

SB2127

LATE



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

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January 24, 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: Friday, January 24, 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: S.B. 2127 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

S.B. 2127 amends section 386-92, Hawaii Revised Statutes (HRS), by requiring the employer or insurance carrier to pay temporary partial disability benefits within fourteen calendar days after the end of the employee's work week. Non-payment will result in a penalty on the employer, which is to be payable without an order or decision from the director. The bill also proposes to clarify that an employee's eligibility for disability benefits is based on the employee's entire record and that an attending physician's failure to certify dates of disability in an interim report will not disqualify an employee from receiving temporary total and temporary partial disability benefits.

II. CURRENT LAW

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

Section 386-96, HRS requires the attending physician to submit an interim report to the employer within seven calendar days of service indicating the dates of disability or the date of release to work.

III. COMMENTS ON THE SENATE BILL

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

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

Denying an employee statutory entitlement to temporary total disability or temporary partial disability benefits as a result of negligent oversight by an attending physician's failure to certify dates of disability or other innocuous technicality is inconsistent with the underlying policy of the workers' compensation statute. By allowing a determination of whether an employee is truly disabled through a review of the whole record, and consequently some limited discretion, the injustice of depriving a truly disabled employee their wage loss can be corrected.

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

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

NEIL ABERCROMBIE
GOVERNOR



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
January 24, 2014

S.B. 2127

RELATING TO WORKERS' COMPENSATION

Chair Hee and members of the Committee, thank you for the opportunity to submit written testimony on S.B. 2127.

The Department of Accounting and General Services does not support S.B. 2127.

S.B. 2127 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 S.B. 2127 be held.

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

HIWA

Hawaii Injured Worker Association

715 South King Street, Suite #410

Honolulu, Hawaii 96813

info@hiwahawaii.org

Phone: (808) 538-9771

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

Date: Friday, January 24, 2014

Time: 10:00 a.m.

Place: Conference Room 016, State Capitol

From: Derrick Ishihara, Legislative Chair

Hawaii Injured Worker Association

Position: Support

Re: S.B. 2127 Relating to Worker's Compensation

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

Thank you for the opportunity to present testimony regarding S.B.
2127. We support this bill.

Current law imposes penalties on an insurer/employer who delays payment of temporary total disability (TTD) wage loss benefits to injured workers who are unable to return to work.

Injured workers who are able to return to part-time work are not afforded this same protection from delays in payment of their temporary partial disability (TPD) wage loss benefits.

This common sense measure to protect injured workers by treating TPD wage loss benefits and TTD wage loss benefits the same in terms of sanctions against insurers for delaying payment is vitally important for those who live paycheck to paycheck. Living on half of your usual income can be a hardship on many who have car payments or rent payments that recur each month.

This measure also seeks to relieve the burden on injured workers whose physicians have failed to file insurance forms timely or properly. Benefits should continue on an examination of the whole record.

HIWA asks that you pass this bill to ensure prompt payment of wage loss benefits and a return to the humanitarian purposes of the worker's compensation statutes.

Thank you for your consideration

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

THE VOICE OF THE CONSTRUCTION INDUSTRY

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simplicityHR by ALTRES

Testimony to the Senate Committee on Judiciary and Labor

Friday, January 24, 2014

10:00 a.m.

Hawaii State Capitol - Conference Room 016

SUBJECT: S.B. 2127, 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** S.B. 2127, which would impose a penalty on an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's customary work week. The bill also clarifies that an eligibility determination for disability benefits depends on the employee's entire record and the failure of the attending physician to certify a specialized form provided by the employer or the department does not disqualify the employee from disability benefits.

While S.B. 2127 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** S.B. 2127.

We appreciate the opportunity to share with you our views.

Twenty-Seventh Legislature
Regular Session of 2014

THE SENATE

Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Friday, January 24, 2014; 10:00 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2127
RELATING TO WORKERS' COMPENSATION**

The ILWU Local 142 supports S.B. 2127, which imposes a penalty on an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's customary work week and clarifies eligibility determination.

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 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 be unintentional. In any case, a penalty as proposed by S.B. 2127 will serve as an incentive for carriers to promptly pay TPD benefits as they do Temporary Total Disability (TTD) payments, which already has a similar penalty.

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

The ILWU urges passage of S.B. 2127 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.



To: The Honorable Senator Clayton Hee, Chair
Senate Committee on Judiciary and Labor

From: Mark Sektnan, Vice President

Re: **SB 2127 – Workers’ Compensation**
PCI Position: Oppose

Date: Friday, January 24, 2014
10:00 a.m., Conference Room 016

Aloha Chair Hee and Members of the Committee:

The Property Casualty Insurers Association of America (PCI) is opposed to SB 2127 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.

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?

This bill also 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, PCI asks the committee to hold SB 2127 in committee.

DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

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

January 23, 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: Friday, January 24, 2014

Time: 10:00 a.m.

Place: Conference Room 016, State Capitol

From: Dennis W.S. Chang

Re: Strong Support for Passage of S.B. 2127 Relating to Workers' Compensation

I am submitting this as an individual labor attorney with the heavy concentration handling workers' compensation claims in my practice since 1977. I strongly encourage the passage of S.B. 2127 which amends section 386-92, Hawaii Revised Statutes (HRS). The bill attempts to treat late payment of temporary total disability benefits in a similar fashion to temporary partial disability benefits. Currently, the section imposes a penalty if compensation in the form of temporary total disability benefits is not timely paid under the terms of a final decision or judgement. It also imposes penalties on the employer or carrier for the nonpayment of temporary total disability benefits within a specific time period or when such benefits are terminated in violation of section 386-31, HRS.

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

The current statutory provision also provides that negligent oversight or a highly inflexible technical rule can be used to deny the payment of temporary total disability benefits even though the injured work is clearly totally disabled for all work. This and the foregoing inconsistencies and ambiguities contained in the present section 386-31, HRS, require the intervention of the Legislature to clarify and amend section 386-31, HRS, to conform with the underlying humanitarian purposes of the workers' compensation statute and to encourage an injured worker to promptly transition to a return to work, even if the transition is for part time work.

Passage of S.B. 2127 is vital and will clearly treat the late payment of temporary total disability benefits and temporary partial disability benefits in a similar manner. There is absolutely no cogent reasoning to not treat both equally with the imposition of penalties for the late payment of critical wage loss replacement benefits. Most workers already live paycheck by paycheck and the late payment of temporary partial disability benefits undoubtably causes more economic ruin and needless stress for the injured worker and/or his family. In my practice I have witnessed the late payment of temporary partial disability benefits for months and as much as nearly two years because there is no deterring factor to force a self-insured employer or insurance carrier to make

timely payments. Exhibit 1. And, consistent with the underlying humanitarian policy of the workers' compensation law, decreasing costs of the workers' compensation system will encourage an injured worker to return to work promptly on a part time basis. The transition to return to work will also reduce costs by avoiding the need to enter into work hardening programs which simulate an injured workers' actual work.

Moreover, denying an employee his statutory entitlement to temporary total disability or temporary partial disability benefits as a result of negligent oversight by an attending physician's failure to certify dates of disability or other innocuous technicality is inconsistent with the underlying policy of the workers' compensation statute. S.B. 2127 allows a determination of whether an employee is truly disabled through a review of the whole record, and consequently prevent the injustice of depriving a truly disabled employee his wage loss. If an employee is disabled and entitled to wage loss benefits, he should be paid. To deprive a disabled employee his rightful wage loss replacement benefits as a direct result of a negligent oversight or the application of a highly technical failure is simply wrong.

Passage of S.B. 2127 should be embraced by the Legislature.

DWSC:mt

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

CONCLUSIONS OF LAW

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

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

DECISION AND ORDER

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

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

DECISION AND ORDER

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

Senate Committee on Judiciary and Labor
Thursday, January 24, 2014
10: 00 AM
Room 016

RE: HB 2127 Related to Workers' Compensation

Dear Honorable Chair Hee, Vice Chair Shimabukuro, and members of the Senate Committee on Judiciary and Labor. I am a Physical Therapist working in Hawaii who evaluates and treat hundreds of injured workers in Hawaii per year, and I am in **STRONG SUPPORT** of SB2127, related to workers' compensation.

Currently there is sense of apathy for some injured workers to return to Part Time work due to a potential delay in receiving temporary partial disability benefits. As a Physical Therapist who assists in rehabilitating many injured workers in Hawaii, it is evident that a patient motivated to return to any available work improves their prognosis for return to full duty work. Decreasing the amount of time a patient is out of work may decrease overall cost associated with compensating an injured worker.

I believe that the proposed penalty for delayed payment past 14 days to an employee on temporary partial disability is a positive step in reducing the total amount of time a patient is on temporary disability by holding payers fiscally responsible for timely payment.

Mahalo,

Elyse Nakama, DPT OCS