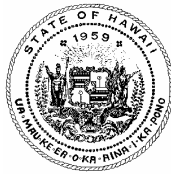


SB2127

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

January 22, 2014

**TESTIMONY TO THE
SENATE COMMITTEE ON JUDICIARY AND LABOR**

For Hearing on Friday, January 24, 2014
10:00 a.m., Conference Room 016

BY

BARBARA A. KRIEG
DIRECTOR

Senate Bill No. 2127
Relating to Workers' Compensation

TO CHAIRPERSON CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on S.B. No. 2127.

The purposes of S.B. 2127 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. **It is in this capacity that 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 reality of these processes, in addition to the customary timing for DAGS’ payroll issuance, makes it unrealistic for the State to meet the 14-day deadline in TPD cases.

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

TESTIMONY BEFORE THE SENATE COMMITTEE ON
JUDICIARY AND LABOR

Friday, January 24, 2014
10:00 a.m.

SB 2127
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 S.B. 2127**. Our companies represent over 2,000 employees throughout the State.

This bill imposes a penalty on employers who do not pay for an employee's temporary partial disability 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 further clarifies that eligibility for disability benefits depends on the employee's entire record and does not disqualify the employee for these benefits if the attending physician fails to certify the dates of disability in an interim report as provided in section 386-96 of the current statute.

We agree that when eligible, temporary partial disability benefits should be paid timely and based on complete information provided by the treating physician. Employers need the physician to verify an employee's periods of temporary disability, and to explore alternate temporary work assignments an employee could safely perform while recovering.

While we can appreciate the intent, we cannot support the bill in its current form, which unreasonably penalizes employers without due process.

For these reasons, we strongly oppose S.B. 2127 and respectfully request this measure be held.

Thank you for this opportunity to submit testimony.

**Testimony to the Senate Committee on Judiciary and Labor
Friday, January 24, 2014 at 10:00 a.m.
State Capitol - Conference Room 016**

RE: SENATE BILL NO. 2127 RELATING TO WORKERS' COMPENSATION

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

The Chamber of Commerce of Hawaii **opposes** S.B. No. 2127. 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 workers 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 workers 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.

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

January 23, 2014

Filed via electronic testimony submission system

RE: SB 2127, 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 January 24, 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. In the spirit of cooperation, NAMIC respectfully tenders the following concerns and suggested revisions to SB 2127:

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.

4) NAMIC is concerned that proposed Section 386-92(c) prejudices the rights of insurers or employers by preventing them from being able to reasonably rely upon the certification or lack thereof by the attending physician of the purported dates of the disability.

Employers and insurers reasonably rely upon the medical services of attending physicians, who are independently retained to investigate and evaluate medical claims and provide an interim report to the parties. An attending physician may fail to certify the dates of the disability for a number of legitimate reasons, some of which need to be considered by the employer or insurer in determining whether an employee is eligible for temporary total disability or temporary partial disability benefits.

The proposed amendment is overly broad in its language in that it arguably prevents the employer or insurer from considering and relying upon the rationale behind the attending physician's failure to certify the dates of the disability.

If the purpose of the suggested amendment is to make sure that an employee is not conclusively disqualified from receiving a temporary disability benefit merely because of an accidental failure by the attending physician to timely certify the disability dates, the proposed amendment should be revised to specifically accomplish this objective.

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,

A handwritten signature in cursive script, appearing to read "Christian John Rataj".

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

TESTIMONY OF JANICE FUKUDA

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

January 24, 2014
10:00 a.m.

SB 2127

Chair Hee, Vice Chair Shimabukuro, 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** SB 2127, 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 SB 2127 be held.

Thank you for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: frankvannatta@hotmail.com
Subject: *Submitted testimony for SB2127 on Jan 24, 2014 10:00AM*
Date: Thursday, January 23, 2014 9:31:14 AM

SB2127

Submitted on: 1/23/2014

Testimony for JDL on Jan 24, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
James Van Natta	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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