DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR

ELAINE N. YOUNG
ACTING DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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February 6, 2015

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

Date: Friday, February 6, 2015
Time: 9:00 a.m.
Place: Conference Room 309, State Capitol

From: Elaine N. Young, Acting Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 679 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 679 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.
- Bases an employee's eligibility to temporary total or temporary partial disability benefits on certification from the attending physician every thirty days or by an examination of the employee's available medical records by another physician if the attending physician is not available.
- Allows contemporaneous certification of an employee's disability status to be waived and allows retroactive certification, provided 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 for retroactive disability certification for the entire claim. This subsection will only apply if the employee's condition has not reached medical stabilization or employee is enrolled in vocational rehabilitation.
- Effects this Act upon approval.

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 the intent of this measure that requires prompt payment of temporary partial disability benefits and temporary total disability benefits to the injured worker.

One of the underlying policies in workers' compensation is to encourage an employee to promptly return to work. 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.

The Department has concerns about penalizing an employer who does not pay an employee temporary partial disability benefits within fourteen calendar days after the end of the employee's workweek (seven consecutive days). Temporary partial disability benefits are computed differently from temporary total disability benefits and the weekly benefit amount may vary each week depending on how much the employee earns when he returns to "light or modified duty".

Section 386-32(b), HRS, requires payment of temporary partial disability benefits at the rate of sixty-six and two-thirds per cent of the difference between the employee's average weekly wages before the injury and the employee's weekly earnings while on temporary partial disability. Pay stubs should be submitted to the employer/insurance carrier in order to compute the correct amount of temporary partial disability benefits owed to the injured employee.

The Department believes that employers who pay their workers on a semi-monthly

or bi-weekly basis should not be forced to change their usual business practices to pay the injured worker on a weekly basis in order to avoid the proposed penalty. The Department also feels that insurance carriers should not be penalized for failing to pay temporary partial disability benefits within fourteen calendar days if the injured worker does not submit pay information on a timely basis to the employer and provided the claim for workers' compensation is not controverted by the employer in the employer's initial report of industrial injury.

The Department also has concerns about the proposed subsection (b) that the penalty will be imposed without the necessity of an order or decision from the director. Since temporary partial disability benefits may vary each week depending on the amount of money the injured employee earns while on light/modified duty, the Department has concerns regarding who will assess the penalty, the amount of the penalty, and when will the penalty be assessed. Disagreements may occur between the injured worker and the employer regarding the penalty assessment.

An employee's eligibility for temporary total disability benefits or temporary partial disability benefits are determined by disability certifications from the employee's attending physician. The DLIR has concerns that 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 to pay benefits on time. Furthermore, recently the Intermediate Court of Appeals underscored this intent in issuing a ruling contained in Alayon v. Urban Management Corp., AB 2008-221 (Aug. 11, 2011) rev'd mem 134 Haw. 305, 339 P.3d 1106 (Dec. 31, 2014).

The Department has concerns about allowing the physician to backdate periods of disability prior to the physician seeing and treating the patient and allowing unlimited retroactive certifications of disability in subsection (c). The Department proposes the following language to limit the retroactive certification, if allowed, to once for the entire claim and within twelve months of the date of the request.

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.

Furthermore, the Department does not believe that Section 386-92(c), HRS, titled "Default in payments of compensation, penalty", is the proper section to include disability certifications. The Department recommends that disability certifications be addressed in Section 386-96, HRS, titled "Reports of physicians, surgeons, and hospitals."

DAVID Y. IGE
GOVERNOR

JAMES K. NISHIMOTO
DIRECTOR

RANDY BALDEMOR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

February 4, 2015

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

For Hearing on Friday, February 6, 2015
9:00 a.m., Conference Room 309

BY

JAMES K. NISHIMOTO
DIRECTOR

House Bill No. 679
Relating to Workers' Compensation

WRITTEN TESTIMONY ONLY

CHAIRPERSON MARK NAKASHIMA AND MEMBERS OF THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT:

Thank you for the opportunity to provide comments on House Bill 679 (H.B. 679).

The purposes of H.B. 679 are to 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 workweek as defined by administrative rule; clarify that an eligibility determination for disability benefits depends on the primary care physician to certify the employee's disability; clarify that the failure of the employee's primary care physician to certify the dates of disability in an interim report does not disqualify the employee from disability benefits; allow contemporaneous certification of an employee's disability status to be waived; and clarify that certification requirements only apply during the period that an employee's injuries have not reach medical stabilization or the employee is enrolled in the vocational rehabilitation process.

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. In that regard, DHRD respectfully submits these comments on the bill.

First, while this bill is premised on a perception that "fourteen calendar days from the end of the customary work week to process temporary partial disability benefits is more than sufficient to process the benefits rightfully due and owed to injured workers," the practical reality is much different. 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 (as allowed by Section 78-25(b), HRS) 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.

Second, we appreciate this bill's recognition of DHRD's statutory obligation to comply with public employment pay periods set forth in Section 78-13, HRS, as a basis for not applying the penalty. DHRD should not be penalized for a "late" payment when the only reason for same is compliance with another law over which DHRD has no control. Moreover, requiring the Director to hold a hearing before any penalties are imposed is critical to afford due process to show a late payment meets the conditions excusing late payment.

Third, 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, contemporaneous certifications, together with monthly WC-2 Reports, help 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).

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

February 6, 2015

The Honorable Mark M. Nakashima, Chair
and Members of the Committee
on Labor & Public Employment
The House of Representatives
State Capitol, Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members of the Committee:

SUBJECT: House Bill No. 679
Relating to Workers' Compensation

The purposes of H.B. 679 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.

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 a 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 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. 679. 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 would end up costing the City approximately $40,000 per 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. 679, be held. Thank you for the opportunity to testify.

Sincerely,

Carolee C. Kubo

Carolee C. Kubo
Director

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Labor & Public Employment
Friday, February 6, 2015 at 9:00 A.M.
Conference Room 309, State Capitol

RE: HOUSE BILL 679 RELATING TO WORKERS' COMPENSATION

Chair Nakashima, Vice Chair Keohokalole, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** HB 679, 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 workweek as defined by administrative rule. Further clarifies that an eligibility determination for disability benefits depends on the primary care physician to certify the employee's disability and clarifies that the failure of the employee's primary care physician to certify the dates of disability in an interim report does not disqualify the employee from disability benefits. Also allows contemporaneous certification of an employee's disability status to be waived and clarifies that certification requirements only apply during the period that an employee's injuries have not yet reached medical stabilization or the employee is enrolled in the vocational rehabilitation process.

The Chamber is the largest business organization in Hawaii, representing over 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 members and the entire business community 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 or allowing retroactive certification. Physicians regularly certify disability in a timely manner on other work related issues like sick leave. We should expect the same in worker's compensation. Lastly, we do not support the penalty being automatic without an order from the Director.

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

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

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 H. Ueoka
Executive Director

TESTIMONY OF ALISON UEOKA

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Representative Mark M. Nakashima, Chair
Representative Jarrett Keohokalole, Vice Chair

Friday, February 6, 2015
9:00 a.m.

HB 679

Chair Nakashima, Vice Chair Keohokalole, and members of the Committee, my name is Alison Ueoka, 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 thirty-six percent of all property and casualty insurance premiums in the state.

Hawaii Insurers Council opposes HB 679, which amends Section 386-92, Default in payments of compensation, penalty.

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

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

Furthermore, imposing penalties without the necessity of an order or decision from the Director also prohibits due process for the Employer. Injured workers should not be

compensated when they refuse to return to work when released to modified duty and modified duty is available. Employers should be allowed to adjudicate Temporary Partial Disability benefits when the injured worker does not return to work as released by their treating physician or when their treating physician refuses to certify disability for an indefinite period.

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

For these reasons, we respectfully request that HB 679 be held.

Thank you for the opportunity to testify.

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Hawaii State Legislature
House Committee on Labor and Public Employment
Hawaii State Capitol
415 South Beretania Street
Honolulu, HI 96813

February 4, 2015

Filed via electronic testimony submission system

RE: HB 679, Workers' Compensation; Penalty; Temporary Partial Disability - NAMIC's Written Testimony for Committee Hearing

Dear Representative Nakashima, Chair; Representative Keohokalole, Vice-Chair; and members of the House Committee on Labor and Public Employment:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the February 6, 2015, 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 HB 679:

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 medial 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 reason, 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,

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

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

To: The Honorable Mark M. Nakashima, Chair
The Honorable Jarrett Keohokalole, Vice Chair
House Committee on Labor & Public Employment

From: Mark Sektnan, Vice President

Re: **HB 679 – Relating to Workers' Compensation**
PCI Position: Oppose

Date: Friday, February 6, 2015
9:00 a.m., Conference Room 309

Aloha Chair Nakashima, Vice Chair Keohokalole and Members of the Committee:

The Property Casualty Insurers Association of America (PCI) is opposed to HB 679 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 42.2 percent of all property casualty insurance written in Hawaii. PCI member companies write 43.2 percent of all personal automobile insurance, 65.2 percent of all commercial automobile insurance and 75 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 and 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 also provides an important safeguard 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 679 in committee.

The Twenty-Eighth Legislature
Regular Session of 2015

HOUSE OF REPRESENTATIVES
Committee on Labor and Public Employment
Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair
State Capitol, Conference Room 309
Friday, February 6, 2015; 9:00 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 679
RELATING TO WORKERS' COMPENSATION

The ILWU Local 142 supports H.B. 679, which: (1) imposes a penalty on an employer who does not pay an employee temporary partial disability benefits within 14 calendar days; (2) clarifies that an eligibility determination for disability benefits depends on the primary care physician's certification; (3) clarifies that failure of the employee's physician to certify the dates of disability does not disqualify the employee from benefits; (4) allows contemporaneous certification of disability status to be waived; and (5) clarifies that certification requirements only apply when medical stabilization has not been reached or the employee is enrolled in VR.

The State Workers' Compensation Law was enacted 100 years ago and was intended to provide wage loss benefits and medical care when a worker is injured on the job. The presumption was written in the statute that if a person is injured in the course of employment or on the jobsite, the claim for benefits should be deemed compensable. In exchange for this, workers give up the right to sue their employers for negligence or other failures on the part of the employers. The ultimate objective is to rehabilitate and return the worker to his job.

However, over the course of a century, employers seem to have moved away from the original intent of the law and the "grand bargain" that was struck to provide for a fair and balanced approach to addressing unfortunate accidents on the job. Some employers, through their insurance carriers and attorneys, delay payments to their employees, either willfully or otherwise. This creates a huge hardship on the worker who is unable to work yet needs a source of income to support himself and his family.

For temporary total disability benefits, if payment is not made in a timely manner, penalties are permitted by statute. However, for workers who return to work on a partial basis (i.e., not full-time) and receive temporary partial disability benefits, there is no similar penalty in the statute. H.B. 679 will correct this discrepancy.

The bill also corrects the unfair practice of penalizing workers for the failure of their physicians to provide timely contemporaneous certification (doctor's slips) of the worker's disability status. If the physician is treating the worker, and doctor visits are recorded in medical charts that will be available to the employer and insurance adjuster, denying payment for not providing medical certificates appears especially punitive to a worker who relies on timely payments of benefits.

The ILWU urges passage of H.B. 679 to ensure that injured workers are timely paid, will not suffer further disruptions in their lives, and will be able to return to work as quickly as possible. Thank you for the opportunity to offer our comments on this measure.

DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

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

February 5, 2015

To: Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair
And Members of the Committee on Labor
and Public Employment

Date: Friday, February 6, 2015
Time: 9:00 a.m.
Place: Conference Room 309
State Capitol
415 South Beretania Street

Re: Strong Support for Passage of HB 679 Relating to Workers' Compensation

I. Discussion.

I am submitting this as an individual labor attorney with a heavy concentration in handling workers' compensation claims in my practice since 1977. I respectfully and strongly encourage the passage of HB 679, which amends section 386-92, Hawaii Revised Statutes (HRS).

As noted in Section 1, the Legislature finds that the injured workers currently lack the incentive to return to work part-time because the statute does not require employers, including their third-party administrators and insurance carriers, to timely pay temporary partial disability benefits (TPD). Public policy dictates that they return to work promptly even if only for part-time work. I stress that injured workers, who return to work even only at part-time as soon as feasible, are a definite cost savings to the overall system. Countless studies have shown that any speedy recovery and prompt transition back to work prevents them from collecting ongoing temporary total disability (TTD) benefits and from remaining on long-term disability.

Section 1 also speaks about the need to treat injured workers equally when collecting TPD and TTD. There is a concern for the equal protection of all workers when disabled and collecting TPD or TTD. Currently, injured workers are often treated unfairly because their entitlement to TPD are denied for months at a time, and have no recourse other than to want for a hearing to be held, suffer economic and emotional ruin, and sometimes lose their homes or become homeless. Under these circumstances, there is no incentive for them to make any attempt to return to part-time duties to gradually return to their original duties because there are penalties as an incentives to pay timely TTD. The situation is compounded when their physicians do not complete and sign specialized forms or the payroll is not expediently processed.

HB 679 will create a late penalty payment to give employers the incentive to timely disburse TPD, and TPD to be treated in the same manner as the need to pay timely

TTD. This is consistent with the application of equal protection under the law and underlying humanitarian purpose of the workers' compensation statute. HB 679 is especially needed in light of the recent decision by the Intermediate Court of Appeals in *Alayon v. Urban Management* issued on December 31, 2015.[1] The decision should be extended to the late payment of TPD. This is consistent with equal protection of the law, provides an incentive for injured workers to promptly return to work, and the legal precepts in *Alayon* should be identical to TTD and TPD.

Currently, the section only imposes a penalty if TTD 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 TTD wage loss benefits within ten days when due or when such benefits are terminated in violation of § 386-92, HRS.

There is a clear anomaly by the explicit failure to impose penalties for the late payment of TPD 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 TTD wage loss benefits and the late payment of TPD 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 TTD benefits. *Sauveur v. J. James Sogi,* AB 2000-077 (WH) (11/28/2001) [2001-158]. HB 679 clarifies the loose ends.

The current statutory provision also provides that negligent oversight or a highly inflexible technical rule can be used to deny the payment of TTD wage loss benefits even though the injured worker is clearly totally disabled for all work. An illustration is an employee, who is recovering from low back surgery, but there is no disability certification of 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?

II Strong Support for Passage of HB 679.

Alayon has changed the mindset of decision makers. § 386-92 currently provides for an imposition of a 20% penalty for late payment of TTD as deemed appropriate by the Director of Labor and Industrial Relations (Director). HB 679 will treat the late payment of TPD in the same fashion and there is no logical reason not to do so, especially when there is a major cost savings by a smooth transition to return to part-time work. As stated above, that, if done properly, it can easily result in more cost savings by utilizing the return to part-time work as work hardening before transition to full duties at the usual and customary employment.

Passage of HB 679 is vital. Most workers live paycheck by paycheck and the late payment of TPD can easily result in their economic ruin and needless distress for them and/or their families. I must repeat that consistent with the underlying humanitarian policy of the workers' compensation law, the prompt return to work decreases the costs of the workers' compensation system. There is also an elementary fairness and not punishing workers when

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[1] *Alayon* will be discussed in greater detail along with the proposed changes contained in HB 679's third portion, subsection (c).

you apply technical rules as pointedly articulated by the Intermediate Court of Appeal (ICA) in *Alayon.*

Moreover, denying an employee the statutory entitlement to TTD or TPD 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. *Alayon* addresses this and provides the ample framework to support subsection (c), which is contained in HB 679.

"We conclude that the Board erred in relying solely on the inadequacy of the interim reports submitted by Alayon's physicians as certifications of disability in ruling that Alayon was not entitled to TTD benefits." The ICA elaborated that "[t]he Board may consider the lack of specificity or other deficiencies in certifications of disability in assessing the evidentiary weight it should give to the certifications. However, the Board cannot deny a claimant's request for TTD benefits based solely on a physician's failure to submit the certifications of disability in the proper form. If the evidence in the record shows that a claimant is entitled to TTD benefits, then the physician's non-compliance with the certification requirements does not justify denial of the TTD benefits." Accordingly, the ICA reversed and remanded that the Board needs to view the case based on merits. "We remand the case to the Board for a determination of Alayon's eligibility for TTD benefits on the merits." 2014 Haw. App. LEXIS 581 at 10-11.

III. Justification and Technical Changes.

1. Misguided due process argument. Contrary to the opposition on the inclusion of subsection (b) does not violate due process or other alleged misleading arguments to strip "[i]n addition to the compensation owed by the employer, the penalty imposed under subsection (a) shall be due and payable without the necessity of an order or decision from the director." That subsection should be read in conjunction with subsection (a), which provides an escape for the employer to justify that a penalty should not be imposed when they are not at fault and payment was delayed through no fault of its own. Implicitly, there will be a hearing conducted, if the employer so chooses to present its version and avoid any sanctions so there will be hearings, if so desired.

Consistent with the underlying policy of this statute, subsection (b) is actually another cost-saving device. Employers may decide that any penalty that is undoubtedly due and owing for a violation should be paid without a decision, and secure closure and avoid a needless hearing. There may be more costs involved in preparing for and attending the hearing with uncertainty and the ultimate outcome. In my long career, employers have voluntarily paid penalties without the necessity of orders and decisions to secure finality and certainty, rather than going to a hearing, getting penalized, and also getting assessed attorney's fees and costs pursuant to 386-93(a), HRS.

For those employers, who wish to have orders and decisions, subsection (b) does not affect their due process rights. They are always free to insist upon a hearing and to present their arguments and evidence, then if they truly believe that penalties are not warranted. The argument that subsection (b) violates due process is wholly without merit.

2. Subsection (b) is solidly the based on the recent case of *Alayon*.

As touched upon above, the recent case of *Alayon* issued by the ICA on December 31, 2014 has completely changed the manner in which TTD should be determined for injured workers. By analogy, the identical legal principles would also apply to the determination of TPD. The ICA communicated in the most simplest terms that the wrongdoing by others, including professionals like physicians, who fail to comply with their responsibilities should not be used to deprive injured workers of legitimate statutory benefits under Chapter 386.

As during the last session, attempts will be made to change the language to reject the inclusion of retroactive certification of disability. I respectfully submit that should be disregarded as inconsistent with making claimants whole for TTD or TPD. There is no sound reason in barring retroactive certifications. It was the result of the Lingle administration's appointees. As stated in *Alayon*, we need to look at the whole merit of the case, and we should be taking a common sense approach. Any other approach to determine claimants' entitlement to TTD or TPD, in particular as maintained by some 2014 session testimonials, for only one retroactive certification for a brief fixed period, merely results in a wholesale windfall for employers. An apt illustration is a claimant, who has low back surgery, but the physician fails to prepare disability slips. I cannot envision a single legitimate reason that would preclude such an injured worker from receiving has statutory entitlement to TTD for the period immediately after his surgery, especially for a fusion, which may take as much as one to two years for a recovery.

There is already in place in the statute that contains extremely harsh consequences for claimants who engage in any type of fraud under § 386-98. That section contains both civil and criminal sanctions. § 386 –98 is broadly worded so that it could very well apply to "any person." That would include physicians. Opponents are making an erroneous assumption, and I have yet to see, that physicians, who engage in fraudulent acts in the form of cheating to get their patients paid at the risks of losing everything, including their licenses, after years of intense long hours of study, hundreds of thousands of dollars in tuition, and years of hard exemplary work to reach the point of having a legitimate medical practice to create fantasies. Such is the outlandish mindset to rob claimants of their statutory entitlements. These very situations verify that for employers are willing to gain a profit. That should be deemed unconscionable!

3. Suggested minor change.

After further analysis, there are some suggested technical changes for consistency. We should prevent having to amend this portion of the statute in the future. "[W]ithin 14 calendar days" in subsection (a) should be re-worded and use the following: "weekly, bi-weekly, or bi-monthly, whichever is applicable." Payroll periods vary and this technical change shall be used only to address TPD because the statute already has ten days for the determination when TTD should be deemed untimely paid.

IV. Conclusion - HB 679 Should be Fully Embraced and Moved Toward Passage.

Due to some oversight, the penalty for untimely payment of TPD was never included in the workers' compensation statute. Contrary to what you will hear, the burden is upon claimants to show that they are entitled to an award of penalties. The Chair, Vice-Chair and Members of the Committee should not be distracted by the unfounded argument that it would be unduly burdensome for the employers to provide prompt payment of TPD upon claimants return to work at part-time hours.

As to the amount of TPD due and owing, it is generally a simple matter of bookkeeping. Claimants usually return to part-time work with the same employers, who should have all of the requisite information to pass on to insurance carriers to make timely payments of TPD. In this regard, I call your attention to § 386-125, which explicitly states that the knowledge of employers are imputed to the insurance carriers.

The real complication occurs when claimants return to part-time work with a different employer. Here the burden is squarely placed on the claimants to secure and present their pay stubs to the proper parties to calculate the TPD. The real problem is when we routinely provide the insurance carriers with copies of part-time pay stubs showing a return to work, but there is no incentive to timely issue TPD checks to the injured workers. Truly at the present time, there is no legitimate reason to give TPD payments proper attention to ensure that timely payments are made to make the claimants financially whole, who return to work part-time.

Generally on the other hand, you will not see extended periods of time, and months and months of nonpayment of TTD because there is a mechanism in place in the form of penalties for the unreasonable delay in the payment of TTD. Consistent with the humanitarian purpose of the workers' compensation statute and *Alayon,* we can now correct the problem and have TPD on equal footing with TTD. As noted in the findings aside from equal protection of the law, there should be an incentive to force the timely payment of TPD. That would result in a sound policy of savings, not only costs, but lives. HB 679 will rectify the inherent inequality.

I respectfully submit that HB 679 be summarily passed out of your committee.

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From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 05, 2015 10:57 PM
To: LABtestimony
Cc: derrick@islandpt.com
Subject: Submitted testimony for HB679 on Feb 6, 2015 09:00AM

HB679
Submitted on: 2/5/2015
Testimony for LAB on Feb 6, 2015 09:00AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Derrick Ishihara	Individual	Support	No

Comments: I strongly support consistency in the statute whether the injured worker is partially or totally disabled. Penalties for late payment of wage loss should be imposed since these benefits are critical even when the employee has returned to part time employment. Many injured workers do not have a financial cushion and face hardship when even a fraction of their monthly income is delayed.

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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