dated 5/3/2013.

The Director finds, based upon the Findings of Fact and Principles of Law, the employer is assessed the claimant's attorney's fees and costs. The Director determines the employer did not have reasonable grounds to defend this issue.

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 \$566.58 for temporary total disability from work beginning (waiting period: 5/30/2012 through 6/1/2012) 6/2/2012 through 1/2/2014; for 82.8571 weeks, for a total of \$46,945.20.
3. Pursuant to Section 386-92, HRS, said employer shall pay a penalty of \$4,125.71, payable to the claimant, which represents twenty percent of the temporary total disability benefits that were not timely paid to the claimant.
4. Pursuant to Section 386-93(a), HRS, employer is assessed claimant's attorney's fees and costs, subject to the approval of the Director.
5. The matters of permanent disability and/or disfigurement, if any, shall be determined at a later date.

BY ORDER OF THE DIRECTOR, MARCH 13, 2014.

Original Signed By
Walter B. Kawamura

Administrator

DISABILITY COMPENSATION
DIVISION

14 MAR 13 09:33

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.

March 17, 2014

To: Senator Chair Hee of the Judiciary Committee
Senator Vice Chair Maile Shimabukuro

Re: HB 1973

Testimony in Favor of HB 1973

I am strongly in support of HB1973. 20% penalty for late payments of Temporary Partial Disability for Injured Workers who are attempting to return to work usually in a modified schedule after injury would be appropriate since the Injured Workers are trying to return to work in a sequenced fashion. The Injured Workers would not be paid their full wages and without the TPD wages they would be financially hurting while they accommodate their work injuries.

TPD late pay should be treated the same as when the TTD payments are late. This encourages the employers and the carriers to pay on a timely basis and to assure that the workers are able to continue their rehabilitation efforts yet still maintain work with their employers.

Thank you for allowing me the opportunity to provide my testimony on this matter.

Sincerely,

Laurie Hamano M. Ed. CRC, LMHC
President of Vocational Management Consultants Inc.
715 S. King Street
Suite 410
Honolulu, HI 96813
#office number 5388733

TESTIMONY IN SUPPORT OF H.B. NO. 1973, H.D. 1
RELATING TO WORKERS' COMPENSATION
COMMITTEE ON FINANCE

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

Mr. Chairman, members of the Committee, I am attorney Wayne Mukaida. I have been in practice since 1978. Since 1989, I have devoted a substantial portion of my legal practice to representing injured workers. I support H.B. 1973, H.D. 1, relating to Workers' Compensation and Temporary Partial Disability benefits.

Fundamental principles in workers' compensation are that procedures should be simple, and that payments should be timely. Departures from these basic principles seriously degrade the system to the detriment of injured workers.

Almost every employee depends on a regular paycheck. After being injured at work, every employee is entitled to receive his/her workers' compensation wage replacement benefit if he/she is unable to work. This bill is commendable in encouraging carriers to promptly pay Temporary Partial Disability benefits. However, certain provisions add unnecessary complexity and would unfairly penalize injured workers.

The guiding principle for this bill is that if an employee is unable to work, he/she should receive his/her disability wage replacement benefit. The added technicalities restricting certification to an "attending physician", and restricting retroactive certification of disability to a one time use, serve only to unfairly penalize an injured worker.

I. Do not require disability certifications to only "attending physicians."

The term "attending physician" is defined in HRS §386-1 as the physician who is primarily responsible for treatment of the injured worker, and restricts an injured worker to having only one "attending physician". Restricting certification of disability by only an "attending physician" is an unnecessary restriction and would result in unfairness in many instances. For example:

A. In cases which involve more than one body system or which required multidiscipline care, §12-15-40 of the Medical Fee Schedule provides for "concurrent care" by other physicians. If these "concurrent care physicians" are disqualified from certifying disability because they are not the "attending physician", the unnecessary extra expense of a separate visit to the attending physician would be required.

B. If an "attending physician" is out of town, a substitute physician should be allowed to certify disability.

C. If after an injury, the employee goes to the emergency room, that emergency physician should be allowed to certify disability.

D. From an employer's point of view, does allowing only attending physicians to make disability determinations prevent insurance physicians from making disability determinations?

There is no reason to restrict certifications of disability to only the "attending physician". Any physician who examined the employee should be able to certify disability, just as it is in non-workers' compensation situations.

II. Change the disability period from "thirty days" to "at least once per month." Having to strictly count every 30 day period will only result in confusion and unnecessary work and expense.

III. Do not restrict retroactive certifications to a one time use.

An injured worker should not be disqualified from receiving his/her benefit because a physician repeatedly failed to submit correct paper work. The proposed bill unfortunately has this result if retroactive certification is limited to a one time use.

For example, suppose in the first six months after an injury, the initial physician failed to provide disability certifications, and the one time retroactive certification is used. The injured employee subsequently needs surgery, is not able to work, but the physician again fails to provide disability certification. It would be grossly unfair to deny disability benefits to the injured employee.

Retroactive certifications of disability were historically permitted by the Labor and Industrial Relations Appeals Board, provided that a physician examined the injured employee at the beginning and at the end of the period in question. Waugh v. State, AB 89-481(H) (11/14/90).

It would be very unfair and ironic that a bill intended to benefit injured employees with prompt payment of benefits, would have the effect of penalizing employees by denying benefits to them.

III. Do not limit retroactive certifications to less than twelve months.

A person who is disabled for more than twelve months is probably in greater need of

benefits than someone who was disabled less than twelve months. The proposed bill illogically penalizes the injured employee who is more disabled.

Quite often in cases where the employer challenges whether an injury or illness is work related, physicians will refuse to comply with paper work requirements because the physicians are not being compensated for the reporting requirements. The resolution of these "compensability" issues through the Department of Labor and the appellate courts can take many years. It would not be fair to restrict retroactive certification of disability to a twelve month period.

IV. Revisions to the bill.

Paragraph (c) of the bill should be amended as follows:

(c) An employee's eligibility for temporary total disability benefits or temporary partial disability benefits shall be determined by certification from the employee's attending physician ~~every thirty days~~ [at least monthly] 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.~~ The 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~~ [shall not be a reason for disqualifying an] employee from receiving temporary total disability benefits or temporary partial disability benefits. Contemporaneous certification of an employee's disability status may be waived and retroactive certification of disability may be allowed ~~provided that the employee's attending physician has served as the employee's previous attending physician or, if the previous attending physician is not~~

~~available~~ [provided that the certifying physician examined the employee before and at the end of the period involved, of if] another physician has an opportunity to examine the employee's previous medical records with regard to the current pending claim. ~~Retroactive certification of disability may be requested only once and shall not be for a period exceeding twelve months prior to the date of the request. This subsection shall apply only during the period that the employee's injuries have not reached medical stabilization or the employee is enrolled in the vocational rehabilitation process.~~

Thank you for considering my testimony.

WAYNE H. MUKAIDA
Attorney at Law
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From: mailinglist@capitol.hawaii.gov
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Subject: Submitted testimony for HB1973 on Mar 18, 2014 10:00AM
Date: Monday, March 17, 2014 11:54:01 AM

HB1973

Submitted on: 3/17/2014

Testimony for JDL on Mar 18, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Douglas Moore	Individual	Support	No

Comments: Aloha: I strongly support HB1973: it simply makes sense. There already is a 20% penalty for late paid TTD; TPD late pay should be treated the same. This encourages employers & carriers to timely pay the appropriate wage loss benefits to injured workers who need the money (and not the stress) to just stay afloat while they get medically rehabilitated so they can return to work. Further, there should be a reasonable time frame for injured workers to submit medical disability certifications which may get inadvertently delayed or mis-sent; injured workers should not be punished by not being paid due to such inadvertency. Thank you.

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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