"CHAPTER 386
WORKERS' COMPENSATION LAW

Note

Chapter heading amended by L 1975, c 41, §1.

This chapter is based on L 1963, c 116, which completely revised and reenacted this chapter. See also L 1975, c 41, §1.

For prior legislative history see: Chapter 97 in RLH 1955, vol 1; L 1957, cc 55, 78, 80, 81, 133, 134, 214, 215, and 216; L 1959, cc 48, 78, 185, 240, and 241; L 1961, cc 3, 5, 99, 115, and 152.

Workers' compensation closed claims study by auditor; submission to 2018 legislature. L 2016, c 188.

Cross References

Hawaii employers' mutual insurance company, see §§431:14A-101 to 431:14A-119.

Leave sharing program, see §78-26.

Workers' compensation closed claims study by auditor; submission to 2018 legislature. L 2016, c 188.

Attorney General Opinions

Absent explicit inclusion, hanai children were not entitled to statutory benefits under workers' compensation laws. Att. Gen. Op. 93-1.

Neither the disability compensation division (DCD) nor the labor and industrial relations appeals board (LIRAB) is an "entity" for purposes of chapter 323C when it reviews, evaluates, and decides on claims for workers’ compensation; some provisions of chapter 323C apply to each in its adjudicatory capacity because the DCD and the LIRAB receive protected health information when they process workers’ compensation claims. Att. Gen. Op. 2000-2.

Law Journals and Reviews

Commentary on Selected Employment and Labor Law Decisions Under the Lum Court. 14 UH L. Rev. 423 (1992).

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai‘i. 15 UH L. Rev. 453 (1993).

Hawai‘i's Workers' Compensation Scheme: An Employer's License to Kill? 29 UH L. Rev. 211 (2006).

One-Sided Bargain? Assessing the Fairness of Hawai‘i's Workers' Compensation Law. 31 UH L. Rev. 553 (2009).

The Jones Act Fish Farmer. 33 UH L. Rev. 223 (2010).

Case Notes

Exclusive remedy for assault and battery suffered during work. 634 F. Supp. 684 (1986).

Plaintiff failed to exhaust the administrative remedies provided to plaintiff by this chapter; prior to filing a separate suit for bad faith denial of benefits or payments, plaintiff must first exhaust all available administrative remedies before the department of labor and industrial relations, disability compensation division. 28 F. Supp. 2d 588 (1997).

This chapter does not bar claims based on the intentional conduct of an employer or employee because such claims are not based on "accidents" related to employment; plaintiff's intentional infliction of emotional distress claim not barred by this chapter. 721 F. Supp. 2d 947 (2010).

Workers' compensation law is constitutional. 71 H. 358, 791 P.2d 1257 (1990).

Appeals board correctly determined that consequent medical expenses attributable to claimant's non-industrial motor vehicle accident were not covered by this chapter. 77 H. 152, 883 P.2d 73 (1994).

Claimant not precluded by exclusivity provision of §386-5 from seeking common law tort remedies against employer's insurer where injuries allegedly caused by insurer's denial of medical benefits and disability payments not "work injuries" within scope of this chapter. 83 H. 457, 927 P.2d 858 (1996).

"PART I. GENERAL PROVISIONS

§386-1 Definitions. In this chapter, unless the context otherwise requires:

"Able to resume work" means an industrially injured worker's injury has stabilized after a period of recovery and the worker is capable of performing work in an occupation for which the worker has received previous training or for which the worker has demonstrated aptitude.

"Appellate board" means the labor and industrial relations appeals board.

"Attending physician" means a physician who is primarily responsible for the treatment of a work injury. There shall not be more than one attending physician. If an injured employee is treated by more than one physician, the employee shall designate a physician as the attending physician.

"Compensation" means all benefits accorded by this chapter to an employee or the employee's dependents on account of a work injury as defined in this section; it includes medical and rehabilitation benefits, income and indemnity benefits in cases

of disability or death, and the allowance for funeral and burial expenses.

"Construction design professional" means any person who is a professional engineer, architect, or land surveyor who is registered under chapter 464 to practice that profession in the State.

"Covered employment" means employment of an employee as defined in this section or of a person for whom the employer has provided voluntary coverage pursuant to section 386-4.

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Disability" means loss or impairment of a physical or mental function.

"Disciplinary action" means personnel action by an employer in the form of punishment against an employee for infraction of employer or contract rules, in the form of a reprimand, suspension, or discharge.

"Emergency medical services" means the delivery of health care services under emergency conditions occurring as the result of a patient's condition due to a work injury that manifests itself by symptoms of sufficient severity, including severe pain, such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to be life-threatening or cause serious harm or aggravation of physiological or psychological sickness, injury, or incapacitation.

"Employee" means any individual in the employment of another person.

Where an employee is loaned or hired out to another person for the purpose of furthering the other person's trade, business, occupation, or profession, the employee shall, beginning with the time when the control of the employee is transferred to the other person and continuing until the control is returned to the original employer, be deemed to be the employee of the other person regardless of whether the employee is paid directly by the other person or by the original employer. The employee shall be deemed to remain in the sole employment of the original employer if the other person fails to secure compensation to the employee as provided in section 386-121.

Whenever an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, the independent contractor shall be deemed the employer of all employees performing work in the execution of the contract, including employees of the

independent contractor's subcontractors and their subcontractors. However, the liabilities of the direct employer of an employee who suffers a work injury shall be primary and that of the others secondary in their order. An employer secondarily liable who satisfies a liability under this chapter shall be entitled to indemnity against loss from the employer primarily liable.

"Employee in comparable employment" means a person, other than the injured employee, who is employed in the same grade in the same type of work by the same employer or, if there is no person so employed, a person, who is employed in the same grade in the same type of work by another employer in the same district.

"Employer" means any person having one or more persons in the person's employment. It includes the legal representative of a deceased employer and the State, any county or political subdivision of the State, and any other public entity within the State.

The insurer of an employer is subject to the employer's liabilities, shall pay the deductible as provided for under section 386-100, shall collect the amount of the deductible from the employer, and be entitled to rights and remedies under this chapter as far as applicable.

The workers' compensation self-insurance group of which an employer is a member is subject to that employer's liabilities and entitled to rights and remedies under this chapter as far as applicable.

"Employment" means any service performed by an individual for another person under any contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully entered into. It includes service of public officials, whether elected or under any appointment or contract of hire, express or implied.

"Employment" does not include:

(1) Service for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity;

(2) Service for a religious, charitable, educational, or nonprofit organization if performed by a recipient of aid therefrom and the service is incidental to or in return for the aid received;

(3) Service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part;

(4) Service performed by a duly ordained, commissioned, or licensed minister, priest, or rabbi of a church in the exercise of the minister's, priest's, or rabbi's ministry or by a member of a religious order in the exercise of nonsecular duties required by the order;

(5) Service performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than $225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve-month period;

(6) Domestic, in-home and community-based services for persons with developmental and intellectual disabilities under the medicaid home and community-based services program pursuant to title 42 Code of Federal Regulations sections 440.180 and 441.300, and title 42 Code of Federal Regulations, part 434, subpart A, as amended, or when provided through state funded medical assistance to individuals ineligible for medicaid, and identified as chore, personal assistance and habilitation, residential habilitation, supported employment, respite, and skilled nursing services, as the terms are defined by the department of human services, performed by an individual whose services are contracted by a recipient of social service payments and who voluntarily agrees in writing to be an independent contractor of the recipient of social service payments;

(7) Domestic services, which include attendant care, and day care services authorized by the department of human services under the Social Security Act, as amended, or when provided through state-funded medical assistance to individuals ineligible for medicaid, when performed by an individual in the employ of a recipient of social service payments. For the purposes of this paragraph only, a "recipient of social service payments" is a person who is an eligible recipient of social services such as attendant care or day care services;

(8) Service performed without wages for a corporation without employees by a corporate officer in which the officer is at least a twenty-five per cent stockholder;

(9) Service performed by an individual for a corporation if the individual owns at least fifty per cent of the corporation; provided that no employer shall require

an employee to incorporate as a condition of employment;

(10) Service performed by an individual for another person as a real estate salesperson or as a real estate broker, if all the service performed by the individual for the other person is performed for remuneration solely by way of commission;

(11) Service performed by a member of a limited liability company if the member is an individual and has a distributional interest, as defined in section 428-101, of not less than fifty per cent in the company; provided that no employer shall require an employee to form a limited liability company as a condition of employment;

(12) Service performed by a partner of a partnership, as defined in section 425-101, if the partner is an individual; provided that no employer shall require an employee to become a partner or form a partnership as a condition of employment;

(13) Service performed by a partner of a limited liability partnership if the partner is an individual and has a transferable interest as described in section 425-127 in the partnership of not less than fifty per cent; provided that no employer shall require an employee to form a limited liability partnership as a condition of employment; and

(14) Service performed by a sole proprietor.

As used in this definition, "religious, charitable, educational, or nonprofit organization" means a corporation, unincorporated association, community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

"Good cause" means a substantial reason amounting in law to be a legal excuse for failing to perform an act required by law considered under the circumstances of the individual case.

"Guide" or "guidelines" means an indication of a suggested criteria, course, or means to a particular end, and not an authoritative or exclusive prescription which limits the exercise of independent judgment, expertise, or care.

"Health care provider" means a person qualified by the director to render health care and service and who has a license for the practice of:

(1) Medicine or osteopathy under chapter 453;

(2) Dentistry under chapter 448;

(3) Chiropractic under chapter 442;

(4) Naturopathic medicine under chapter 455;

(5) Optometry under chapter 459;
(6) Podiatry under chapter 463E;
(7) Psychology under chapter 465; and
(8) Advanced practice registered nurse under chapter 457.

"Medical care", "medical services", or "medical supplies" means every type of care, treatment, surgery, hospitalization, attendance, service, and supplies as the nature of the work injury requires, and includes such care, services, and supplies rendered or furnished by a licensed or certified physician, dispensing optician, physical therapist, physical therapist assistant as recognized pursuant to section 461J-3(e), nurse, advanced practice registered nurse as recognized pursuant to chapter 457, occupational therapist, certified occupational therapy assistant as recognized pursuant to chapter 457G, or licensed massage therapist as recognized pursuant to chapter 452.

"Personal injury" includes death resulting therefrom.

"Physician" includes a doctor of medicine, a dentist, a chiropractor, an osteopath, a naturopathic physician, a psychologist, an optometrist, and a podiatrist.

"Psychologist" means a licensed clinical psychologist with a doctorate degree in psychology and who either has at least two years clinical experience in a recognized health setting, or has met the standards of the National Register of the Health Service Providers in Psychology. When treatment or evaluation for an injury is provided by a psychologist, provision shall be made for appropriate medical collaboration when requested by the employer or the insurer, as provided by rules adopted in conformance with chapter 91.

"Recipient of social service payments" includes:

(1) A person who is an eligible recipient of social services such as attendant care and day care services; and
(2) A corporation or private agency that contracts directly with the department of human services to provide attendant care and day care authorized under the Social Security Act, as amended.

"State average weekly wage" means the amount determined by the director under section 383-22 as the average weekly wage.

"Suitable gainful employment" means employment or self-employment within the geographical area where the employee resides, which is reasonably attainable and which offers an opportunity to restore the employee's earnings capacity as nearly as possible to that level which the employee was earning at the time of injury and to return the employee to the active labor force as quickly as possible in a cost-effective manner, giving due consideration to the employee's qualifications,

interests, incentives, future earnings capacity, and the present and future labor market.

"Total disability" means disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market.

"Trade, business, occupation, or profession" means all commercial, occupational, or professional activities, whether conducted for pecuniary gain or not. It includes all activities of nonprofit organizations conducted in pursuit of their purposes.

"Usual and customary employment" means the line or type of work in the gainful employment market consistent with a claimant's background, training, and experience.

"Vocational rehabilitation plan" means an approved plan prepared by a certified rehabilitation provider with an employee that is designed to assist the employee in obtaining and maintaining suitable gainful employment.

"Vocational rehabilitation services" means services provided in a rehabilitation program to assist an employee in obtaining and maintaining suitable gainful employment that may include but shall not be limited to on-the-job training, job modification, vocational evaluation, adjustment to disability, counseling, guidance, vocational and personal adjustment, referrals, transportation, training, supplies, equipment, appliances, aid, occupational licenses, and other goods and services needed to assist an employee in obtaining and maintaining suitable gainful employment.

"Wages" means all remuneration for services constituting employment. It includes the market value of board, lodging, fuel, and other advantages having a cash value which the employer has paid as a part of the employee's remuneration and gratuities received in the course of employment from others than the employer to the extent that they are customary and expected in that type of employment or accounted for by the employee to the employer.

"Work injury" means a personal injury suffered under the conditions specified in section 386-3. [L 1963, c 116, pt of §1; Supp, §97-1; HRS §386-1; am L 1969, c 244, §2a; am L 1970, c 200, §1; am L 1974, c 153, §1; am L 1975, c 68, §1; am L 1978, c 110, §4; am L 1979, c 40, §1; am L 1985, c 296, §§4, 14; gen ch 1985; am L 1986, c 304, §2; am L 1987, c 339, §4 and c 374, §1; am L 1989, c 56, §§1, 2 and c 300, §4; am L 1993, c 363, §2; am L 1996, c 94, §3; am L 1999, c 222, §2; am L 2000, c 69, §2; am L 2003, c 171, §1; am L Sp 2005, c 11, §1; am L 2006, c 176, §2; am L 2007, c 259, §§3, 7; am L 2009, c 11, §47; am L Sp 2009, c 22, §11(2); am L 2010, c 4, §6; am L 2011, c 196, §1 and c 220, §15; am L 2012, c 157, §1 and c 158, §2; am L 2016, c 183, §6]

Attorney General Opinions

Prisoners compensated under §353-25 are not covered by this chapter. Att Gen. Op. 69-11.

Law Journals and Reviews

Torts and Workers' Compensation. 2 UH L. Rev. 209 (1979).

Case Notes

Company is liable to employee of its contractor. 23 H. 291 (1916).

Law must be broadly and liberally construed. 23 H. 291 (1916); 24 H. 324 (1918); 24 H. 731 (1919); 26 H. 737 (1923).

Prior law, L 1915, c 221 held constitutional. 24 H. 97 (1917); 26 H. 737 (1923); 28 H. 383 (1925).

Employer defined. 31 H. 102 (1929).

Independent contractor. 32 H. 373 (1932).

Casual employment excluded. 32 H. 735 (1933).

Wages defined. 33 H. 412 (1935).

Owner of premises held employer of employee of independent contractor. 41 H. 603 (1957).

Effect of 1963 amendment. 48 H. 288, 398 P.2d 154 (1965).

Under definition of "employer" as it read prior to 1963 revision, general contractor was not "employer" of a subcontractor's employee. 50 H. 293, 439 P.2d 669 (1968).

Act should be given liberal construction to accomplish its beneficent purposes. 52 H. 595, 483 P.2d 187 (1971).

Student employees, coverage of. 52 H. 595, 483 P.2d 187 (1971).

Third-party general contractors are not immune to common law negligence actions by employees of their subcontractors. 54 H. 578, 513 P.2d 156 (1973).

Factors to be considered in determining the employer in loaned-employee cases. 56 H. 544, 545 P.2d 687 (1976).

Factors to be considered in determining the employer in lent employee cases. 59 H. 139, 577 P.2d 787 (1978).

"Disability", "total disability" referred to. 59 H. 409, 583 P.2d 321 (1978).

Control of employee is the predominant consideration in fixing compensation liability between a lending and a borrowing employer. 63 H. 374, 628 P.2d 629 (1981).

Sole director and stockholder of corporation was "employee". 63 H. 642, 636 P.2d 721 (1981).

Intent is to place primary responsibility on subcontractor to obtain workers' compensation coverage; construing contract insurance policies to cover workers' compensation claims would frustrate intent. 69 H. 37, 731 P.2d 167 (1987).

Licensed real estate agents who performed sales activities pursuant to independent contractor agreements were independent contractors, and not employees. 79 H. 208, 900 P.2d 784 (1995).

Section assigns secondary liability for workers' compensation benefits to next subcontractor above primarily liable employer in default regardless of whether that subcontractor carries workers' compensation insurance mandated by Hawaii law. 83 H. 1, 924 P.2d 169 (1996).

Cited: 25 H. 747, 751 (1921); 31 H. 554 (1930); 31 H. 638, 648 (1930); 32 H. 928, 932 (1933); 37 H. 517, 523 (1947); 41 H. 442, 446 (1956).

" **§386-2 Definitions relating to family relationships.** "Brother" or "sister" includes a half brother or half sister, a stepbrother or stepsister, and a brother or sister by adoption.

"Child" includes a posthumous child, adopted child, stepchild, child born to parents not married to each other, and hanai child acknowledged prior to the personal injury.

"Grandchild" includes a child of an adopted child and a child of a stepchild, but does not include a stepchild of a child.

"Grandparent" includes a parent of a parent by adoption, but does not include a parent of a stepparent, a stepparent of a parent, or a stepparent of a stepparent.

"Parent" includes a stepparent or a parent by adoption. [L 1963, c 116, pt of §1; Supp, §97-2; HRS §386-2; am L 1982, c 193, §1; am L 1997, c 52, §1]

Revision Note

Definitions rearranged pursuant to §23G-15.

Attorney General Opinions

Prior to 1982 amendment, benefits under workers' compensation law did not extend to hanai children. Att. Gen. Op. 93-1.

Case Notes

Construed. 31 H. 814 (1931).

" **§386-3 Injuries covered.** (a) If an employee suffers personal injury either by accident arising out of and in the

course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter.

Accident arising out of and in the course of the employment includes the wilful act of a third person directed against an employee because of the employee's employment.

(b) No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self-defense, or by the employee's intoxication.

(c) A claim for mental stress resulting solely from disciplinary action taken in good faith by the employer shall not be allowed; provided that if a collective bargaining agreement or other employment agreement specifies a different standard than good faith for disciplinary actions, the standards set in the collective bargaining agreement or other employment agreement shall be applied in lieu of the good faith standard. For purposes of this subsection, the standards set in the collective bargaining agreement or other employment agreement shall be applied in any proceeding before the department, the appellate board, and the appellate courts. [L 1963, c 116, pt of §1; Supp, §97-3; HRS §386-3; gen ch 1985; am L 1995, c 234, §6; am L 1998, c 224, §2]

Cross References

Police officers injured while off-duty covered, see §52D-15.

Attorney General Opinions

Where employee at work is injured and dies as a result of an assault by a third party, compensation should be awarded notwithstanding the assault may have arisen from personal matters. Att. Gen. Op. 73-4.

Law Journals and Reviews

Suicide was compensable injury by disease caused by the employment. Haw. Supp, 4 HBJ, no. 3, at 24 (1966).

Death by heart attack was not compensable because there was no causal relationship between work and death. Haw. Supp, 5 HBJ, no. 1, at 38 (1967).

Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death from Overwork" in Japan. 21 UH L. Rev. 169 (1999).

Mitchell v. State and HRS §386-3: Workers' Compensation Reform in the State of Hawai‘i. 21 UH L. Rev. 807 (1999).

Hawai‘i's Workers' Compensation Scheme: An Employer's License to Kill? 29 UH L. Rev. 211 (2006).

Case Notes

Course of employment. 66 F. Supp. 875 (1946); 34 H. 221 (1937).

Employee suffered work-related injury when employee sustained a psychogenic disability due to employee's employment. 714 F. Supp. 1108 (1989).

"Out of" and "in the course of". 24 H. 324 (1918).

Covers workers under nonmaritime contract of employment injured aboard ship. 26 H. 737 (1923).

"By accident", "arising out of", and "course of employment". 26 H. 785 (1923); 37 H. 556 (1947); 38 H. 384 (1949); 40 H. 660 (1955).

Causal connection. 33 H. 576 (1935).

Cancer. 34 H. 717 (1938).

On death from cerebral hemorrhage as arising out of employment. 43 H. 94 (1959).

Reasonable evidence of disease proximately caused. 43 H. 337 (1959).

Where employee is injured on a business trip, employee's personal activities preceding the business activity are immaterial. 52 H. 242, 473 P.2d 561 (1970).

Mental disabilities arising out of employment are compensable. 53 H. 32, 487 P.2d 278 (1971).

Injury occurring off the premises during a coffee break is compensable if it occurred in course of reasonable and necessary activity incident to such break. 54 H. 66, 502 P.2d 1399 (1972).

Influenza is a compensable injury. 59 H. 551, 584 P.2d 119 (1978).

"Work connection" test to decide whether heart attack arose out of and in course of employment. 63 H. 642, 636 P.2d 721 (1981).

Claimant's act of returning to claimant's employer's premises for the sole purpose of retrieving a piece of cake for claimant's personal enjoyment bore no relation to an incident or condition of claimant's employment; accordingly, there was no causal connection between claimant's injury and any incident or condition of that employment. 77 H. 100, 881 P.2d 1246 (1994).

Employee's psychological stress injury not compensable as injury was direct consequence of disciplinary action imposed on employee for altering time cards and this prohibited conduct exceeded bounds of employment duties. 80 H. 120, 906 P.2d 127 (1995).

Employee's injury suffered in crossing public street between employer's office and parking lot not in course of employment as parking lot not part of employer's "premises"; employer's office lease merely allowed employees to enter into independent parking stall rental contract with building management. 80 H. 150, 907 P.2d 101 (1995).

Injury did not arise in the course of employment where assault on claimant, though occurring on employer's premises, emanated from personal dispute over auto accident. 80 H. 442, 911 P.2d 77 (1996).

Where teacher-claimant allegedly administered corporal punishment in violation of work-rule prohibiting such conduct, claimant nevertheless sustained compensable stress-related injury from subsequent discipline as claimant was acting within course of employment at time of alleged misconduct. 85 H. 250, 942 P.2d 514 (1997).

An employee's injury caused by a disease is compensable as an "injury by disease", pursuant to this section, when the disease (1) is caused by conditions that are characteristic of or peculiar to the particular trade, occupation, or employment, (2) results from employee's actual exposure to such working conditions, and (3) is due to causes in excess of the ordinary hazards of employment in general. 94 H. 70, 9 P.3d 382 (2000).

In order to identify the "date of injury" required by the department of labor and industrial relations in connection with the filing of a workers' compensation claim under §386-82, a claimant in a case arising under the "injury-by-disease" prong of this section may rely upon the last day of employment as the "date of disability", but this "date of disability" may also be the date of diagnosis of the disabling condition. 94 H. 70, 9 P.3d 382 (2000).

Under the doctrine of substantial deviation, employee was precluded from compensability for injuries received when trying to return employer's vehicle to employer's baseyard over seven hours after normal workday ended where employee left the scope of employment to embark on a purely personal and unauthorized journey to correct a sewer line problem on girlfriend's property halfway around the island, and had dinner, a few beers and a nap at the girlfriend's house. 100 H. 285, 59 P.3d 920 (2002).

Although employee was not physically injured while taking promotion test, psychological injuries employee sustained caused by employee's dissatisfaction with the process for ranking

individuals and the overall grievance and promotion process was compensable; injury that stemmed from that promotion process was incidental to the employment and resulted from an activity that served an important interest of the employer. 100 H. 481, 60 P.3d 882 (2002).

Employee's injury not compensable where employee's injury occurred on public sidewalk outside of employer's business premises, did not occur during a lunch or recreation period, did not occur as an incident of employee's employment, employer did not expressly or impliedly bring after-hours drinking party within employee's orbit of employment and party did not benefit employer in any way. 87 H. 492 (App.), 960 P.2d 162 (1998).

An intentional tort committed by a co-employee acting in the course and scope of his or her employment may be considered an "accident", as defined in this section, if the intentional act was directed against the employee because of the employee's employment; and a co-employee may be considered a "third person" as used in subsection (a). 128 H. 173 (App.), 284 P.3d 946 (2012).

Cited: 2 F. Supp. 2d 1295 (1998); 24 H. 731, 733 (1919).

Employee who sought compensation for the aggravation of employee's asthma resulting from exposure to vog at work was entitled to compensation. 131 H. 545, 319 P.3d 464 (2014).

" **[§386-3.5] Negotiation for benefit coverage.** (a) Notwithstanding any provision of law to the contrary, any employer may determine the benefits and coverage of a policy required under this chapter through collective bargaining with an appropriate bargaining unit; provided that the bargained agreement shall be reviewed by the director to ensure that the agreement does not provide benefits and coverage less than those provided in this chapter. The director shall approve the agreement within ninety days after submittal upon a finding that the agreement provides the benefits and coverage required. This section shall not apply to collective bargaining contracts negotiated pursuant to chapter 89. The director may adopt rules pursuant to chapter 91 to implement this section.

(b) This section shall apply only to collective bargaining agreements negotiated subsequent to June 29, 1995. [L 1995, c 234, §1]

Revision Note

Section was enacted as an addition to part II, but was codified to this part pursuant to §23G-15.

"June 29, 1995" substituted for "the effective date of this Act".

" **§386-4 Voluntary coverage.** Any employer who has individuals in the employer's employment who are not employees as defined in section 386-1 may elect to provide coverage for them under this chapter. During the period for which the election is effective the employer and the individuals in the employer's employment covered thereby shall be deemed to be employees and be subject in all respects to this chapter.

Election by any employer to provide coverage under this chapter shall be made by securing compensation to the individuals in the employer's employment affected thereby in the manner provided in section 386-121 and giving the notice prescribed by section 386-122.

Every employer who elects to provide coverage under the terms of this section shall be bound by the election until January 1 of the next succeeding year and for terms of one year thereafter. Any such employer may elect to discontinue the coverage for personal injuries occurring after the expiration of any such calendar year by filing notice of the election with the director of labor and industrial relations at least sixty days prior to the expiration of any such calendar year and at the same time posting notices to that effect conspicuously in such places of work that they can reasonably be expected to come to the attention of all individuals affected thereby. [L 1963, c 116, pt of §1; Supp, §97-4; HRS §386-4; gen ch 1985]

Case Notes

Cited: 41 H. 603, 605 (1957).

" **§386-5 Exclusiveness of right to compensation; exception.** The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought. [L 1963, c 116, pt of §1; Supp, §97-5; HRS §386-5; gen ch 1985; am L 1992, c 275, §2]

Law Journals and Reviews

Makaneole v. Gampon: Site Owners Vicariously Liable for Negligence of Contractors and Their Employees. 12 UH L. Rev. 481 (1990).

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai‘i. 15 UH L. Rev. 453 (1993).

Hawai‘i's Workers' Compensation Scheme: An Employer's License to Kill? 29 UH L. Rev. 211 (2006).

Case Notes

Statute provides exclusive remedy against fellow employees for work-related injuries. 818 F.2d 210 (1987).

Emotional distress claim was barred. 899 F.2d 845 (1990).

Since Hawaii law bars action for contribution by a third party tortfeasor against the plaintiff's employer, it would preclude employee of government contractor from recovering from the United States the full amount of employee's damages where a portion of those damages were attributable to negligence of the employer. 473 F. Supp. 1077 (1979).

Injured seaman, section does not oust admiralty court of its jurisdiction. 557 F. Supp. 1024 (1983).

No indemnity from United States available to asbestos manufacturers sued for asbestos-related diseases. 603 F. Supp. 599 (1984).

Remedy exclusive. 611 F. Supp. 1285 (1985).

Exclusive remedy for emotional distress claims. 720 F. Supp. 829 (1989).

Claim of negligent or intentional infliction of emotional distress preempted by workers' compensation law. 763 F. Supp. 1544 (1990); 768 F. Supp. 734 (1991).

Section, as amended, could not be applied retroactively. 910 F. Supp. 479 (1995).

Barred emotional distress claims where no sexual harassment or sexual assault alleged. 938 F. Supp. 1503 (1996).

Defendant's motion for partial dismissal denied, where defendant sought dismissal of all negligence-based claims in the action and the gravamen of the motion was that exclusivity provision of Hawaii's workers' compensation statute barred all work-related actions sounding in negligence. 112 F. Supp. 2d 1041 (2000).

Exclusivity provision barred plaintiff's negligence-based counts against defendants, where the counts arose "on account" of a work injury suffered by plaintiff; exception provided in exclusivity provision did not afford plaintiff a cause of action, where plaintiff did not allege sexual harassment or sexual assault. 266 F. Supp. 2d 1233 (2003).

Barred plaintiff's claim for negligent infliction of emotional distress, where plaintiff did not claim sexual harassment or assault. 284 F. Supp. 2d 1261 (2003).

Plaintiff's negligent infliction of emotional distress claim was barred by this section because the claim did not arise out of sexual harassment or sexual assault; "dual persona exception" did not apply to the facts as alleged. 721 F. Supp. 2d 968 (2010).

Where defendant claimed that defendant was entitled to summary judgment based upon worker's compensation exclusivity, as set forth in this section, defendant failed to establish that defendant was plaintiff's employer, as opposed to plaintiff's supervisor, for purposes of this section. 937 F. Supp. 2d 1237 (2013).

Exclusive remedy. 24 H. 97 (1917); 28 H. 383 (1925).

History; purpose of Workmen's Compensation Act; exclusiveness of remedy. 41 H. 442 (1956).

Exclusiveness of remedy, bars wrongful death action. 42 H. 518 (1958).

Right of employee of subcontractor to workers' compensation from the subcontractor did not exclude remedy against general contractor. 50 H. 293, 439 P.2d 669 (1968).

Exclusiveness of remedy. 52 H. 595, 483 P.2d 187 (1971).

Employer may be liable for indemnity based on breach of indemnity agreement. 54 H. 153, 504 P.2d 861 (1972).

Section precludes defendant in tort action from obtaining contribution from employer on theory that the employer was a joint tortfeasor. 54 H. 153, 504 P.2d 861 (1972); 56 H. 598, 546 P.2d 527 (1976); 67 H. 357, 688 P.2d 1139 (1984); 68 H. 22, 702 P.2d 772 (1985).

Third party general contractors are not immune to common law negligence actions by employees of their subcontractors. 54 H. 578, 513 P.2d 156 (1973).

Section precludes third party tortfeasor from bringing action against employer for contribution. 55 H. 375, 520 P.2d 62 (1974).

Section does not preclude per se, third party's indemnity claim against employer. 65 H. 232, 649 P.2d 1149 (1982); 68 H. 171, 707 P.2d 365 (1985).

Where subcontractor fails to provide benefits to its injured worker and the general contractor pays those benefits, the latter is immunized from negligence action brought by injured worker. 66 H. 568, 670 P.2d 457 (1983).

Owner of premises who hired an independent contractor to do work on the premises was not considered an employer. 70 H. 501, 777 P.2d 1183 (1989).

Court did not adopt dual capacity doctrine; found exclusivity of the workers' compensation law constitutional. 71 H. 358, 791 P.2d 1257 (1990).

Claimant not precluded by exclusivity provision of this section from seeking common law tort remedies against employer's insurer where injuries allegedly caused by insurer's denial of medical benefits and disability payments not "work injuries" within scope of chapter 386. 83 H. 457, 927 P.2d 858 (1996).

This chapter does not bar relief on claims filed with the civil rights commission. 85 H. 7, 936 P.2d 643 (1997).

Where statutory employer secured workers' compensation coverage as required under this chapter by paying a fee for that purpose to the lending employer, and employee received a statutory award for work-connected injuries, statutory employer was entitled to tort immunity. 88 H. 140, 963 P.2d 349 (1998).

Where employer newspaper hired newspaper carrier as "independent contractor" under the express terms of employer's own agreement, employer was estopped from claiming tort protection under this section unless and until injured carrier challenged the form-over-substance nature of the agreement and was awarded workers' compensation benefits by the director or appeals board. 89 H. 411, 974 P.2d 51 (1999).

Where plaintiff's claims did not arise under this chapter, the exclusive remedy and original jurisdiction provisions in the workers' compensation statute did not apply, and where plaintiff's claims for relief of tortious conduct on the part of workers' compensation insurer were not within the original jurisdiction of the labor director, trial court erred in granting summary judgment on that basis. 90 H. 407, 978 P.2d 845 (1999).

Section bars neither a minor's tort claims for the minor's in utero injuries, nor any otherwise valid claims of any other party that allegedly derive from minor's injuries. 91 H. 146, 981 P.2d 703 (1999).

The exclusive remedy provision of the workers' compensation law does not bar claims for negligent infliction of emotional distress related to sexual harassment. 97 H. 376, 38 P.3d 95 (2001).

Where law firm's actions as an employer and law firm were not inconsistent and law firm's status as an employer and law firm involved a single legal entity for purposes of the "dual persona" doctrine, trial court did not err in granting law firm's motion to dismiss terminated attorney's negligent investigation claim. 117 H. 92, 176 P.3d 91 (2008).

Where this section unambiguously provides that claims for infliction of emotional distress or invasion of privacy are not subject to the exclusivity provision when such claims arise from

claims for sexual harassment or sexual assault, in which case a civil action may be brought, and plaintiff alleged a claim for emotional distress (negligent investigation) that did not arise out of sexual harassment or sexual assault, such claim was, pursuant to this section, barred. 117 H. 92, 176 P.3d 91 (2008).

Bars third party's indemnity claim against employer where latter owed no duty to third party. 6 H. App. 525, 735 P.2d 939 (1987).

Exclusive remedy for claims of negligent and intentional infliction of emotional distress. 9 H. App. 21, 821 P.2d 937 (1991).

An employee may bring action against employer for intentional infliction of emotional distress caused by discrimination in violation of §378-2, and this action is not barred by exclusivity provision of this section. 87 H. 57 (App.), 951 P.2d 507 (1998).

Section does not bar a child from bringing a tort action against mother's employer for in utero injuries child personally sustained, allegedly as a result of a work-related accident involving the mother. 91 H. 157 (App.), 981 P.2d 714 (1999).

Where record revealed that the parties disputed at least two material facts--whose work was being done by plaintiff when plaintiff was injured and who controlled plaintiff's work at the job site--defendant failed to produce evidence that defendant was a "statutory employer" for workers' compensation purposes; thus, circuit court erred in granting summary judgment to defendant because defendant had not demonstrated that it was immune from suit and was therefore entitled to judgment as a matter of law. 124 H. 230 (App.), 239 P.3d 1280 (2010).

This section and the workers' compensation law as a whole mandated the conclusion that the workers' compensation remedies granted to employee excluded all other liabilities of employer to employee on account of personal injuries employee allegedly suffered arising out of and in the course of employee's employment; also, §386-8 and this section did not allow employee to pursue suit against the employer for the alleged wilful and wanton misconduct of employee's fellow employees acting in the course and scope of their employment. 128 H. 173 (App.), 284 P.3d 946 (2012).

Cited: 23 H. 291, 294 (1916); 56 H. 544, 545 P.2d 687 (1976).

Where the plaintiffs alleged damages resulting from exposure to a chemical pesticide allegedly manufactured or utilized by the employers, the workers' compensation law was the exclusive remedy for claims against the employers for the alleged injuries. Also, more than one employing entity can claim the

liability protection of the exclusivity provision in this section. 132 H. 478 (App.), 323 P.3d 122 (2014).

Where the plaintiffs proposed an amended complaint that no longer alleged that the defendants were the plaintiffs' employers, taking the amended allegations as true, the workers' compensation law would not bar the claims against the defendants. 132 H. 478 (App.), 323 P.3d 122 (2014).

" **§386-6 Territorial applicability.** (a) This chapter shall be applicable to all work injuries sustained by employees within the territorial boundaries of the State.

(b) If an employee who has been hired in the State suffers work injury, the employee shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right to compensation shall exclude all other liability of the employer for damages as provided in section 386-5. All contracts of hire of employees made within the State shall be deemed to include an agreement to that effect.

(c) If an employee who has been hired without the State is injured while engaged in the business of the employee's employer, and is entitled to compensation for the injury under the law of the state or territory where the employee was hired, the employee shall be entitled to enforce against the employee's employer the employee's rights in this State if the employee's rights are such that they can reasonably be determined and dealt with by the director of labor and industrial relations, the appellate board, and the court in this State. [L 1963, c 116, pt of §1; Supp, §97-6; HRS §386-6; am L 2016, c 55, §10]

Case Notes

Not exclusive remedy where emotional distress is caused by wilful and wanton conduct of corporate officer. 720 F. Supp. 829 (1989).

Claimant not entitled to rely on foreign law where in proceedings below, claimant not only failed to rely on foreign law but affirmatively relied on Hawaii law. 54 H. 98, 503 P.2d 434 (1972).

Employee "hired in the State" construed. 59 H. 551, 584 P.2d 119 (1978).

" **§386-7 Interstate and foreign commerce and maritime employment.** To the extent permissible under the Constitution and the laws of the United States, this chapter shall apply to employees and employers engaged in interstate and foreign commerce and to employees in maritime employment and their

employers not otherwise provided for by the laws of the United States. [L 1963, c 116, pt of §1; Supp, §97-7; HRS §386-7]

Case Notes

Employment of all decedents, circumstances of death, and purpose of mission bore significant relationship to traditional maritime activity. 557 F. Supp. 1024 (1983).

" **§386-8 Liability of third person.** (a) When a work injury for which compensation is payable under this chapter has been sustained under circumstances creating in some person other than the employer or another employee of the employer acting in the course of employment a legal liability to pay damages on account thereof, the injured employee or the injured employee's dependents (hereinafter referred to collectively as "the employee") may claim compensation under this chapter and recover damages from that third person.

(b) If the employee commences an action against a third person, the employee shall without delay give the employer written notice of the action and the name and location of the court in which the action is brought by personal service or registered mail. The employer, at any time before trial on the facts, may join as party plaintiff.

(c) If within nine months after the date of the personal injury the employee has not commenced an action against a third person, the employer, having paid or being liable for compensation under this chapter, shall be subrogated to the rights of the injured employee. Except as limited by chapter 657, the employee may at any time commence an action or join in any action commenced by the employer against a third person.

(d) No release or settlement of any claim or action under this section is valid without the written consent of both employer and employee. The entire amount of the settlement after deductions for attorney's fees and costs as provided in this section is subject to the employer's right of reimbursement for the employer's compensation payments under this chapter and the employer's expenses and costs of action.

(e) If the action is prosecuted by the employer alone, the employer shall be entitled to be paid from the proceeds received as a result of any judgment for damages, or settlement in case the action is compromised before judgment, the reasonable litigation expenses incurred in preparation and prosecution of the action, together with a reasonable attorney's fee, which shall be based solely upon the services rendered by the employer's attorney in effecting recovery both for the benefit of the employer and the employee. After the payment of the

expenses and attorney's fee, the employer shall apply out of the amount of the judgment or settlement proceeds an amount sufficient to reimburse the employer for the amount of the employer's expenditure for compensation and shall pay any excess to the injured employee or other person entitled thereto.

(f) If the action is prosecuted by the employee alone, the employee shall be entitled to apply out of the amount of the judgment for damages, or settlement in case the action is compromised before judgment, the reasonable litigation expenses incurred in preparation and prosecution of the action, together with a reasonable attorney's fee, which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of the expenses and attorney's fee, there shall be applied out of the amount of the judgment or settlement proceeds, the amount of the employer's expenditure for compensation, less the employer's share of the expenses and attorney's fee. On application of the employer, the court shall allow as a first lien against the amount of the judgment for damages or settlement proceeds, the amount of the employer's expenditure for compensation, less the employer's share of the expenses and attorney's fee.

(g) If the action is prosecuted both by the employee and the employer, in a single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, there shall first be paid from any judgment for damages recovered, or settlement proceeds in case the action or actions are settled before judgment, the reasonable litigation expenses incurred in preparation and prosecution of the action or actions, together with reasonable attorney's fees based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. After the payment of the expenses and attorneys' fees, there shall be applied out of the amount of the judgment for damages, or settlement proceeds an amount sufficient to reimburse the employer for the amount of the employer's expenditure for compensation and any excess shall be paid to the injured employee or other person entitled thereto.

(h) If the parties are unable to agree upon the amount of reasonable litigation expenses and the amount of attorneys' fees under this section, the expenses and attorneys' fees shall be fixed by the court.

(i) After reimbursement for the employer's compensation payments, the employer shall be relieved from the obligation to

make further compensation payments to the employee under this chapter up to the entire amount of the balance of the settlement or the judgment, if satisfied, as the case may be, after deducting the cost and expenses, including attorneys' fees.

(j) The amount of compensation paid by the employer or the amount of compensation to which the injured employee is entitled shall not be admissible in evidence in any action brought to recover damages.

(k) Another employee of the same employer shall not be relieved of that employee's liability as a third party, if the personal injury is caused by that employee's wilful and wanton misconduct.

(l) If the special compensation fund has paid or is liable for any compensation under this chapter, the fund shall be entitled to all the rights and remedies granted an employer under this section; provided that the employer's right to reimbursement for compensation payments and expenses under this chapter shall have priority. [L 1963, c 116, pt of §1; Supp, §97-8; am L 1967, c 53, §1; HRS §386-8; am L 1969, c 13, §1; am L 1970, c 58, §1; am L 1973, c 144, §1; am L 2016, c 55, §11]

Cross References

Mailing of notice, see §1-28.

Rules of Court

Consolidation of actions, see HRCP rule 42.
Intervention, see HRCP rule 24.

Law Journals and Reviews

Makaneole v. Gampon: Site Owners Vicariously Liable for Negligence of Contractors and Their Employees. 12 UH L. Rev. 481 (1990).

Case Notes

Employer or insurance carrier may be required to pay share of attorney's fees proportionate to total amount of compensation benefits it would have had to pay but for settlement of third party action. 625 F.2d 314 (1980).

Did not allow claim against defendant individually for negligent infliction of emotional distress; section may allow claim for intentional infliction of emotional distress. 938 F. Supp. 1503 (1996).

Damages awarded against third party. 23 H. 524 (1916).

Section not applicable when person for whose compensation the carrier is liable is the widow of the decedent whose death was caused by the wrongful act or neglect of a third person. 32 H. 153 (1931).

Election, employer or third party. 32 H. 446 (1932).

Suit by next friend appointed solely for that purpose, not an election. 32 H. 928 (1933).

Negligence suit may be filed by an employee of a subcontractor against the general contractor and general contractor's employees. 50 H. 293, 439 P.2d 669 (1968).

Employer entitled to attorney's fees out of judgment recovered from third party tortfeasor but not out of settlement claim. 51 H. 437, 462 P.2d 196 (1969).

Section preserves employee's right of action in common law or under a statute against a third party; it does not establish an independent claim. 63 H. 273, 626 P.2d 182 (1981).

Co-employee liable to injured employee or nonemployee third-party plaintiff for injury caused by co-employee's wilful and wanton misconduct. 68 H. 22, 702 P.2d 772 (1985).

Notwithstanding the language of this statute, disclosure of workers' compensation evidence, including the amount, may be appropriate where some relevant purpose for allowing its admission develops in trial. 79 H. 14, 897 P.2d 941 (1995).

Employer's reliance on the provisions of this section was reasonable; employer had no duty to intervene until it knew or reasonably should have known that plaintiff would dismiss plaintiff's claims against defendant without consent. 79 H. 352, 903 P.2d 48 (1995).

Where plaintiff stipulated to dismiss plaintiff's claims against defendant without the written consent of plaintiff's employer, the stipulation dismissing all claims with prejudice was invalid. 79 H. 352, 903 P.2d 48 (1995).

Co-employee liability claims based on "wilful and wanton misconduct" must be proven by clear and convincing evidence. 82 H. 1, 919 P.2d 263 (1996).

"Wilful and wanton misconduct" exception to co-employee immunity under this section includes reckless conduct, where specific intent by co-employee to cause injury is not required. 82 H. 1, 919 P.2d 263. (1996)

Under §386-73, this section, and Hawaii administrative rule §12-10-31, a settlement or compromise of future workers' compensation benefits cannot be valid or binding without the consent or approval of the director of labor and industrial relations. 90 H. 152, 977 P.2d 160 (1999).

Under this section, the employer must bear a proportionate share of the employee's attorney's fees and costs incurred while pursuing recovery from a third party tortfeasor; the employer,

and/or its workers' compensation insurance carrier, must bear its share of the employee's attorney's fees and costs in proportion to the present and future benefits derived from a third party settlement or judgment. 92 H. 515, 993 P.2d 549 (2000).

Assuming defendants' claims for "unreasonable failure to consent" and "negligent claims handling" fell within the interference with contract rights exception of §662-15(4), it could not be said that the State improperly interfered with the alleged settlement agreement because, pursuant to this section, the State was a necessary party to such agreement. 114 H. 202, 159 P.3d 814 (2007).

There is nothing in the case law or in the legislative history of this section to support the imposition of a duty on employers in favor of tortfeasors regarding consent to a third-party settlement; thus, trial court did not err in ruling that the State did not owe defendants an actionable duty and thus, did not err in dismissing defendants' cross-claim against the State. 114 H. 202, 159 P.3d 814 (2007).

Trial court did not abuse its discretion in setting aside the stipulation to dismiss the case with prejudice where, pursuant to this section, neither the settlement nor the stipulation was valid without the State's written consent; this section's plain and unambiguous language required the State to consent in writing to validate the settlement between the parties, and the State's letter did not constitute written consent to the settlement as required, but had instead proposed an alternative settlement. 114 H. 202, 159 P.3d 814 (2007).

The statutory scheme and legislative history of this section indicated that the phrase "except as limited by chapter 657" was not intended to restrict an employee's right to intervene in a lawsuit that was timely filed by his or her employer; thus, employee was not barred by the statute of limitations under §657-7 to intervene in plaintiff insurer's timely filed suit, and the circuit court erred in granting defendant's motion for summary judgment. 126 H. 406, 271 P.3d 1165 (2012).

No abuse of discretion in requiring insurance company to pay one-half of the employee's court expenses. 2 H. App. 344, 631 P.2d 1209 (1981).

Plaintiff permitted to amend pleading to allege cause of action for wilful and wanton misconduct against defendant employees of same employer. 9 H. App. 21, 821 P.2d 937 (1991).

Where an employee pursues a third-party action "alone", this section requires that an employer is only entitled to a first lien in the amount of its workers' compensation expended, less the employer's "share" of attorneys' fees and expenses. 92 H. 524 (App.), 993 P.2d 558 (1998).

Where employer intervened before any trial on the facts, trial court did not abuse discretion by allowing employer to intervene. 92 H. 524 (App.), 993 P.2d 558 (1998).

Section 386-5 and the workers' compensation law as a whole mandated the conclusion that the workers' compensation remedies granted to employee excluded all other liabilities of employer to employee on account of personal injuries employee allegedly suffered arising out of and in the course of employee's employment; also, §386-5 and this section did not allow employee to pursue suit against the employer for the alleged wilful and wanton misconduct of employee's fellow employees acting in the course and scope of their employment. 128 H. 173 (App.), 284 P.3d 946 (2012).

Cited: 721 F. Supp. 2d 947 (2010).

" **§386-8.5 Limits of third party liability.** (a) Notwithstanding section 386-8 and any other law to the contrary, when a work injury for which compensation is payable under this chapter has been sustained, the discussion or furnishing of, or failure to discuss or furnish, or failure to enforce any safety, health, or personal conduct provision to protect employees against work injuries, in any collective bargaining agreement or in negotiations thereon, shall not subject a labor organization representing the injured employee to any civil liability for the injury.

(b) As used in this section:

"Health provision" includes but is not limited to health inspections and advisory services.

"Labor organization" means any organization that exists and is constituted for the purposes, in whole or in part, of collective bargaining or dealing with employers, concerning grievances, terms, or conditions of employment, or of other mutual aid or protection, and includes both private industry and public employment labor organizations.

"Personal conduct provision" includes but is not limited to contractual language covering sexual harassment or assault and related infliction of emotional distress or invasion of privacy.

"Safety provision" includes but is not limited to safety inspections and advisory services.

(c) No construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project shall be liable for any injury on the construction project resulting from the employer's failure to comply with safety standards on the construction project for

which compensation is recoverable under this chapter unless the responsibility for the compliance of safety practices is specifically assumed by contract or by other conduct of the construction design professional or any employee of the construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project. The limitation of liability provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications. [L 1980, c 100, §2; am L 1989, c 300, §3; am L 1992, c 275, §3; am L 2016, c 55, §12]

" **§386-9 Contracting out forbidden.** Except as provided in section 386-78, no contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter. [L 1963, c 116, pt of §1; Supp, §97-9; HRS §386-9; am L 1969, c 17, §1]

Case Notes

Section preempted by ERISA to the extent it prohibits offsetting workers' compensation payments intended to provide income replacement against pension benefits. 679 F.2d 1319 (1982).

Cited: 23 H. 291, 294 (1916); 31 H. 672, 673 (1930).

" **§386-10 Out of state employers.** Any employer whose principal place of business is outside the State shall, prior to the commencement of employment within the State, register with the director the employer's name, approximate total wages to be paid, and the dates of employment activity within the State. The employer shall file with the director, in the form prescribed by the director, a notice of insurance as required by section 386-122. [L 1986, c 132, §1; am L 1989, c 24, §1]

"PART II. COMPENSATION

A. Medical and Rehabilitation Benefits

Cross References

Limitation on charges, see §431:10C-308.5.

§386-21 Medical care, services, and supplies. (a) Immediately after a work injury sustained by an employee and so long as reasonably needed the employer shall furnish to the

employee all medical care, services, and supplies as the nature of the injury requires. The liability for the medical care, services, and supplies shall be subject to the deductible under section 386-100.

(b) Whenever medical care is needed, the injured employee may select any physician or surgeon who is practicing on the island where the injury was incurred to render medical care. If the services of a specialist are indicated, the employee may select any physician or surgeon practicing in the State. The director may authorize the selection of a specialist practicing outside the State where no comparable medical attendance within the State is available. Upon procuring the services of a physician or surgeon, the injured employee shall give proper notice of the employee's selection to the employer within a reasonable time after the beginning of the treatment. If for any reason during the period when medical care is needed, the employee wishes to change to another physician or surgeon, the employee may do so in accordance with rules prescribed by the director. If the employee is unable to select a physician or surgeon and the emergency nature of the injury requires immediate medical attendance, or if the employee does not desire to select a physician or surgeon and so advises the employer, the employer shall select the physician or surgeon. The selection, however, shall not deprive the employee of the employee's right of subsequently selecting a physician or surgeon for continuance of needed medical care.

(c) The liability of the employer for medical care, services, and supplies shall be limited to the charges computed as set forth in this section. The director shall make determinations of the charges and adopt fee schedules based upon those determinations. Effective January 1, 1997, and for each succeeding calendar year thereafter, the charges shall not exceed one hundred ten per cent of fees prescribed in the Medicare Resource Based Relative Value Scale applicable to Hawaii as prepared by the United States Department of Health and Human Services, except as provided in this subsection. The rates or fees provided for in this section shall be adequate to ensure at all times the standard of services and care intended by this chapter to injured employees.

If the director determines that an allowance under the medicare program is not reasonable or if a medical treatment, accommodation, product, or service existing as of June 29, 1995, is not covered under the medicare program, the director, at any time, may establish an additional fee schedule or schedules not exceeding the prevalent charge for fees for services actually received by providers of health care services, to cover charges for that treatment, accommodation, product, or service. If no

prevalent charge for a fee for service has been established for a given service or procedure, the director shall adopt a reasonable rate which shall be the same for all providers of health care services to be paid for that service or procedure.

The director shall update the schedules required by this section every three years or annually, as required. The updates shall be based upon:

(1) Future charges or additions prescribed in the Medicare Resource Based Relative Value Scale applicable to Hawaii as prepared by the United States Department of Health and Human Services; or

(2) A statistically valid survey by the director of prevalent charges for fees for services actually received by providers of health care services or based upon the information provided to the director by the appropriate state agency having access to prevalent charges for medical fee information.

When a dispute exists between an insurer or self-insured employer and a medical services provider regarding the amount of a fee for medical services, the director may resolve the dispute in a summary manner as the director may prescribe; provided that a provider shall not charge more than the provider's private patient charge for the service rendered.

When a dispute exists between an employee and the employer or the employer's insurer regarding the proposed treatment plan or whether medical services should be continued, the employee shall continue to receive essential medical services prescribed by the treating physician necessary to prevent deterioration of the employee's condition or further injury until the director issues a decision on whether the employee's medical treatment should be continued. The director shall make a decision within thirty days of the filing of a dispute. If the director determines that medical services pursuant to the treatment plan should be or should have been discontinued, the director shall designate the date after which medical services for that treatment plan are denied. The employer or the employer's insurer may recover from the employee's personal health care provider qualified pursuant to section 386-27, or from any other appropriate occupational or non-occupational insurer, all the sums paid for medical services rendered after the date designated by the director. Under no circumstances shall the employee be charged for the disallowed services, unless the services were obtained in violation of section 386-98. The attending physician, employee, employer, or insurance carrier may request in writing that the director review the denial of the treatment plan or the continuation of medical services.

(d) The director, with input from stakeholders in the workers' compensation system, including but not limited to insurers, health care providers, employers, and employees, shall establish standardized forms for health care providers to use when reporting on and billing for injuries compensable under this chapter. The forms may be in triplicate, or in any other configuration so as to minimize, to the extent practicable, the need for a health care provider to fill out multiple forms describing the same workers' compensation case to the department, the injured employee's employer, and the employer's insurer.

(e) If it appears to the director that the injured employee has wilfully refused to accept the services of a competent physician or surgeon selected as provided in this section, or has wilfully obstructed the physician or surgeon, or medical, surgical, or hospital services or supplies, the director may consider such refusal or obstruction on the part of the injured employee to be a waiver in whole or in part of the right to medical care, services, and supplies, and may suspend the weekly benefit payments, if any, to which the employee is entitled so long as the refusal or obstruction continues.

(f) Any funds as are periodically necessary to the department to implement the foregoing provisions may be charged to and paid from the special compensation fund provided by section 386-151.

(g) In cases where the compensability of the claim is not contested by the employer, the medical services provider shall notify or bill the employer, insurer, or the special compensation fund for services rendered relating to the compensable injury within two years of the date services were rendered. Failure to bill the employer, insurer, or the special compensation fund within the two-year period shall result in the forfeiture of the medical services provider's right to payment. The medical [services] provider shall not directly charge the injured employee for treatments relating to the compensable injury. [L 1963, c 116, pt of §1; Supp, §97-20; am L 1967, c 16, §1; HRS §386-21; am L 1973, c 78, §1; am L 1979, c 132, §1; am L 1985, c 296, §15; gen ch 1985; am L 1987, c 120, §1; am L 1995, c 234, §7; am L 1996, c 260, §2; am L 1998, c 191, §1; am L 2006, c 191, §1; am L Sp 2009, c 26, §1]

Case Notes

Voluntary, involuntary medical attendance. 32 H. 503 (1932).

A decision that finally adjudicates the matter of medical and temporary disability benefits under §§386-31(b), 386-32(b), and this section is an appealable final order under §91-14(a), even

though the matter of permanent disability benefits under §§386-31(a) and 386-32(a) has been left for later determination. 89 H. 436, 974 P.2d 1026 (1999).

There is no statutory authority granted to board to apportion the medical treatment coverage afforded under this section between a preexisting dental condition and the accident-induced temporomandibular joint disorder; where substantial evidence in record indicated that the medical treatment proposed was necessitated by the nature of the injury, the employer was required to provide compensation for "all" medical treatment required. 93 H. 116 (App.), 997 P.2d 42 (2000).

Cited: 24 H. 731, 733 (1919).

" **[§386-21.2] Treatment plans.** (a) A physician may transmit a treatment plan to an employer by mail or facsimile; provided that the physician shall send the treatment plan to an address or facsimile number provided by the employer.

(b) Beginning January 1, 2021, an employer shall allow a physician to transmit a treatment plan to an employer by mail, facsimile, or secure electronic means; provided that the physician shall send the treatment plan to an address or facsimile number provided by the employer.

(c) A treatment plan shall be deemed received by an employer when the plan is sent by mail or facsimile with reasonable evidence showing that the treatment plan was received.

(d) A treatment plan shall be deemed accepted if an employer fails to file with the director:

(1) An objection to the treatment plan;

(2) Any applicable documentary evidence supporting the denial; and

(3) A copy of the denied treatment plan,

copying the physician and the injured employee.

(e) After acceptance of the treatment plan, an employer may file an objection to the plan if new documentary evidence supporting the denial is received by the employer. [L 2016, c 101, §2]

" **[§386-21.5] Publication of fees by prepaid health care plan contractors.** (a) A prepaid health care plan contractor as defined in section 393-3 shall provide the director upon request with a schedule of all the maximum allowable medical fees.

(b) Pursuant to section 386-21(c), the director shall review and, to the extent possible, shall use the fee obtained under subsection (a) as the primary guideline in establishing prevalent charges for medical care, services, and supplies in

adopting the fee schedule for workers' compensation claims. [L 1995, c 234, §2]

" **[§386-21.7] Prescription drugs; pharmaceuticals.** (a) Notwithstanding any other provision to the contrary, immediately after a work injury is sustained by an employee and so long as reasonably needed, the employer shall furnish to the employee all prescription drugs as the nature of the injury requires. The liability for the prescription drugs shall be subject to the deductible under section 386–100.

(b) Payment for all forms of prescription drugs including repackaged and relabeled drugs shall be one hundred forty per cent of the average wholesale price set by the original manufacturer of the dispensed prescription drug as identified by its National Drug Code and as published in the Red Book: Pharmacy's Fundamental Reference as of the date of dispensing, except where the employer or carrier, or any entity acting on behalf of the employer or carrier, directly contracts with the provider or the provider's assignee for a lower amount.

(c) Payment for compounded prescription drugs shall be the sum of one hundred forty per cent of the average wholesale price by gram weight of each underlying prescription drug contained in the compounded prescription drug. For compounded prescription drugs, the average wholesale price shall be that set by the original manufacturer of the underlying prescription drug as identified by its National Drug Code and as published in the Red Book: Pharmacy's Fundamental Reference as of the date of compounding, except where the employer or carrier, or any entity acting on behalf of the employer or carrier, directly contracts with the provider or provider's assignee for a lower amount.

(d) All pharmaceutical claims submitted for repackaged, relabeled, or compounded prescription drugs shall include the National Drug Code of the original manufacturer. If the original manufacturer of the underlying drug product used in repackaged, relabeled, or compounded prescription drugs is not provided or is unknown, then reimbursement shall be one hundred forty per cent of the average wholesale price for the original manufacturer's National Drug Code number as listed in the Red Book: Pharmacy's Fundamental Reference of the prescription drug that is most closely related to the underlying drug product.

(e) Notwithstanding any other provision in this section to the contrary, equivalent generic drug products shall be substituted for brand name pharmaceuticals unless the prescribing physician certifies that no substitution shall be prescribed because the injured employee's condition does not tolerate an equivalent generic drug product.

(f) For purposes of this section, "equivalent generic drug product" has the same meaning as provided in section 328-91. [L 2014, c 231, §2]

" **§386-22 Artificial member and other aids.** Where an injury results in the amputation of an arm, hand, leg, or foot, or the enucleation of an eye, or the loss of natural or artificial teeth, or the loss of vision which may be partially or wholly corrected by the use of lenses, the employer shall furnish an artificial member to take the place of each member lost and, in the case of correctible loss of vision, a set of suitable glasses. Where it is certified to be necessary by a licensed physician or surgeon chosen by agreement of the employer and the employee, the employer shall furnish such other aids, appliances, apparatus, and supplies as are required to cure or relieve the effects of the injury. When a licensed physician or surgeon, chosen as above, certifies that it is necessitated by ordinary wear, the employer shall repair or replace such artificial members, aids, appliances, or apparatus.

Where an employee suffers the loss of or damage to any artificial member, aid, appliance, or apparatus by accident arising out of and in the course of the employee's employment, the employer shall repair or replace the member, aid, appliance, or apparatus whether or not the same was furnished initially by the employer.

The liability of the employer for artificial members, aids, appliances, apparatus, or supplies as is imposed by this section shall be limited to such charges as prevail in the same community for similar equipment of a person of a like standard of living when the equipment is paid for by that person and shall be subject to the deductible under section 386-100. [L 1963, c 116, pt of §1; Supp, §97-21; HRS §386-22; am L 1985, c 296, §16; gen ch 1985]

" **§386-23 Services of attendant.** When the director of labor and industrial relations finds that the service of an attendant for the injured employee is constantly necessary the director may award a monthly sum of not more than the product of four times the effective maximum weekly benefit rate prescribed in section 386-31, as the director may deem necessary, for the procurement of such service. Payment for the services of an attendant shall be the liability of the employer, but shall be subject to the deductible under section 386-100. [L 1963, c 116, pt of §1; Supp, §97-22; HRS §386-23; am L 1971, c 25, §1; am L 1976, c 17, §1; am L 1985, c 296, §17; gen ch 1985]

Case Notes

Section allows compensation for attendant care services so long as claimants can establish their inability to function or perform activities of daily living on a consistent basis. 83 H. 361, 926 P.2d 1284 (1996).

" **§386-23.5 Services of attendant, allowance adjustments.** (a) When the maximum allowed for procurement of services of an attendant as provided in section 386-23 is changed by law, any employee who has been totally and continuously disabled and has been awarded and is receiving a sum under this chapter to procure such services in an amount which is less than the new maximum allowed for this purpose shall be entitled, upon application, to a supplemental allowance calculated in accordance with the following provisions:

(1) In any case where a totally disabled employee is receiving the maximum allowed at the time the award was made, the supplemental allowance shall be an amount which, when added to such award, will equal the new maximum allowance.

(2) In any case where a totally disabled employee is receiving less than the maximum allowed at the time the award was made, the supplemental allowance shall be an amount equal to the difference between the amount the disabled employee is receiving and a percentage of the new maximum allowance by multiplying it by a fraction, the numerator of which is the amount the employee is receiving and the denominator of which is the maximum monthly allowance applicable at the time such award was made.

(b) As of July 1, 1973, any employee who has been totally and continuously disabled and has been awarded and is receiving a sum under this chapter to procure services of an attendant in an amount which is less than the maximum allowed for this purpose, shall be entitled, upon application, to an additional amount calculated in accordance with the following provisions:

(1) In any case where a totally disabled person is receiving the maximum allowed under this chapter at the time the award was made, the supplemental allowance shall be an amount which, when added to such award, will equal the maximum allowance effective as of the date of this section.

(2) In any case where a totally disabled person is receiving less than the maximum allowed under this chapter at the time the award was made, the supplemental allowance shall be an amount equal to the difference between the amount the disabled employee is

receiving and a percentage of the maximum allowance as of July 1, 1973, by multiplying it by a fraction, the numerator of which is the amount the employee is receiving and the denominator of which is the maximum monthly allowance applicable at the time such award was made.

(c) Any supplemental allowances awarded by the director pursuant to this section shall be paid to the employee from the special compensation fund. [L 1973, c 101, §1; gen ch 1985]

Revision Note

"July 1, 1973" substituted for "the effective date of this section".

" **§386-23.6 Weekly benefit adjustments for recipients of services of attendants.** Any permanently and totally disabled employee awarded and receiving compensation under section 386-23 or 386-23.5, but:

(1) Who is no longer receiving weekly benefits shall, without application, be entitled to a resumption of weekly benefits from the special compensation fund in an amount equal to a percentage of the current maximum weekly benefit determined by multiplying the current maximum weekly benefit rate by a fraction, the numerator of which is the weekly benefit amount the employee had been receiving and the denominator of which is the maximum weekly benefit rate applicable at the time the weekly benefit award was made.

(2) Who is receiving one-half of weekly benefits from the special compensation fund shall be entitled to weekly benefits in an amount equal to a percentage of the current maximum weekly benefit rate determined by multiplying the current maximum weekly benefit rate by a fraction, the numerator of which is twice the amount the employee had been receiving and the denominator of which is the maximum weekly benefit rate applicable at the time the weekly benefit award was made. [L 1974, c 52, §1; am L 1980, c 232, §21; gen ch 1985]

" **§386-24 Medical rehabilitation.** The medical services and supplies to which an employee suffering a work injury is entitled shall include such services, aids, appliances, apparatus, and supplies as are reasonably needed for the employee's greatest possible medical rehabilitation. The director of labor and industrial relations, on competent medical advice, shall determine the need for or sufficiency of medical

rehabilitation services furnished or to be furnished to the employee and may order any needed change of physician, hospital or rehabilitation facility. [L 1963, c 116, pt of §1; Supp, §97-23; HRS §386-24; gen ch 1985]

" **§386-25 Vocational rehabilitation.** (a) The purposes of vocational rehabilitation are to restore an injured worker's earnings capacity as nearly as possible to that level that the worker was earning at the time of injury and to return the injured worker to suitable gainful employment in the active labor force as quickly as possible in a cost-effective manner. Vocational rehabilitation shall not be available for public employees who have retired from a public employer, as defined in section 76-11, with whom they sustained their work injury.

Employees of public employers, as defined in section 76-11, who are eligible for their respective public employer's return to work program, shall participate in and complete the return to work program, including temporary light duty placement efforts, as a prerequisite to vocational rehabilitation benefits under this section.

(b) The director may refer employees who may have or have suffered permanent disability as a result of work injuries and who, in the director's opinion, can be vocationally rehabilitated to the department of human services or to private providers of rehabilitation services for vocational rehabilitation services that are feasible. A referral shall be made upon recommendation of the rehabilitation unit established under section 386-71.5 and after the employee has been deemed physically able to participate in rehabilitation by the employee's attending physician. The unit shall include appropriate professional staff and shall have the following duties and responsibilities:

(1) To review and approve rehabilitation plans developed by certified providers of rehabilitation services, whether they be private or public;

(2) To adopt rules consistent with this section that shall expedite and facilitate the identification, notification, and referral of industrially injured employees to rehabilitation services, and establish minimum standards for providers providing rehabilitation services under this section;

(3) To certify private and public providers of rehabilitation services meeting the minimum standards established under paragraph (2); and

(4) To enforce the implementation of rehabilitation plans.

(c) Enrollment in a rehabilitation plan or program shall not be mandatory and the approval of a proposed rehabilitation

plan or program by the injured employee shall be required. The injured employee may select a certified provider of rehabilitation services. Both the certified provider and the injured employee, within a reasonable time after initiating rehabilitation services, shall give proper notice of selection to the employer.

(d) A provider shall submit an initial evaluation report of the employee to the employer and the director within forty-five days of the date of referral or selection. The evaluation shall determine whether the employee requires vocational rehabilitation services to return to suitable gainful employment, identify the necessary services, and state whether the provider can provide these services. The initial evaluation report shall contain:

(1) An assessment of the employee's:
    (A) Current medical status;
    (B) Primary disability;
    (C) Secondary disability;
    (D) Disabilities that are not related to the work injury; and
    (E) Physical or psychological limitations or both.
    If this information is not provided by the treating physician within a reasonable amount of time, information from another physician shall be accepted;

(2) A job analysis addressing the demands of the employee's employment;

(3) A statement from the provider identifying the employee's vocational handicaps in relation to the employee's ability to:
    (A) Return to usual and customary employment; and
    (B) Participate in and benefit from a vocational rehabilitation program;

(4) A statement from the provider determining the feasibility of vocational rehabilitation services, including:
    (A) The provider's ability to assist the employee in the employee's efforts to return to suitable gainful employment;
    (B) An outline of specific vocational rehabilitation services to be provided, justification for the necessity of services, and how the effectiveness of these services is measured; and
    (C) How the vocational rehabilitation services directly relate to the employee obtaining suitable gainful employment; and

(5) The enrollment form and the statement of worker's rights and responsibilities form obtained from the department.

(e) A provider shall file the employee's plan with the approval of the employee. Upon receipt of the plan from the provider, an employee shall have ten days to review and sign the plan. The plan shall be submitted to the employer and the employee and be filed with the director within two days from the date of the employee's signature. A plan shall include a statement of the feasibility of the vocational goal, using the process of:

(1) First determining if the employee's usual and customary employment represents suitable gainful employment, and, should it not;

(2) Next determining if modified work or other work with the same employer represents suitable gainful employment, and, should it not;

(3) Next determining if modified or other employment with a different employer represents suitable gainful employment, and finally, should it not;

(4) Then providing training to obtain employment in another occupational field.

(f) A plan may be approved by the director; provided the plan includes:

(1) A physician's assessment of the employee's physical limitations, psychological limitations, and ability to return to work. If this information is not provided by the treating physician within a reasonable amount of time, information from another physician shall be accepted;

(2) A labor market survey indicating there are reasonable assurances that the proposed occupation for which the employee is to be placed or trained is readily available in the community when placement begins, or there are assurances of reemployment by the employer;

(3) A job analysis of the proposed occupation, setting forth its duties, responsibilities, physical demands, environmental working conditions, specific qualifications needed for entry-level employment, reasonable accommodations, expected estimated earnings, and other relevant information;

(4) The nature and extent of the vocational rehabilitation services to be provided, including:

(A) Specific services to be provided;

(B) Justification for the necessity of the services;

(C) Estimated time frames for delivery of services;

(D) The manner in which the effectiveness of these services is to be measured;
(E) Criteria for determining successful completion of the vocational rehabilitation plan; and
(F) The employee's responsibilities;

(5) A report of tests and copies thereof that have been administered to the employee, including a statement regarding the need for and use of the tests to identify a vocational goal;

(6) If retraining, including on-the-job training, is found to be necessary, the estimated cost of retraining, a description of specific skills to be learned or knowledge acquired with specific time periods and clearly defined measurements of success, and the nature, amount, and duration of living expenses;

(7) The total cost of the plan; and

(8) The employee's approval of the plan.

(g) The employer shall have ten calendar days from the postmark date on which the plan was mailed to submit in writing to the director any objections to the plan.

(h) The director may approve a plan that does not include all of the requirements outlined in subsection (f); provided that the director finds the plan:

(1) Is in the best interest of the employee;

(2) Contains reasonable assurances that the employee will be placed in suitable gainful employment; and

(3) Has been approved by the employee.

(i) If the plan requires the purchase of any tools, supplies, or equipment, the purchase deadline shall be included in the plan. Tools, supplies, and equipment shall be considered to be the property of the employer until the plan is determined by the director to be successfully completed, after which it shall become the property of the employee. If the plan requires the purchase, etc., the employer shall purchase the items prior to the purchase deadline in the plan.

(j) An employee with an approved plan who is determined as able to return to usual and customary employment may choose to complete the plan or request a new plan of which the goal may be the employee's usual and customary employment.

(k) An injured employee's enrollment in a rehabilitation plan or program shall not affect the employee's entitlement to temporary total disability compensation if the employee earns no wages during the period of enrollment. If the employee receives wages for work performed under the plan or program, the employee shall be entitled to temporary total disability compensation in an amount equal to the difference between the employee's average weekly wages at the time of injury and the wages received under

the plan or program, subject to the limitations on weekly benefit rates prescribed in section 386-31(a). The employee shall not be entitled to temporary total disability compensation for any week during this period where the wages equal or exceed the average weekly wages at the time of injury.

(l) The director shall adopt rules for additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training.

(m) If the rehabilitation unit determines that vocational rehabilitation is not possible or feasible, it shall certify the determination to the director.

(n) Except as otherwise provided, determinations of the rehabilitation unit shall be final unless a written request for reconsideration is filed with the rehabilitation unit within ten calendar days of the date of the determination.

The rehabilitation unit shall issue a reconsideration determination to affirm, reverse, or modify the determination or refer the request for reconsideration for hearing.

(o) A reconsideration determination shall be final unless a written request for hearing is filed within ten calendar days from the date of the reconsideration determination. All hearings shall be held before a hearings officer designated by the director. A written decision shall be issued in the name of the director.

(p) The eligibility of any injured employee to receive other benefits under this chapter shall in no way be affected by the employee's entrance upon a course of vocational rehabilitation as herein provided.

(q) Vocational rehabilitation services for the purpose of developing a vocational rehabilitation plan may be approved by the director and the director may periodically review progress in each case. [L 1963, c 116, pt of §1; Supp, §97-24; HRS §386-25; am L 1970, c 105, §5; am L 1980, c 224, §2; am L 1985, c 296, §2; gen ch 1985; am L 1987, c 339, §4; am L 1998, c 256, §1; am L Sp 2005, c 11, §4; am L 2010, c 18, §1; am L 2015, c 168, §2]

Case Notes

Board properly found claimant not interested or motivated in pursuing vocational rehabilitation or returning to suitable work where claimant moved to remote mainland village, declared claimant was "fully retired", and made unreasonable demands upon employer as conditions for returning to work. 80 H. 239, 909 P.2d 567 (1996).

Board properly terminated claimant's vocational rehabilitation services where it found claimant not interested or motivated in

pursuing vocational rehabilitation. 80 H. 239, 909 P.2d 567 (1996).

Where this section did not provide--expressly or impliedly--that the director has the power to waive an employee's right to vocational rehabilitation (VR) services or that once a permanent partial disability (PPD) award was issued, the right to VR services was extinguished, the director exceeded the bounds of the director's rule-making authority in promulgating Hawaii administrative rule §12-14-36, which created a total bar to VR services when an employee received a PPD award. 117 H. 439, 184 P.3d 191 (2008).

" **§386-26 Guidelines on frequency of treatment and reasonable utilization of health care and services.** The director shall issue guidelines for the frequency of treatment and for reasonable utilization of medical care and services by health care providers that are considered necessary and appropriate under this chapter. The guidelines shall not be considered as an authoritative prescription for health care, nor shall they preclude any health care provider from drawing upon the health care provider's medical judgment and expertise in determining the most appropriate care.

The guidelines shall be adopted pursuant to chapter 91 and shall not interfere with the injured employee's rights to exercise free choice of physicians under section 386-21.

In addition, the director shall adopt updated medical fee schedules referred to in section 386-21, and where deemed appropriate, shall establish separate fee schedules for services of health care providers as defined in section 386-1 to become effective no later than June 30, 1986, in accordance with chapter 91. [L 1985, c 296, pt of §5; am L 1995, c 234, §8; am L 1996, c 260, §3; am L Sp 2005, c 11, §5]

Cross References

Publication of fees by prepaid health care plan contractors, see §386-21.5.

" **§386-27 Qualification and duties of health care providers.** (a) All health care providers rendering health care and services under this chapter shall be qualified by the director and shall remain qualified by satisfying the requirements established in this section. The director shall qualify any person initially who has a license for the practice of:

(1) Medicine or osteopathy under chapter 453;

(2) Dentistry under chapter 448;

(3) Chiropractic under chapter 442;

(4) Naturopathic medicine under chapter 455;
(5) Optometry under chapter 459;
(6) Podiatry under chapter 463E;
(7) Psychology under chapter 465; and
(8) Advanced practice registered nurses under chapter 457.

(b) To remain a qualified provider under this chapter a health care provider shall:

(1) Comply with guidelines established by the director on the frequency of treatment and reasonable utilization of health care and services;
(2) Conform to limitations established by the director for charges on services under medical fee and other fee schedules;
(3) File timely reports required under section 386-96;
(4) Avoid unnecessary and unreasonable referrals of injured employees to other health care providers;
(5) Refrain from ordering unnecessary and unreasonable diagnostic tests and studies;
(6) Remain available as a treating health care provider to injured employees and as an advisor to the director in proceedings under this section; and
(7) Comply with all requirements established under this chapter and by rules and decisions adopted and issued by the director pursuant to this chapter.

(c) Any health care provider who fails to comply with subsections (a) and (b) may be subject to such sanctions deemed just and proper by the director which may include:

(1) Disallowance of fees for services rendered to an injured employee;
(2) Forfeiture of payments for services rendered to an injured employee under this chapter;
(3) Fines of not more than $1,000 for each violation;
(4) Suspension as a qualified provider; and
(5) Disqualification as a provider of services under this chapter.

(d) No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date of the complaint. A copy of the complaint shall be sent to the health care provider charged promptly upon receipt by the director. The director may establish an advisory panel of health care providers consisting of three members, one selected by the complainant, another selected by the health care provider charged, and the third selected by the director who shall assist the director in any case arising under this section. Fees for services rendered by members of the advisory panel shall be paid for by the special

compensation fund. No member of the advisory panel shall be liable in damages for libel, slander, or other defamation of character of any party for any action taken while acting within their capacities as members of the advisory panel.

The director shall issue, where a sanction is ordered under this section, a written decision of findings following a hearing held upon not less [than] twenty days written notice to the complainant and the health care provider charged. No violation shall be found unless the director determines that the violator acted in bad faith. Any person aggrieved by a decision of the director may appeal the decision under section 386-87.

(e) In any case arising under this section, the injured employee treated by the health care provider charged with a violation of this section shall not be a party to the proceeding and shall not appear unless called as a witness before the director or the appellate board. Charges for services rendered by the health care provider alleged to be in violation of this section shall be suspended pending action by the director and the appellate board in cases on appeal.

In any case in which fees for services rendered by a health care provider are disallowed by the director, the health care provider shall be ordered to forfeit payment. [L 1985, c 296, pt of §5; am L 2009, c 11, §48; am L Sp 2009, c 22, §11(2); am L 2016, c 183, §7]

"B. Income and Indemnity Benefits

1. Disability

§386-31 Total disability. (a) Permanent total disability. Where a work injury causes permanent total disability the employer shall pay the injured employee a weekly benefit equal to sixty-six and two-thirds per cent of the employee's average weekly wages, subject to the following limitation:

Beginning January 1, 1975, and during each succeeding twelve-month period thereafter, not more than the state average weekly wage last determined by the director, rounded to the nearest dollar, nor less than $38 or twenty-five per cent of the foregoing maximum amount, rounded to the nearest dollar, whichever is higher.

In the case of the following injuries, the disability caused thereby shall be deemed permanent and total:

(1) The permanent and total loss of sight in both eyes;

(2) The loss of both feet at or before the ankle;

(3) The loss of both hands at or above the wrist;

(4) The loss of one hand and one foot;

(5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or one leg and one arm;

(6) An injury to the skull resulting in incurable imbecility or insanity.

In all other cases the permanency and totality of the disability shall be determined on the facts. No adjudication of permanent total disability shall be made until after two weeks from the date of the injury.

(b) Temporary total disability. Where a work injury causes total disability not determined to be permanent in character, the employer, for the duration of the disability, but not including the first three calendar days thereof, shall pay the injured employee a weekly benefit at the rate of sixty-six and two-thirds per cent of the employee's average weekly wages, subject to the limitations on weekly benefit rates prescribed in subsection (a), or if the employee's average weekly wages are less than the minimum weekly benefit rate prescribed in subsection (a), at the rate of one hundred per cent of the employee's average weekly wages.

If an employee is unable to complete a regular daily work shift due to a work injury, the employee shall be deemed totally disabled for work for that day.

The employer shall pay temporary total disability benefits promptly as they accrue to the person entitled thereto without waiting for a decision from the director, unless this right is controverted by the employer in the employer's initial report of industrial injury. The first payment of benefits shall become due and shall be paid no later than on the tenth day after the employer has been notified of the occurrence of the total disability, and thereafter the benefits due shall be paid weekly except as otherwise authorized pursuant to section 386-53.

The payment of these benefits shall only be terminated upon order of the director or if the employee is able to resume work. When the employer is of the opinion that temporary total disability benefits should be terminated because the injured employee is able to resume work, the employer shall notify the employee and the director in writing of an intent to terminate the benefits at least two weeks prior to the date when the last payment is to be made. The notice shall give the reason for stopping payment and shall inform the employee that the employee may make a written request to the director for a hearing if the employee disagrees with the employer. Upon receipt of the request from the employee, the director shall conduct a hearing as expeditiously as possible and render a prompt decision as specified in section 386-86. If the employee is unable to perform light work, if offered, temporary total disability

benefits shall not be discontinued based solely on the inability to perform or continue to perform light work.

An employer or insurance carrier who fails to comply with this section shall pay not more than $5,000 into the special compensation fund upon the order of the director, in addition to other penalties prescribed in section 386-92.

(1) If the director determines, based upon a review of medical records and reports and other relevant documentary evidence, that an injured employee's medical condition may be stabilized and the employee is unable to return to the employee's regular job, the director shall issue a preliminary decision regarding the employee's entitlement and limitation to benefits and rights under Hawaii's workers' compensation laws. The preliminary decision shall be sent to the affected employee and the employee's designated representative and the employer and the employer's designated representative and shall state that any party disagreeing with the director's preliminary findings of medical stabilization and work limitations may request a hearing within twenty days of the date of the decision. The director shall be available to answer any questions during the twenty-day period from the injured employee and affected employer. If neither party requests a hearing challenging the director's finding the determination shall be deemed accepted and binding upon the parties. In any case where a hearing is held on the preliminary findings, any person aggrieved by the director's decision and order may appeal under section 386-87.

A preliminary decision of the director shall inform the injured employee and the employer of the following responsibilities, benefits, and limitations on vocational rehabilitation benefits that are designed to facilitate the injured employee's early return to suitable gainful employment:

(A) That the injured employee may invoke the employee's rights under section 378-2, 378-32, or 386-142, or all of them, in the event of unlawful discrimination or other unlawful employment practice by the employer; and

(B) That after termination of temporary total disability benefits, an injured employee who resumes work may be entitled to permanent partial disability benefits, which if awarded, shall be paid regardless of the earnings or employment status of the disabled employee at the time.

(2) If the rehabilitation unit determines that an injured employee is not a feasible candidate for rehabilitation and that the employee is unable to resume the employee's regular job, it shall promptly certify the same to the director. Soon thereafter, the director shall conduct a hearing to determine whether the injured employee remains temporarily totally disabled, or whether the employee is permanently partially disabled, or permanently totally disabled. [L 1963, c 116, pt of §1; am L 1965, c 152, §1(a); Supp, §97-30; am L 1967, c 138, §1; HRS §386-31; am L 1969, c 18, §1; am L 1972, c 42, §1; am L 1974, c 153, §2; am L 1975, c 107, §1; am L 1979, c 66, §1; am L 1985, c 296, §3; gen ch 1985; am L 1988, c 37, §1; am L Sp 2005, c 11, §6; am L 2016, c 187, §1]

Case Notes

Right to compensation presupposes disability for work, either total or partial. 34 H. 317 (1937).

"Average", "weekly" defined. 37 H. 517 (1947).

Burden of proof for claimants under odd-lot doctrine discussed. 72 H. 272, 813 P.2d 1386 (1991).

Claimant's temporary total disability payments properly terminated where director's review of medical records and reports found claimant's condition stable and claimant was not feasible candidate for rehabilitation because of lack of motivation. 80 H. 239, 909 P.2d 567 (1996).

Administrative penalties authorized by subsection (b) and §386-92 not intended to provide an injured worker's exclusive remedy for injuries resulting from an insurer's tortious delay or termination of benefits. 83 H. 457, 927 P.2d 858 (1996).

A decision that finally adjudicates the matter of medical and temporary disability benefits under §§386-21, 386-32(b), and subsection (b) is an appealable final order under §91-14(a), even though the matter of permanent disability benefits under §386-32(a) and subsection (a) has been left for later determination. 89 H. 436, 974 P.2d 1026 (1999).

The date-of-death maximum weekly benefit rate should be used to calculate death benefits. 109 H. 255, 125 P.3d 476 (2005).

Odd-lot doctrine. 2 H. App. 659, 638 P.2d 1381 (1982).

Cited: 32 H. 920, 924 (1933); 34 H. 65, 70 (1937).

" **§386-32 Partial disability.** (a) Permanent partial disability. Where a work injury causes permanent partial disability, the employer shall pay the injured worker

compensation in an amount determined by multiplying the effective maximum weekly benefit rate prescribed in section 386-31 by the number of weeks specified for the disability as follows:

Thumb. For the loss of thumb, seventy-five weeks;

First finger. For the loss of a first finger, commonly called index finger, forty-six weeks;

Second finger. For the loss of a second finger, commonly called the middle finger, thirty weeks;

Third finger. For the loss of a third finger, commonly called the ring finger, twenty-five weeks;

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks;

Phalanx of thumb or finger. Loss of the first phalanx of the thumb shall be equal to the loss of three-fourths of the thumb, and compensation shall be three-fourths of the amount above specified for the loss of the thumb. The loss of the first phalanx of any finger shall be equal to the loss of one-half of the finger, and compensation shall be one-half of the amount above specified for loss of the finger. The loss of more than one phalanx of the thumb or any finger shall be considered as loss of the entire thumb or finger;

Great toe. For the loss of a great toe, thirty-eight weeks;

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks;

Phalanx of toe. Loss of the first phalanx of any toe shall be equal to the loss of one-half of the toe, and the compensation shall be one-half of the amount specified for the loss of the toe. The loss of more than one phalanx of any toe shall be considered as the loss of the entire toe;

Hand. For the loss of a hand, two hundred forty-four weeks;

Arm. For the loss of an arm, three hundred twelve weeks;

Foot. For the loss of a foot, two hundred five weeks;

Leg. For the loss of a leg, two hundred eighty-eight weeks;

Eye. For the loss of an eye by enucleation, one hundred sixty weeks. For the loss of vision in an eye, one hundred forty weeks. Loss of binocular vision or of eighty per cent of the vision of an eye shall be considered loss of vision of the eye;

Ear. For the permanent and complete loss of hearing in both ears, two hundred weeks. For the permanent and complete loss of hearing in one ear, fifty-two weeks. For the loss of both ears, eighty weeks. For the loss of one ear, forty weeks;

Loss of use. Permanent loss of the use of a hand, arm, foot, leg, thumb, finger, toe, or phalanx shall be equal to and compensated as the loss of a hand, arm, foot, leg, thumb, finger, toe, or phalanx;

Partial loss or loss of use of member named in schedule. Where a work injury causes permanent partial disability resulting from partial loss of use of a member named in this schedule, and where the disability is not otherwise compensated in this schedule, compensation shall be paid for a period that stands in the same proportion to the period specified for the total loss or loss of use of the member as the partial loss or loss of use of that member stands to the total loss or loss of use thereof;

More than one finger or toe of same hand or foot. In cases of permanent partial disability resulting from simultaneous injury to the thumb and one or more fingers of one hand, or to two or more fingers of one hand, or to the great toe and one or more toes other than the great toe of one foot, or to two or more toes other than the great toe of one foot, the disability may be rated as a partial loss or loss of use of the hand or the foot and the period of benefit payments shall be measured accordingly. In no case shall the compensation for loss or loss of use of more than one finger or toe of the same hand or foot exceed the amount provided in this schedule for the loss of a hand or foot;

Amputation. Amputation between the elbow and the wrist shall be rated as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be rated as the equivalent of the loss of a foot. Amputation at or above the elbow shall be rated as the loss of an arm. Amputation at or above the knee shall be rated as the loss of a leg;

Disfigurement. In cases of personal injury resulting in disfigurement the director may award compensation not to exceed $30,000 as the director deems proper and equitable in view of the disfigurement. Disfigurement shall be separate from other permanent partial disabilities and shall include scarring and other disfiguring consequences caused by medical, surgical, and hospital treatment of the employee;

Other cases. In all other cases of permanent partial disability resulting from the loss or loss of use of a part of the body or from the impairment of any physical function, weekly benefits shall be paid at the rate and subject to the limitations specified in this subsection for a period that bears the same relation to a period named in the schedule as the disability sustained bears to a comparable disability named in the schedule. In cases in which the permanent partial disability must be rated as a percentage of the total loss or

impairment of a physical or mental function of the whole person, the maximum compensation shall be computed on the basis of the corresponding percentage of the product of three hundred twelve times the effective maximum weekly benefit rate prescribed in section 386-31.

Payment of compensation for permanent partial disability. Compensation for permanent partial disability shall be paid in weekly installments at the rate of sixty-six and two-thirds per cent of the worker's average weekly wage, subject to the limitations on weekly benefit rates prescribed in section 386-31.

Unconditional nature and time of commencement of payment. Compensation for permanent partial disability shall be paid regardless of the earnings of the disabled employee subsequent to the injury. Payments shall not commence until after termination of any temporary total disability that may be caused by the injury.

(b) Temporary partial disability. Where a work injury causes partial disability, not determined to be permanent, which diminishes the employee's capacity for work, the employer, beginning with the first day of the disability and during the continuance thereof, shall pay the injured employee weekly benefits equal to 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 thereafter, subject to the schedule for the maximum and minimum weekly benefit rates prescribed in section 386-31.

(c) Provisions common to permanent and temporary partial disability. No determination of partial disability shall be made until two weeks from the date of the injury. [L 1963, c 116, pt of §1; am L 1965, c 106, §1; Supp, §97-31; am L 1967, c 138, §2; HRS §386-32; am L 1969, c 25, §1; am L 1970, c 100, §1 and c 126, §1; am L 1972, c 42, §2; am L 1973, c 47, §1; am L 1974, c 153, §3; gen ch 1985; am L 1992, c 67, §1; am L 1995, c 234, §9]

Case Notes

Right to compensation presupposes disability for work, either total or partial. 34 H. 317 (1937).

Disfigurement benefits may be awarded in addition to permanent total disability benefits. 59 H. 409, 583 P.2d 321 (1978).

Exclusiveness of scheduled allowances rejected. 67 H. 16, 675 P.2d 770 (1984).

Injury to one finger may constitute hand disability. 67 H. 16, 675 P.2d 770 (1984).

A decision that finally adjudicates the matter of medical and temporary disability benefits under §§386-21, 386-31(b), and subsection (b) is an appealable final order under §91-14(a), even though the matter of permanent disability benefits under §386-31(a) and subsection (a) has been left for later determination. 89 H. 436, 974 P.2d 1026 (1999).

Odd-lot doctrine. 2 H. App. 659, 638 P.2d 1381 (1982); 8 H. App. 543, 812 P.2d 1199 (1991).

Appeals board was not limited to basing its partial permanent disability (PPD) award on the impairment of claimant's great toe, but could determine the extent to which the effects of claimant's great toe injury resulted in the impairment of claimant's whole body where the effects of an injury to a scheduled member extended to other parts of the body not included in subsection (a)'s schedule of awards or to the whole person; subsection (a) thus entitled claimant to a PPD award based on the impairment of claimant's great toe if that award exceeded the appeals board's award based on the impairment of claimant's whole person. 119 H. 304 (App.), 196 P.3d 306 (2008).

Cited: 24 H. 731, 733 (1919).

" **§386-33 Subsequent injuries that would increase disability.** (a) Where prior to any injury an employee suffers from a previous permanent partial disability already existing prior to the injury for which compensation is claimed, and the disability resulting from the injury combines with the previous disability, whether the previous permanent partial disability was incurred during past or present periods of employment, to result in a greater permanent partial disability or in permanent total disability or in death, then weekly benefits shall be paid as follows:

(1) In cases where the disability resulting from the injury combines with the previous disability to result in greater permanent partial disability the employer shall pay the employee compensation for the employee's actual permanent partial disability but for not more than one hundred four weeks; the balance if any of compensation payable to the employee for the employee's actual permanent partial disability shall thereafter be paid out of the special compensation fund; provided that in successive injury cases where the claimant's entire permanent partial disability is due to more than one compensable injury, the amount of the award for the subsequent injury shall be offset by the amount awarded for the prior compensable injury;

(2) In cases where the disability resulting from the injury combines with the previous disability to result in permanent total disability, the employer shall pay the employee for one hundred four weeks and thereafter compensation for permanent total disability shall be paid out of the special compensation fund; and

(3) In cases where the disability resulting from the injury combines with the previous disability to result in death the employer shall pay weekly benefits in accordance with sections 386-41 and 386-43 but for not more than one hundred four weeks; the balance of compensation payable under those sections shall thereafter be paid out of the special compensation fund.

(b) Notwithstanding subsection (a), where the director or the appellate board determines that the previous permanent partial disability amounted to less than that necessary to support an award of thirty-two weeks of compensation for permanent partial disability, there shall be no liability on the special compensation fund and the employer shall pay the employee or the employee's dependents full compensation for the employee's permanent partial or total disability or death.

(c) Effective July 1, 1995, subsection (a)(1), as amended, shall apply in all cases in which the work injury occurs on or after July 1, 1995, and combines with a previous disability from a compensable injury to result in a greater permanent partial disability. [L 1963, c 116, pt of §1; Supp, §97-32; HRS §386-33; am L 1982, c 93, §1; am L 1984, c 284, §1; am L 1995, c 234, §10; am L 2000, c 46, §1]

Case Notes

Section applies to death benefits. 64 H. 415, 643 P.2d 48 (1982).

Conditions to the apportionment of death benefits. 66 H. 290, 660 P.2d 1316 (1983).

Intent. 66 H. 290, 660 P.2d 1316 (1983).

Prior disability need not be manifest before compensation liability apportioned to special compensation fund. 67 H. 663, 701 P.2d 1282 (1985).

Board did not err when it concluded that claimant's permanent total disability benefits should not be apportioned with special compensation fund. 78 H. 275, 892 P.2d 468 (1995).

Odd-lot factors cannot be considered in determining whether a preexisting permanent partial disability amounted to award of thirty-two weeks of compensation for the purposes of this section. 78 H. 275, 892 P.2d 468 (1995).

Board properly concluded that, pursuant to subsection (a)(1), claimant was entitled to an award of the monetary value of 14 per cent permanent partial disability of the whole person as a result of claimant's latter work injury less the monetary value of the 2 per cent permanent partial disability award of the whole person as a result of claimant's earlier work injury. 100 H. 16 (App.), 58 P.3d 74 (2002).

Subsection (a)(1) lacks any condition or limitation that compensation for a prior injury must have been paid pursuant to a claim under the Hawaii workers' compensation law; thus, labor appeals board did not err when it decided that the offset provision set forth in subsection (a)(1) applied to claimant's prior out-of-state permanent partial disability award. 109 H. 372 (App.), 126 P.3d 415 (2005).

Cited: 56 H. 552, 545 P.2d 692 (1976).

" **§386-34 Payment after death.** Where an employee is entitled to weekly income and indemnity benefits for permanent total or permanent partial disability and dies from any cause other than the compensable work injury, payment of any unpaid balance of the benefits to the extent that the employer is liable therefor, but not to exceed the amount prescribed under section 386-32(a) for other cases, shall be made to the employee's dependents as provided herein. If, at the time of the death, the employee is entitled to any benefits from the special compensation fund, the benefits shall also be paid to the employee's dependents as provided herein:

(1) To a dependent widow, widower, or reciprocal beneficiary, for the use of the widow, widower, or reciprocal beneficiary, and the dependent children, if any. The director of labor and industrial relations may from time to time apportion such compensation among the widow, widower, or reciprocal beneficiary, and any dependent children.

(2) If there be no dependent widow, widower, or reciprocal beneficiary, but one or more dependent children, then to such child or children to be divided equally among them if more than one.

(3) If there be no dependent widow, widower, reciprocal beneficiary, or child, but there be a dependent parent, then to such parent, or if both parents be dependent, to both of them, to be divided equally between them; or if there be no such parents, but a dependent grandparent, then to such grandparent, or if more than one, then to all of them to be divided equally among them.

(4) If there be no dependent widow, widower, reciprocal beneficiary, child, parent, or grandparent, but there be a dependent grandchild, brother, or sister, then to such dependent, or if more than one, then to all of them to be divided equally among them.

(5) If there be no such dependents, the unpaid balance of the compensation shall be paid in a lump sum into the special compensation fund. [L 1963, c 116, pt of §1; Supp, §97-33; HRS §386-34; am L 1969, c 85, §1; am L 1972, c 42, §3; am L 1973, c 47, §2; gen ch 1985; am L 1997, c 383, §52]

Attorney General Opinions

Cited in discussion of hanai children. Att. Gen. Op. 93-1.

" **§386-35 Benefit adjustment.** (a) Effective January 1, 1992, and January 1 of every tenth year thereafter, any employee whose date of work injury is before January 1, 1992, and January 1 of every tenth year thereafter, and who is at any time after the work injury determined to be permanently and totally disabled shall be paid, without application, a supplemental allowance by the responsible employer calculated in accordance with the following provisions:

(1) In any case where the employee is entitled to receive the maximum weekly income benefit applicable on the date of the work injury, the supplemental allowance shall be an amount which when added to the benefit will equal the maximum weekly benefit as of January 1, 1992, and January 1 of every tenth year thereafter; or

(2) In any case where the employee is entitled to receive less than the maximum weekly income benefit applicable on the date of the work injury, the supplemental allowance shall be an amount equal to the maximum weekly income benefit as of January 1, 1992, and January 1 of every tenth year thereafter, multiplied by the ratio of the employee's weekly income benefit to the maximum weekly income benefit applicable on the date of the work injury, minus the employee's current weekly income benefit.

(b) The employer shall be entitled to reimbursement from the special compensation fund for the additional amount paid under subsection (a). Requests for reimbursements shall be filed annually with the department by January 31 of the subsequent calendar year. The director shall disapprove requests that are not filed properly or not filed in a timely manner, except for good cause shown.

(c) Effective January 1, 1992, and January 1 of every tenth year thereafter, any employee whose date of work injury is before January 1, 1992, and January 1 of every tenth year thereafter, and who is at any time after the work injury determined to be permanently and totally disabled, and who is further being paid weekly income benefits for permanent total disability by the special compensation fund shall be paid, without application, a supplemental allowance in accordance with the following provisions:

(1) In any case where the employee is entitled to receive the maximum weekly income benefit applicable on the date of the work injury, the supplemental allowance shall be an amount which when added to the benefit will equal the maximum weekly benefit as of January 1, 1992, and January 1 of every tenth year thereafter;

(2) In any case where the employee is entitled to receive less than the maximum weekly income benefit applicable on the date of the work injury, the supplemental allowance shall be an amount equal to the maximum weekly income benefit as of January 1, 1992, and January 1 of every tenth year thereafter, multiplied by the ratio of the employee's current weekly income benefit to the maximum weekly income benefit applicable on the date of the work injury, minus the employee's current weekly income benefit;

(3) In any case where the employee is entitled to receive weekly benefits at a fifty per cent rate, the supplemental allowance shall be an amount equal to the maximum weekly income benefit as of January 1, 1992, and January 1 of every tenth year thereafter, multiplied by twice the ratio of the employee's current weekly income benefit to the maximum weekly income benefit applicable on the date of the work injury minus the employee's current weekly income benefit; or

(4) In any case where the employee is no longer receiving weekly benefits, the supplemental allowance shall be an amount equal to the maximum weekly income benefit as of January 1, 1992, and January 1 of every tenth year thereafter, multiplied by the ratio of the employee's last weekly income benefit to the maximum weekly income benefit applicable on the date of the work injury. [L 1980, c 298, §1; am L 1981, c 114, §1; gen ch 1985; am L 1991, c 71, §1]

"2. Death

§386-41 Entitlement to and rate of compensation. (a) Funeral and burial allowance. Where a work injury causes death, the employer shall pay funeral expenses not to exceed ten times the maximum weekly benefit rate to the mortician and burial expenses not to exceed five times the maximum weekly benefit rate to the cemetery selected by the family including a reciprocal beneficiary or next of kin of the deceased or in the absence of such family including a reciprocal beneficiary or next of kin, by the employer. Such payments shall be made directly to the mortician and cemetery; provided that when the deceased has a prepaid funeral and burial plan such payments for funeral and burial expenses, not to exceed the foregoing limits, shall be made directly to the surviving spouse or reciprocal beneficiary or the decedent's estate if there is no surviving spouse or reciprocal beneficiary.

(b) Weekly benefits for dependents. In addition, the employer shall pay weekly benefits to the deceased's dependents at the percentages of the deceased's average weekly wages specified below, taking into account not more than the maximum weekly benefit rate prescribed in section 386-31 divided by .6667 and not less than the minimum prescribed in the section divided by .6667.

To the dependent widow, widower, or reciprocal beneficiary, if there are no dependent children, fifty per cent.

To the dependent widow, widower, or reciprocal beneficiary, if there are one or more dependent children of the deceased, sixty-six and two-thirds per cent. The compensation to the widow, widower, or reciprocal beneficiary shall be for the use and benefit of the widow, widower, or reciprocal beneficiary and of the dependent children, and the director of labor and industrial relations from time to time may apportion the compensation between them in such way as the director deems best.

If there is no dependent widow, widower, or reciprocal beneficiary, but a dependent child, then to the child forty per cent, and if there is more than one dependent child, then to the children in equal parts sixty-six and two-thirds per cent.

If there is no dependent widow, widower, or reciprocal beneficiary, or child, but there is a dependent parent, then to the parent, if wholly dependent fifty per cent, or if partially dependent twenty-five per cent; if both parents are dependent, then one-half of the foregoing compensation to each of them; if there is no dependent parent, but one or more dependent grandparents, then to each of them the same compensation as to a parent.

If there is no dependent widow, widower, or reciprocal beneficiary, child, parent or grandparent, but there is a

dependent grandchild, brother, or sister, or two or more of them, then to those dependents thirty-five per cent for one dependent, increased by fifteen per cent for each additional dependent, to be divided equally among the dependents if more than one.

(c) Maximum weekly amounts. The sum of all weekly benefits payable to the dependents of the deceased employee shall not exceed sixty-six and two-thirds per cent of the employee's average weekly wages, computed by observing the limits specified in subsection (b), if necessary, the individual benefits shall be proportionally reduced.

(d) Liability in the absence of dependents. If there be no dependents who are entitled to benefits under this section, the employer shall pay an amount equal to twenty-five per cent of three hundred and twelve times the effective maximum weekly benefit rate provided in section 386-31, to the nondependent parent or parents. If there be no such parent or parents, the employer shall pay the sum into the special compensation fund, pursuant to an order made by the director. The employer, pursuant to an order made by the director, shall pay any remaining balance into the special compensation fund, if the weekly benefits to which dependents are entitled terminate without totalling the amounts as calculated above. [L 1963, c 116, pt of §1; am L 1965, c 152, §1(b); Supp, §97-40; HRS §386-41; am L 1971, c 24, §1 and c 101, §1; am L 1972, c 42, §4; am L 1973, c 64, §1; am L 1974, c 153, §4; am L 1977, c 87, §1; am L 1982, c 52, §1; gen ch 1985; am L 1991, c 72, §1 and c 98, §1; am L 1997, c 383, §53]

Attorney General Opinions

Cited in discussion of hanai children. Att. Gen. Op. 93-1.

Case Notes

The date-of-death maximum weekly benefit rate should be used to calculate death benefits. 109 H. 255, 125 P.3d 476 (2005).

Cited: 43 H. 173, 175 (1959).

" **§386-42 Dependents.** (a) The following persons, and no others, shall be deemed dependents and entitled to income, and indemnity benefits under this chapter:

(1) A child who is:

(A) Unmarried and under eighteen years;

(B) Unmarried and under twenty years if the child is a full-time student at a high school, business school, or technical school, or unmarried and

under twenty-two years if the child is a full-time undergraduate student at a college;

(C) Unmarried and incapable of self-support; or

(D) Married and under eighteen years, if actually dependent upon the deceased;

(2) The surviving spouse or reciprocal beneficiary, if either living with the deceased at the time of the injury or actually dependent upon the deceased;

(3) A parent or grandparent, if actually dependent upon the deceased; and

(4) A grandchild, brother, or sister, if under eighteen years or incapable of self-support, and actually and wholly dependent upon the deceased.

(b) A person shall be deemed to be actually dependent upon the deceased, if the deceased contributed all or a substantial portion of the living expenses of that person at the time of the injury.

(c) Alien dependents not residing in the United States at the time of the injury or leaving the United States subsequently shall maintain annual proof of such dependency as required by the director of labor and industrial relations. [L 1963, c 116, pt of §1; Supp, §97-41; am L 1967, c 213, §1 and c 257, §1; HRS §386-42; am L 1971, c 87, §1; am L 1974, c 151, §1; gen ch 1985; am L 1997, c 383, §54; am L 2016, c 55, §13]

Case Notes

Alien Japanese dependent upon leaving the United States loses all rights to benefits; "leaving the U. S." construed; an alien widow leaving the U.S. ceases to be a "dependent". 27 H. 431 (1923).

Illegitimate children. 31 H. 814 (1931).

Nonresident alien. 32 H. 118 (1931).

Alien "actually residing". 32 H. 699 (1933).

Citizen of Philippine Republic. 39 H. 258 (1952).

Actual dependency of parents on child. 43 H. 173 (1959).

Part-time students, as defined by each individual educational institution, are not entitled to compensation under subsection (a) and §386-43(a). 84 H. 390 (App.), 935 P.2d 105 (1997).

Cited: 41 H. 442, 447 (1956).

" **§386-43 Duration of dependents' weekly benefits.** (a) The weekly benefits to dependents shall continue:

(1) To a surviving spouse or reciprocal beneficiary, until death, remarriage, marriage, or entry into a new reciprocal beneficiary relationship with two years'

compensation in one sum upon remarriage, marriage, or entry into a new reciprocal beneficiary relationship;

(2) To or for a child:

(A) So long as unmarried, until attainment of the age of eighteen;

(B) So long as unmarried, until attainment of the age of:

(i) Twenty if the child is a full-time student at a high school, business school, technical school; or

(ii) Twenty-two if the child is a full-time undergraduate student at a college;

(C) So long as unmarried, until termination of the child's incapability of self-support; or

(D) Until marriage, except that in the case of a married child under eighteen, weekly benefits shall continue during the period of actual dependency until attainment of the age of eighteen;

(3) To a parent or grandparent, for the duration, whether continuous or not, of the actual dependency, provided that the amount of the weekly benefits shall at no time exceed the amount payable at the time of death; and

(4) To or for a grandchild, brother, or sister, for the period in which that grandchild, brother, or sister remains actually and wholly dependent until attainment of the age of eighteen or termination of the incapability of self-support.

(b) The aggregate weekly benefits payable on account of any one death shall not exceed the product of three hundred twelve times the effective maximum weekly benefit rate prescribed in section 386-31, but this limitation shall not apply with respect to benefits to a surviving spouse or reciprocal beneficiary who is physically or mentally incapable of self-support and unmarried as long as that surviving spouse or reciprocal beneficiary remains in that condition and to benefits to a child and to benefits to an unmarried child over eighteen incapable of self-support as long as that unmarried child is otherwise entitled to compensation.

(c) Upon the cessation under this section of compensation to or for any person, the benefits of the remaining dependents in the same class for any further period during which they are entitled to weekly payments shall be in the amounts which they would have received, had they been the only dependents entitled to benefits at the time of the employee's death. [L 1963, c 116, pt of §1; Supp, §97-42; am L 1966, c 6, §2; am L 1967, c 257,

§2; HRS §386-43; am L 1974, c 151, §2 and c 153, §5; am L 1975, c 4, §1; gen ch 1985; am L 1997, c 383, §55; am L 2016, c 55, §14]

Case Notes

The date-of-death maximum weekly benefit rate should be used to calculate death benefits. 109 H. 255, 125 P.3d 476 (2005).

Part-time students, as defined by each individual educational institution, are not entitled to compensation under subsection (a) and §386-42(a). 84 H. 390 (App.), 935 P.2d 105 (1997).

Cited: 27 H. 431, 435 (1923).

" **§386-44 Effect of erroneous payment; insanity of beneficiary.** If an employer in good faith pays weekly benefits to a dependent who is inferior in right to another dependent or with whom another dependent is entitled to share, the payment shall discharge the employer, unless and until such other dependent notifies the employer of such other dependent's claim. In case the employer is in doubt as to the respective rights of rival claimants, the employer may institute proceedings before the director of labor and industrial relations for determination of the proper beneficiary.

Benefits to a person who is insane shall be paid to the person's guardian. [L 1963, c 116, pt of §1; Supp, §97-43; HRS §386-44; gen ch 1985]

Case Notes

Cited: 27 H. 431, 438 (1923).

"3. Provisions Common to Benefits for Disability and Death

§386-51 Computation of average weekly wages. Average weekly wages shall be computed in a manner that the resulting amount represents most fairly, in the light of the employee's employment pattern and the duration of the employee's disability, the injured employee's average weekly wages from all covered employment at the time of the personal injury. In no event, however, shall an employee's average weekly wages be computed to be less than the employee's hourly rate of pay multiplied by thirty-five; provided that where the employee holds part-time employment of fewer than thirty-five hours per week, the employee's average weekly wages shall be the hourly rate at the place of employment where the injury occurred multiplied by the average hours worked in the fifty-two weeks (or portions thereof) preceding the week in which the injury

occurred, for the calculation of temporary partial disability and temporary total disability benefits only. Other benefits including permanent partial disability, permanent total disability, and death shall be calculated as if the employee had been a full-time employee.

(1) Where appropriate and feasible, computation shall be made on the basis of the injured employee's earnings from covered employment during the twelve months preceding the employee's personal injury; but if during that period, the employee, because of sickness or similar personal circumstances was unable to engage in employment for one or more weeks then the number of those weeks shall not be included in the computation of the average weekly wage.

(2) Where an employee at the time of the injury was employed at higher wages than during any other period of the preceding twelve months then the employee's average weekly wages shall be computed exclusively on the basis of the higher wages.

(3) Where, by reason of the shortness of the time during which the employee has been in the employment or the casual nature or terms of the employment, it is not feasible to compute the average weekly wages on the basis of the injured employee's own earnings from that employment, regard may be had to the average weekly wages which during the twelve months preceding the injury was being earned by an employee in comparable employment.

(4) Except as otherwise provided, the total average weekly wages of any employee shall be computed at a lower amount than the average weekly wages earned at the time of the injury by an employee in comparable employment engaged as a full-time employee on an annual basis in the type of employment in which the injury occurred.

(5) If an employee, while under twenty-five years of age, sustains a work injury causing permanent disability or death, the employee's average weekly wages shall be computed on the basis of the wages which the employee would have earned in the employee's employment had the employee been twenty-five years of age.

(6) The director may issue rules for the determination of the average weekly wages in particular classes of cases, consistent with the principles laid down in the first paragraph of this section. [L 1963, c 116, pt of §1; Supp, §97-50; am L 1967, c 139, §1; HRS §386-51;

am L 1970, c 53, §1; gen ch 1985; am L 1995, c 234, §11]

Cross References

Rulemaking, see chapter 91.
Volunteer emergency medical disaster response personnel, see §321-23.3.

Law Journals and Reviews

Paragraph (5) not applicable to injuries sustained before its effective date. Haw. Supp, 6 HBJ, no. 1 at 23 (1969).

Case Notes

Section limited by last paragraph of §386-42 applying to aliens. 27 H. 431 (1923).
Overtime included as wages. 33 H. 412 (1935).
"Earnings" defined. 37 H. 517 (1947).
English rule to be used. 43 H. 173 (1959).
Par. (5): Where there is injury causing permanent disability or death, use of hypothetical earnings at age twenty-five is proper to compute benefits for both the permanent and temporary disabilities. 52 H. 577, 482 P.2d 151 (1971).

" **§386-51.5 Limited liability in concurrent employment.** Where an employee is concurrently engaged in more than one employment covered by this chapter and sustains a personal injury in one employment under conditions specified in section 386-3, the liability of the employer shall be limited to the benefits as would be payable had the employee no other employment than the one in which the employee was injured. The balance of the employee's benefits shall be paid from the special compensation fund, except that benefits for disability rated as a percentage of total impairment of physical or mental function of the whole person shall be the sole liability of the employer. [L 1970, c 53, §2; gen ch 1985, 1993; am L 1998, c 281, §1]

Case Notes

Section does not address the circumstance of multiple concurrent employers being simultaneously liable for the employee's benefits; in such circumstances, the director may apportion liability among the liable employers; the apportionment of liability may be in proportion to the wages

earned by the employee in the employ of each of those employers. 94 H. 70, 9 P.3d 382 (2000).

" **§386-52 Credit for voluntary payments and supplies in kind.** (a) Any payments made by the employer to the injured employee during the employee's disability or to the employee's dependents which by the terms of this chapter were not payable when made, shall be deducted from the amount payable as compensation subject to the approval of the director; provided that:

(1) The employer notifies the injured employee and the director in writing of any such credit request stating the reasons for such credit and informing the injured employee that the employee has the right to file a written request for a hearing to submit any evidence to dispute such a credit;

(2) The deduction shall be made by shortening the period during which the compensation must be paid, or by reducing the total amount for which the employer is liable and not the amount of weekly benefits;

(3) If overpayment cannot be credited, the director shall order the claimant to reimburse the employer. Failure to reimburse the employer shall entitle the employer to file for enforcement of such a decision in accordance with section 386-91.

(b) If the employer continues to furnish to the injured employee, during the employee's disability, or to the employee's dependents, during their entitlement to weekly benefits, board, lodging, fuel, and other advantages the value of which has been included in the calculation of wages as provided in section 386-1, the furnishing of such advantages may be considered as payment in kind of that portion of the compensation which is based on such remuneration in kind; but if at any time during the compensation period the employer ceases to furnish such advantages, no further deduction of the value of such advantages as payment in kind from the compensation shall be permissible. [L 1963, c 116, pt of §1; Supp, §97-51; HRS §386-52; am L 1979, c 66, §2; gen ch 1985]

Case Notes

Claimant required to reimburse employer/carrier where claimant's attendant care services were not "constantly necessary" under §386-23 and benefits were thus not "payable when made" and employer/carrier letter satisfied notice requirements of this section. 83 H. 361, 926 P.2d 1284 (1996).

" **§386-53 Nonweekly periodic payments.** On the application of either party, the director may, having due regard for the welfare of the employee or the employee's dependents and the convenience of the employee's employer, authorize benefits to be paid fortnightly, semimonthly, monthly or quarterly instead of weekly. [L 1963, c 116, pt of §1; Supp, §97-52; HRS §386-53; am L 1969, c 18, §2; gen ch 1985]

" **§386-54 Commutation of periodic payments.** Upon application of the disabled employee, the employee's dependents or the employer, the director of labor and industrial relations may order that the periodic benefit payments be commuted to one or more lump sum payments equal to the present value at the time when the lump sum payments are due of the future benefit payments, computed at four per cent true discount compounded annually, if the director finds that such commutation is in the best interest of the employee or the employee's dependents and does not impose undue hardship upon the employer.

The probability of the death of the disabled employee or of a dependent entitled to benefits before the expiration of the period during which the employee or dependent is entitled to receive such payments and the probability of the remarriage of the spouse shall be determined in accordance with the latest United States Life Tables and the American Remarriage Tables, respectively, as adjusted and corrected on the basis of the most recent available experience, or in accordance with any other appropriate actuarial tables selected by the director, upon advice of the chief actuary of the Social Security Administration. The probability of the happening of any other contingency affecting the amount or duration of the benefit payments shall not be considered.

Payment of the lump sums shall discharge the employer of the employer's liability for the corresponding income and indemnity benefits. [L 1963, c 116, pt of §1; Supp, §97-53; HRS §386-54; am L 1974, c 157, §1; gen ch 1985]

Law Journals and Reviews

Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals. 14 UH L. Rev. 271 (1992).

Case Notes

Board may make lump sum payments not less than the present worth of installments. 31 H. 672 (1930).

" **§386-55 Trustee in case of lump sum payments.** Whenever for any reason the director of labor and industrial relations deems it advisable, any lump sum which is payable as provided in section 386-54 shall be paid to a suitable individual or corporation appointed by the circuit judge in whose jurisdiction the work injury occurred as trustee to administer or apply the same for the benefit of the disabled worker or the dependent entitled thereto in the manner determined by the director. The receipt of the trustee for the amount so paid shall discharge the employer of the employer's liability. [L 1963, c 116, pt of §1; Supp, §97-54; HRS §386-55; gen ch 1985]

" **§386-56 Payment from the special compensation fund in case of default.** Where an injured employee or the employee's dependents fail to receive prompt and proper compensation and this default is caused through no fault of the employee, the director shall pay the full amount of all compensation awards and benefits from the special compensation fund to the employee or dependent.

The employer, upon order of the director, shall reimburse the special compensation fund for the sums paid therefrom under this section, and the fund, represented by the director, shall be subrogated to all the rights and remedies of the individual receiving the payments.

In case a defaulting employer moves to another state without reimbursing the special compensation fund, the director shall be authorized to contract, on a contingent fee basis, with a private collection agency in that state to effect collection from the employer. [L 1963, c 116, pt of §1; Supp, §97-55; HRS §386-56; am L 1971, c 86, §1; am L 1985, c 296, §18; gen ch 1985]

" **§386-57 Legal status of right to compensation and compensation payments.** (a) The right to compensation under this chapter shall not be assignable, and the right to compensation and compensation payments received shall be exempt from the reach of creditors.

(b) The right to compensation under this chapter shall have the same status as a lien or the same priority for the whole thereof with respect to the assets of the employer as are accorded by law to any unpaid wages for labor. [L 1963, c 116, pt of §1; Supp, §97-56; HRS §386-57]

Case Notes

Does not bar use of portion of lump sum payment to pay child support arrearage. 6 H. App. 217, 716 P.2d 501 (1986).

"**PART III. ADMINISTRATION**

Law Journals and Reviews

One-Sided Bargain? Assessing the Fairness of Hawai‘i's Workers' Compensation Law. 31 UH L. Rev. 553 (2009).

§386-71 Duties and powers of the director in general. The director of labor and industrial relations shall be in charge of all matters of administration pertaining to the operation and application of this chapter. The director shall have and exercise all powers necessary to facilitate or promote the efficient execution of this chapter and, in particular, shall supervise, and take all measures necessary for, the prompt and proper payment of compensation.

If an injury which may be compensable under this chapter is reported to, or comes to the notice of, the department of labor and industrial relations, the director and the director's staff shall investigate such injury to the extent as may appear necessary. The director shall cause to be printed and furnished free of charge to any employer or employee such blank forms as the director deems requisite to the performance of the director's functions. The blanks shall also be supplied by the director to the clerks of the respective circuit courts, who shall furnish the same to any employer or employee free of charge pursuant to any rules issued by the director. [L 1963, c 116, pt of §1; Supp, §97-70; HRS §386-71; gen ch 1985]

Case Notes

Cited: 43 H. 173, 180 (1959).

" **[§386-71.5] Rehabilitation unit.** There is established within the department of labor and industrial relations a rehabilitation unit. All professional and clerical employees of this unit shall be appointed by the director. The rehabilitation unit shall have the duties and responsibilities provided in section 386-25. Employees of the unit shall be subject to chapter 76. [L 1980, c 224, §1; am L 2000, c 253, §150]

" **[§386-71.6] Workers' compensation benefits facilitator unit.** (a) There is established within the department of labor and industrial relations the workers' compensation benefits facilitator unit. All professional and clerical employees of

the unit shall be appointed by the director and shall be subject to chapter 76.

(b) Facilitators of the unit shall have the following duties and responsibilities:

(1) Assist injured workers in filing their workers' compensation claims under this chapter;

(2) Assist insurers, employers, and providers; and

(3) Facilitate the workers' compensation claims process.

(c) All expenses incurred by the director in establishing the unit shall be paid from the special compensation fund. [L 1996, c 260, §1; am L 2000, c 253, §150]

" **§386-72 Rulemaking powers.** In conformity with and subject to chapter 91, the director of labor and industrial relations shall make rules, not inconsistent with this chapter, which the director deems necessary for or conducive to its proper application and enforcement. [L 1963, c 116, pt of §1; Supp, §97-71; HRS §386-72; gen ch 1985; am L Sp 2005, c 11, §§7, 14]

" **§386-73 Original jurisdiction over controversies.** Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders. [L 1963, c 116, pt of §1; Supp, §97-72; HRS §386-73; am L 1969, c 244, §2b; am L 1979, c 111, §18; am L 2004, c 202, §42; am L 2006, c 94, §1; am L 2010, c 109, §1]

Cross References

Appeal, see chapter 91.

Rules of Court

Appeal to supreme court, stay, see Hawaii Rules of Appellate Procedure.

Case Notes

This section and §386-88 supersede §91-14 and remove the circuit court from the appellate process with regard to

proceedings brought under chapter 386. 53 H. 640, 500 P.2d 746 (1972).

"Independent system of legal relations" in this chapter debars declaratory relief under chapter 632. 64 H. 380, 641 P.2d 1333 (1982).

Section does not deprive circuit court of subject matter jurisdiction over common law tort claims not based on the original work injury. 83 H. 457, 927 P.2d 858 (1996).

Where claimant's common law tort claims against employer's insurer did not arise under this chapter, director did not have original jurisdiction under this section. 83 H. 457, 927 P.2d 858 (1996).

Where claimant's complaint raised a "controversy or dispute under this chapter" over which the director had original jurisdiction, summary judgment properly granted by circuit court as court was without jurisdiction over claim. 83 H. 457, 927 P.2d 858 (1996).

A settlement or compromise of future workers' compensation benefits constitutes a controversy or dispute within the original jurisdiction of the director of labor and industrial relations under this section. 90 H. 152, 977 P.2d 160 (1999).

Under §386-8, this section, and Hawaii administrative rule §12-10-31, a settlement or compromise of future workers' compensation benefits cannot be valid or binding without the consent or approval of the director of labor and industrial relations. 90 H. 152, 977 P.2d 160 (1999).

Where plaintiff's claims did not arise under this chapter, the exclusive remedy and original jurisdiction provisions in the workers' compensation statute did not apply, and where plaintiff's claims for relief of tortious conduct on the part of workers' compensation insurer were not within the original jurisdiction of the labor director, trial court erred in granting summary judgment on that basis. 90 H. 407, 978 P.2d 845 (1999).

This section and §386-87 set forth the right to appeal from the decisions of the director in workers' compensation cases and it gives a party the right to appeal the decision of the director in a medical fee dispute to the labor and industrial relations appeals board; thus, the no-appeal provision of Hawaii administrative rule §12-15-94(d) was invalid as inconsistent with this chapter, and the director exceeded the director's rulemaking authority in making the director's decisions in medical fee disputes final and non-appealable. 120 H. 101 (App.), 201 P.3d 614 (2009).

Cited: 24 H. 731, 736 (1919).

" **§386-73.5 Proceedings to determine employment and coverage.** The director of labor and industrial relations shall have original jurisdiction over all controversies and disputes over employment and coverage under this chapter. Except in cases where services are specifically and expressly excluded from "employment" under section 386-1, it shall be presumed that coverage applies unless the party seeking exclusion is able to establish under both the control test and the relative nature of the work test that coverage is not appropriate under this chapter. There shall be a right of appeal from decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602. [L 1996, c 94, §1; am L 2004, c 202, §43; am L 2006, c 94, §1; am L 2010, c 109, §1]

" **§§386-74 to 386-77 REPEALED.** L 1969, c 244, §2c.

" **§386-78 Compromise.** (a) No compromise in regard to a claim for compensation pending before the director shall be valid unless it is approved by decision of the director as conforming to this chapter and made a part of the decision.

(b) No compromise in regard to a claim for compensation shall be effected and approved in any appeal until after the director has been notified of the proposed terms thereof and has had an opportunity to be heard relative thereto. [L 1963, c 116, pt of §1; Supp, §97-77; HRS §386-78; am L 1969, c 17, §2; am L 1973, c 11, §1; am L 1982, c 59, §1; gen ch 1985; am L 1995, c 234, §12; am L 2014, c 25, §§1, 4]

Note

The repeal and reenactment note at subsection (a) in the main volume took effect on June 30, 2016, pursuant to L 2014, c 25, §4.

Case Notes

Where letter withdrawing compensability issue did not result in final disposition of case, claimants properly and timely filed request for attorney's fees and costs under provisions of administrative rule after appeals board's final decision and order. 84 H. 390 (App.), 935 P.2d 105 (1997).

Cited: 24 H. 97, 102 (1917); 31 H. 672, 673 (1930).

" **§386-79 Medical examination by employer's physician.** After an injury and during the period of disability, the employee, whenever ordered by the director of labor and industrial relations, shall submit to examination, at reasonable

times and places, by a duly qualified physician or surgeon designated and paid by the employer. The employee shall have the right to have a physician or surgeon designated and paid by the employee present at the examination, which right, however, shall not be construed to deny to the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability.

If an employee refuses to submit to, or in any way obstructs such examination, the employee's right to claim compensation for the work injury shall be suspended until the refusal or obstruction ceases and no compensation shall be payable for the period during which the refusal or obstruction continues.

In cases where the employer is dissatisfied with the progress of the case or where major and elective surgery, or either, is contemplated, the employer may appoint a physician or surgeon of the employer's choice who shall examine the injured employee and make a report to the employer. If the employer remains dissatisfied, this report may be forwarded to the director.

Employer requested examinations under this section shall not exceed more than one per case unless good and valid reasons exist with regard to the medical progress of the employee's treatment. The cost of conducting the ordered medical examination shall be limited to the complex consultation charges governed by the medical fee schedule established pursuant to section 386-21(c). [L 1963, c 116, pt of §1; Supp, §97-78; HRS §386-79; gen ch 1985; am L 1995, c 234, §13; am L 1996, c 260, §4]

Case Notes

Labor and industrial relations appeals board's failure to apply this section, as amended, in its decision and order constituted harmless error, where record reflected that the reason for the 1995 medical examination ordered by the director related directly "to the medical progress of employee's treatment" in accordance with the mandate of this section as amended. 94 H. 487, 17 P.3d 219 (2001).

Cited: 760 F. Supp. 2d 1005 (2010).

" **§386-80 Examination by impartial physician.** The director of labor and industrial relations may appoint a duly qualified impartial physician to examine the injured employee and to report. The fees for such examination shall be paid from the funds appropriated by the legislature for the use of the

department of labor and industrial relations. [L 1963, c 116, pt of §1; Supp, §97-79; HRS §386-80]

" **§386-81 Notice of injury; waiver.** No proceedings for compensation under this chapter shall be maintained unless written notice of the injury has been given to the employer as soon as practicable after the happening thereof. The notice may be given by the injured employee or by some other person on the employee's behalf. Failure to give such notice shall not bar a claim under this chapter if[:]

(1) The employer or the employer's agent in charge of the work in the place where the injury was sustained had knowledge of the injury;

(2) Medical, surgical, or hospital service and supplies have been furnished to the injured employee by the employer; or

(3) For some satisfactory reason the notice could not be given and the employer has not been prejudiced by such failure.

Unless the employer is prejudiced thereby notice of injury shall be deemed to have been waived by the employer if objection to the failure to give such notice is not raised at the first hearing on a claim in respect of such injury of which the employer is given reasonable notice and opportunity to be heard. [L 1963, c 116, pt of §1; Supp, §97-90; HRS §386-81; gen ch 1985]

Revision Note

In the first paragraph, (1) to (3) reformatted as paragraphs (1) to (3) and in paragraph (1), "or" deleted pursuant to §23G-15.

Case Notes

Notice. 24 H. 97 (1917).

Neither technical nor formal notice is required. 24 H. 731 (1919).

Furnishing medical aid. 32 H. 503 (1932).

Sufficiency of knowledge of injury. 32 H. 503 (1932).

Time limitation runs from date of accident, not time of discovery of permanency of injury. 32 H. 920 (1933).

Minors. 32 H. 928 (1933).

Time limitation runs from date employee is disabled by injury from working; notice dispensed with. 34 H. 65 (1937).

Time for giving of notice; there is compliance where claimant gives notice after claimant becomes aware or should have become

aware that the injury may be compensable. 50 H. 519, 445 P.2d 34 (1968).

"Satisfactory reason" to excuse late notice. 55 H. 558, 523 P.2d 832 (1974).

Cited: 24 H. 97, 101 (1917).

" **§386-82 Claim for compensation; limitation of time.** The right to compensation under this chapter shall be barred unless a written claim therefor is made to the director of labor and industrial relations[:]

(1) Within two years after the date at which the effects of the injury for which the employee is entitled to compensation have become manifest; and

(2) Within five years after the date of the accident or occurrence which caused the injury.

The foregoing limitations of time shall not apply to a claim for injury caused by compressed air or due to occupational exposure to, or contact with, arsenic, asbestos, benzol, beryllium, zirconium, cadmium, chrome, lead, fluorine, or other mineral or substance with carcinogenic properties, as incorporated in the Hawaii Occupational Safety and Health Standards, or to exposure to X-rays, radium, ionizing radiation, or radioactive substances, but such claim shall be barred unless it is made to the director, in writing, within two years after knowledge that the injury was proximately caused by, or resulted from the nature of, the employment. The claim may be made by the injured employee or the employee's dependents or by some other person on the employee's or their behalf. The claim shall state in ordinary language the time, place, nature, and cause of the injury. [L 1963, c 116, pt of §1; Supp, §97-91; HRS §386-82; am L 1979, c 114, §1; gen ch 1985]

Revision Note

In the first paragraph, (1) and (2) reformatted as paragraphs (1) and (2), and in paragraph (1), punctuation changed pursuant to §23G-15.

Case Notes

Statute of limitations for asserting claim starts from discovery of injury or illness. 50 H. 1, 427 P.2d 845 (1967).

Condition which causes no loss of function and having no treatment should not be considered an injury. 71 H. 269, 788 P.2d 170 (1990).

No lawful claim for workers' compensation benefits were filed with the director where employer's filing of "WC-1" form did not

constitute a claim for workers' compensation benefits on employee's behalf and no evidence that employer had been "duly empowered to act" on injured employee's behalf. 89 H. 411, 974 P.2d 51 (1999).

Under this section, the two-year statute of limitations for the filing of a workers' compensation claim begins to run when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of claimant's injury or disease. 93 H. 8, 994 P.2d 1054 (2000).

In order to identify the "date of injury" required by the department of labor and industrial relations in connection with the filing of a workers' compensation claim under this section, a claimant in a case arising under the "injury-by-disease" prong of §386-3 may rely upon the last day of employment as the "date of disability", but this "date of disability" may also be the date of diagnosis of the disabling condition. 94 H. 70, 9 P.3d 382 (2000).

Tolling of limitation period. 2 H. App. 136, 627 P.2d 288 (1981).

The two-year limitation period begins at a point where the employee's injury has had a disabling effect that prevents employee from working. 2 H. App. 157, 628 P.2d 205 (1981).

Cited: 24 H. 97, 101 (1917); 24 H. 731, 738 (1919).

" **§386-83 When claim within specified time is unnecessary or waived.** (a) If payments of income and indemnity benefits have been made voluntarily by the employer, the making of a claim within the time prescribed in section 386-82 shall not be required. No such payments shall be deemed to have been made if the payments are in the nature of a gift and not intended as compensation, or are made by welfare or benefit organizations operating under direction or control of the employer, or are for medical, surgical, or hospital services and supplies, or are made as wages during periods of partial or total disability if the employer notifies the director of labor and industrial relations at the time in writing that such payments of wages are not in lieu of and shall not be considered as compensation.

(b) Unless the employer is prejudiced thereby, failure to make a claim within the time prescribed in section 386-82 shall not bar a claim to compensation if objection to such failure is not raised at the first hearing on the claim of which the employer is given reasonable notice and opportunity to be heard. [L 1963, c 116, pt of §1; Supp, §97-92; HRS §386-83]

Case Notes

Payment of wages for work actually performed by employee on hourly wage basis is not payment of compensation for injuries. 54 H. 98, 503 P.2d 434 (1972).

Where employer objects at first hearing to the delay in filing, there is no waiver of limitation period, notwithstanding employer might have indicated, prior to hearing an intent to waive the limitation period. 54 H. 98, 503 P.2d 434 (1972).

Tolling of limitation period. 2 H. App. 136, 627 P.2d 288 (1981).

Cited: 24 H. 97, 101 (1917); 24 H. 731, 738 (1919).

" **§386-84 Limitation of time with respect to minors and mentally incompetent.** No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as the person or minor has no guardian or next friend. [L 1963, c 116, pt of §1; Supp, §97-93; HRS §386-84; gen ch 1985]

Case Notes

Limitation does not run against minors, even though represented by next friend prosecuting an action in tort for wrongful death. 32 H. 928 (1933).

Cited: 24 H. 97, 101 (1917); 32 H. 503, 506 (1932).

" **§386-85 Presumptions.** In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:

(1) That the claim is for a covered work injury;
(2) That sufficient notice of such injury has been given;
(3) That the injury was not caused by the intoxication of the injured employee; and
(4) That the injury was not caused by the wilful intention of the injured employee to injure oneself or another. [L 1963, c 116, pt of §1; Supp, §97-94; HRS §386-85; gen ch 1985]

Law Journals and Reviews

Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death from Overwork" in Japan. 21 UH L. Rev. 169 (1999).

Case Notes

Scope and nature of presumption discussed. 51 H. 312, 459 P.2d 541 (1969); 51 H. 632, 466 P.2d 439 (1970).

Substantial evidence defined. 51 H. 312, 459 P.2d 541 (1969); 53 H. 406, 495 P.2d 1164 (1972).

Where death might have been caused by preexisting heart condition or by occupational exertions or by both, presumption of paragraph (1) was applicable. 51 H. 312, 459 P.2d 541 (1969).

Presumption places on employer the burden of going forward with the evidence as well as that of persuasion. 53 H. 32, 487 P.2d 278 (1971); 53 H. 406, 495 P.2d 1164 (1972).

If employer fails to produce substantial evidence to contrary, presumption dictates that claimant must win. 53 H. 161, 489 P.2d 419 (1971).

Evidence adduced by employer to show that death by heart attack was not work-connected held not to amount to substantial evidence. 53 H. 406, 495 P.2d 1164 (1972).

Presumption may be rebutted only by substantial evidence to the contrary. 53 H. 406, 495 P.2d 1164 (1972).

Presumption applies in §386-89(c) proceeding and places burden on employer. 56 H. 552, 545 P.2d 692 (1976).

Employer has burden of going forward with evidence and burden of ultimate persuasion, and all reasonable doubt should be resolved in favor of claimant. 57 H. 296, 555 P.2d 855 (1976).

Proceeding for review brought by claimant under §386-89(c) is a "proceeding for the enforcement of a claim for compensation under this chapter". 57 H. 535, 560 P.2d 1292 (1977).

If employer fails to present substantial evidence to rebut presumption, employee must prevail. 59 H. 551, 584 P.2d 119 (1978).

Paragraph (1) applies from outset. Preliminary showing that injury occurred in course of employment not required. 63 H. 642, 636 P.2d 721 (1981).

Where labor and industrial relations appeals board failed expressly to acknowledge statutory presumption of compensability in its decision, issue deemed not to be whether board had explicitly referred to the presumption, but whether the presumption had been rebutted by substantial evidence; board’s conclusion that claimant was not engaged in employment-related activity when claimant sustained injury was supported by substantial evidence. 77 H. 100, 881 P.2d 1246 (1994).

Statutory presumption of paragraph (1) not triggered where claimant conceded that accident was not work-related. 77 H. 152, 883 P.2d 73 (1994).

Employee's disability was compensable under this chapter where labor appeals board failed to apply statutory presumption in favor of compensability of employee's claim under this section,

and employers failed to demonstrate by substantial evidence that employee's disease (1) was not caused by conditions that are characteristic of or peculiar to employee's employment as a dental hygienist, (2) did not result from employee's actual exposure to such conditions, and (3) was not due to causes in excess of the ordinary hazards of employment in general. 94 H. 70, 9 P.3d 382 (2000).

In any proceeding on a claim for compensation due to an alleged compensable consequence of a work-related injury, this section creates a presumption in favor of the claimant that the subsequent injury is causally related to the primary injury. 94 H. 297, 12 P.3d 1238 (2000).

Where the paragraph (1) presumption of work-connectedness was neither applicable nor relevant to any issue on appeal, as a matter of law, the appellate court erred in applying the presumption to the issue in the case. 97 H. 86, 34 P.3d 16 (2001).

Appellate court did not err in applying paragraph (1) presumptions where whether the cause of claimant's permanent disability was work-related or caused by prior injury and other personal and/or psychological stresses was clearly at issue in the proceedings. 97 H. 402, 38 P.3d 570 (2001).

In order to overcome the paragraph (1) presumption of work-relatedness, the employer must introduce substantial evidence to the contrary; once the trier of fact determines that the employer has adduced substantial evidence to overcome the presumption, it must weigh the evidence elicited by the employer against the evidence elicited by the claimant. 97 H. 402, 38 P.3d 570 (2001).

Appeals board's decision denying employee's claim not clearly erroneous where employer adduced substantial evidence rebutting the presumption of compensability for employee's alleged stress-related workplace injury through psychiatrist's report that employee suffered from preexisting paranoid schizophrenia that was triggered by wage garnishment, which was not an incident of employment. 98 H. 263, 47 P.3d 730 (2002).

Injury or death arises in course of employment when it takes place within the period of employment, at place where the employee may reasonably be, and while fulfilling duties or engaged in something incidental thereto. 1 H. App. 77, 613 P.2d 927 (1980).

Pursuant to requirements of §91-12, appeals board should generally state whether or not it has applied presumption of paragraph (1). But failure to do so in instant case did not prejudice appellant's substantial rights. 1 H. App. 77, 613 P.2d 927 (1980).

Substantial evidence defined. 1 H. App. 77, 613 P.2d 927 (1980).

Scope and nature of presumption discussed. 3 H. App. 39, 640 P.2d 1175 (1982).

Board failed to correctly apply presumption of compensability; decision that claimant's low back condition was not a compensable consequence of a work injury was clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. 94 H. 257 (App.), 12 P.3d 357 (2000).

In light of the strong presumption of work-relatedness under Hawaii workers' compensation law, as well as the lack of any non-speculative evidence to explain the cause of claimant's injuries from non-witnessed fall while claimant was performing employment duties at claimant's place of employment during working hours, employer failed to satisfy its heavy burden of adducing a "high quantum" of "relevant and credible evidence of a quality and quantity sufficient to justify a conclusion by a reasonable person" that claimant's fall and consequent injuries were not work-related. 101 H. 293 (App.), 67 P.3d 792 (2003).

Employer presented substantial evidence to rebut the presumption that employee's injuries were work-related where the undisputed evidence showed employee was injured while on unpaid leave, was injured while bowling, an activity that was not part of employee's work duties, at an off work site that was not operated or controlled by employer; employee's attendance there was strictly voluntary; employer did not finance the tournament; employer did not require employees to participate; and employer derived no substantial direct benefit from the bowling tournament beyond the intangible value of improvement in employee morale. 118 H. 239 (App.), 188 P.3d 753 (2008).

Department of education failed to present substantial evidence to overcome the statutory presumption of compensability, where evidence overwhelmingly demonstrated that employee's exposure to vog at work, combined with the surrounding circumstances of employee's employment and employee's preexisting condition, resulted in the exacerbation of employee's asthma. 131 H. 545, 319 P.3d 464 (2014).

Mentioned: 52 H. 242, 473 P.2d 561 (1970); 4 H. App. 26, 659 P.2d 77 (1983).

" **§386-86 Proceedings upon claim; hearings.** (a) If a claim for compensation is made, the director shall make such further investigation as deemed necessary and render a decision within sixty days after the conclusion of the hearing awarding or denying compensation, stating the findings of fact and conclusions of law. The director may extend the due date for decisions for good cause provided all parties agree. The

decision shall be filed with the record of the proceedings and a copy of the decision shall be sent immediately to each party.

(b) The hearing shall be informal and shall afford the parties a full and fair opportunity to present the facts and evidence to be considered. Hearings under this section shall not be subject to chapter 91. No stenographic or tape recording shall be allowed.

(c) The order of presentation shall not alter the burden of proof, including the burden of producing evidence and the burden of persuasion. The party or parties who bear these burdens shall be determined by law consistent with the purposes of this section.

(d) Should the injured employee or injured employee's representative, or the employer or employer's representative fail to appear at the hearing, the director may issue a decision based on the information on file. The decision shall be final unless appealed pursuant to section 386-87. In all other circumstances, a decision shall not be rendered by the director without a hearing, which may not be waived by the parties.

(e) For the purpose of obtaining any matter, not privileged, which is relevant to the subject matter involved in the pending action, the director, upon application and for good cause shown, may order the taking of relevant testimony by deposition, upon oral examination, or written interrogatories, or by other means of discovery in the manner and effect prescribed by the Hawaii rules of civil procedure; provided that when the claimant's deposition is taken, the employer shall pay for the cost to the claimant of attending the deposition, any costs associated with having the deposition transcribed and copied, and any and all reasonable attorney's fees and costs incurred by the claimant with respect to the deposition.

(f) Subpoenas requiring the attendance of witnesses at a hearing before a hearings officer or for the taking of a deposition or the production of documentary evidence from any place within the State at any designated place of hearing may be issued by the director or a duly authorized representative. The employer shall serve a claimant with a copy of a medical record subpoena unless the employer has previously obtained the claimant's authorization to examine the claimant's medical records. Should the claimant subpoena medical records, the employer shall be served a copy. The party subpoenaing the records shall provide these records within fifteen calendar days of their receipt to the employer, claimant, and the special compensation fund if a joinder has been filed, or their representatives. These records shall be submitted by the party requesting the subpoena to the director within seven calendar days of the date of the notice of hearing or upon request by the

director. A party who desires to enforce the director's subpoena shall seek enforcement from a court of competent jurisdiction. [L 1963, c 116, pt of §1; Supp, §97-95; HRS §386-86; am L 1985, c 296, §8; am L Sp 2005, c 11, §8]

Law Journals and Reviews

One-Sided Bargain? Assessing the Fairness of Hawai‘i's Workers' Compensation Law. 31 UH L. Rev. 553 (2009).

Case Notes

Where no lawful claim was filed with the director, director lacked the statutory authority either to award or to deny benefits to injured employee. 89 H. 411, 974 P.2d 51 (1999).

" **§386-87 Appeals to appellate board.** (a) A decision of the director shall be final and conclusive between the parties, except as provided in section 386-89, unless within twenty days after a copy has been sent to each party, either party appeals therefrom to the appellate board by filing a written notice of appeal with the appellate board or the department. In all cases of appeal filed with the department the appellate board shall be notified of the pendency thereof by the director. No compromise shall be effected in the appeal except in compliance with section 386-78.

(b) The appellate board shall hold a full hearing de novo on the appeal.

(c) The appellate board shall have power to review the findings of fact, conclusions of law and exercise of discretion by the director in hearing, determining or otherwise handling of any compensation case and may affirm, reverse or modify any compensation case upon review, or remand the case to the director for further proceedings and action.

(d) In the absence of an appeal and within thirty days after mailing of a certified copy of the appellate board's decision or order, the appellate board may, upon the application of the director or any other party, or upon its own motion, reopen the matter and thereupon may take further evidence or may modify its findings, conclusions or decisions. The time to initiate judicial review shall run from the date of mailing of the further decision if the matter has been reopened. If the application for reopening is denied, the time to initiate judicial review shall run from the date of mailing of the denial decision. [L 1963, c 116, pt of §1; Supp, §97-96; HRS §386-87; am L 1969, c 244, §2d; am L 1974, c 8, §1]

Cross References

Hearings, see chapter 91.

Case Notes

Constitutional. 24 H. 97 (1917).

If board's questions to court are ambiguous or uncertain, the reserved question cannot be answered or determined. 31 H. 554 (1930).

Reservations to supreme court confined to questions of law. 37 H. 517 (1947). See 33 H. 412 (1935); 34 H. 65 (1937).

Appeal lies from circuit court to supreme court. 38 H. 384 (1949).

Contested case heard by appellate board is bound by requirements of §91-10. 54 H. 479, 510 P.2d 89 (1973).

Issue of credibility is responsibility of appeals board as fact finder. 56 H. 552, 545 P.2d 692 (1976).

Time for filing a written notice of appeal is mandatory. 57 H. 37, 549 P.2d 470 (1976).

Denial of application for reconsideration under subsection (d) is not subject to requirements of §91-11. 57 H. 535, 560 P.2d 1292 (1977).

A motion to reopen a case for newly discovered evidence pursuant to §386-89(a) tolls the twenty-day period within which a claimant must appeal the department's decision under this section. 85 H. 275, 942 P.2d 539 (1997).

Collateral estoppel did not preclude determination that employee was permanently and totally disabled, despite employee's failure to appeal department's finding of no permanent disability, since finding was superfluous to department's decision. 8 H. App. 543, 812 P.2d 1199 (1991).

Where there was no rational basis for board's refusing to consider additional evidence submitted by claimant, and no cogent explanation for board's failure to consider evidence in light of its direct effect on board's finding and conclusion, board abused its discretion in denying claimant's motion to reopen case. 93 H. 116 (App.), 997 P.2d 42 (2000).

Claimant's appeal of director's decision was untimely where appeal was not filed for that decision within twenty-day deadline as required under subsection (a), notwithstanding that other issues were yet to be decided. 98 H. 508 (App.), 51 P.3d 375 (2002).

At the time plaintiff's appeals matured, where plaintiff was precluded by Hawaii administrative rule §12-15-94(d) from appealing the director's decisions to the labor and industrial relations appeals board, plaintiff could not be faulted for

failing to file notices of appeal with the board within the twenty-day time limit as required by this section; thus, plaintiff was given twenty days from the effective date of this judgment to file appeals of the director's decisions with the board. 120 H. 101 (App.), 201 P.3d 614 (2009).

Section 386-73 and this section set forth the right to appeal from the decisions of the director in workers' compensation cases and it gives a party the right to appeal the decision of the director in a medical fee dispute to the labor and industrial relations appeals board; thus, the no-appeal provision of Hawaii administrative rule §12-15-94(d) was invalid as inconsistent with this chapter, and the director exceeded the director's rulemaking authority in making the director's decisions in medical fee disputes final and non-appealable. 120 H. 101 (App.), 201 P.3d 614 (2009).

Petitioner's September 7, 2010 appeal was timely, where petitioner's June 14, 2010 letter to the disability compensation division (DCD) objecting to the director's approval of petitioner's attorney's fees and requesting a hearing, followed by petitioner's subsequent letters, was an application to reopen the case pursuant to §386-89(a) to permit the introduction of newly discovered evidence and the DCD's August 30, 2010 letter was the director's final decision denying the application to reopen the case. 132 H. 320, 321 P.3d 671 (2014).

Cited: 27 H. 431, 433 (1923); 31 H. 672, 676 (1930); 31 H. 814, 815 (1931); 32 H. 699, 700 (1933); 32 H. 928 (1933); 37 H. 556 (1947); 37 H. 583 (1947); 39 H. 258 (1952).

" **[§386-87.1] Standing to intervene in appeals.** In any proceeding before the appellate board under section 386-87, a prepaid health care plan contractor, as defined in section 393-3, may participate as a party in interest for the sole purpose of asserting its subrogation rights or other reimbursement right against any employer or insurance carrier for medical benefits which were previously paid by the contractor provided however any reimbursement shall be in accordance with the appropriate health care provider fee schedule. A prepaid health care plan contractor shall not have a right to intervene or participate on any other contested issue including the issue of compensability or entitlement to benefits before the appellate board. [L 1985, c 296, §21]

" **§386-88 Judicial review.** The decision or order of the appellate board shall be final and conclusive, except as provided in section 386-89, unless within thirty days after mailing of a certified copy of the decision or order, the director or any other party appeals to the intermediate

appellate court, subject to chapter 602, by filing a written notice of appeal with the appellate board, or by electronically filing a notice of appeal in accordance with the Hawaii rules of appellate procedure. A fee in the amount prescribed by section 607-5 for filing a notice of appeal from a circuit court shall be paid to the appellate board for filing the notice of appeal from the board, which together with the appellate court costs shall be deemed costs of the appellate court proceeding. The appeal shall be on the record, and the court shall review the appellate board's decision on matters of law only. No new evidence shall be introduced in the appellate court, except that if evidence is offered that is clearly newly discovered evidence and material to the just decision of the appeal, the court may admit the evidence. [L 1963, c 116, pt of §1; am L 1965, c 156, §1; Supp, §97-97; HRS §386-88; am L 1969, c 244, §2e; am L 1974, c 145, §4; am L 1979, c 111, §19; am L 2004, c 202, §44; am L 2006, c 94, §1; am L 2010, c 109, §1; am L 2013, c 14, §2]

Cross References

Appeals, see chapter 91.

Rules of Court

Appeal, see Hawaii Rules of Appellate Procedure.

Case Notes

Constitutional. 24 H. 97 (1917).

Appeal is upon both law and facts and is trial of cause de novo. 24 H. 731 (1919); 40 H. 660 (1955).

This section and §386-73 supersede §91-14 and remove the circuit court from the appellate process with regard to proceedings brought under chapter 386. 53 H. 640, 500 P.2d 746 (1972).

Appeals to supreme court from appeals board are governed by Administrative Procedure Act which sets out the "clearly erroneous" standard of review. 57 H. 296, 555 P.2d 855 (1976).

Appeals are governed by chapter 91. 2 H. App. 219, 629 P.2d 125 (1981).

Cited: 56 H. 544, 545 P.2d 687 (1976); 56 H. 552, 545 P.2d 692 (1976).

" **§386-89 Reopening of cases; continuing jurisdiction of director.** (a) In the absence of an appeal and within twenty days after a copy of the decision has been sent to each party, the director of labor and industrial relations may upon the

director's own motion or upon the application of any party reopen a case to permit the introduction of newly discovered evidence, and may render a revised decision.

(b) The director may at any time, either of the director's own motion or upon the application of any party, reopen any case on the ground that fraud has been practiced on the director or on any party and render such decision as is proper under the circumstances.

(c) On the application of any party in interest, supported by a showing of substantial evidence, on the ground of a change in or of a mistake in a determination of fact related to the physical condition of the injured employee, the director may, at any time prior to eight years after date of the last payment of compensation, whether or not a decision awarding compensation has been issued, or at any time prior to eight years after the rejection of a claim, review a compensation case and issue a decision which may award, terminate, continue, reinstate, increase, or decrease compensation. No compensation case may be reviewed oftener than once in six months and no case in which a claim has been rejected shall be reviewed more than once if on such review the claim is again rejected. The decision shall not affect any compensation previously paid, except that an increase of the compensation may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, a decrease of the compensation may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased compensation shall be deducted from any unpaid compensation in such manner and by such method as may be determined by the director. In the event any such decision increases the compensation in a case where the employee has received damages from a third party pursuant to section 386-8 in excess of compensation previously awarded, the amount of such excess shall constitute a pro tanto satisfaction of the amount of the additional compensation awarded. This subsection shall not apply when the employer's liability for compensation has been discharged in whole by the payment of a lump sum in accordance with section 386-54. [L 1963, c 116, pt of §1; am L 1965, c 69, §1; Supp, §97-98; HRS §386-89; am L 1974, c 8, §2; am L 1985, c 296, §9; gen ch 1985]

Law Journals and Reviews

Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals. 14 UH L. Rev. 271 (1992).

Case Notes

Constitutional. 24 H. 97 (1917).

Departure of alien dependent widow from U.S. constitutes a "change of condition" and board might modify its former award accordingly to take effect from date of departure subject to maximum and minimum amount of death benefit. 27 H. 431 (1923).

The presumptions contained in §386-85 apply to a reopening proceeding under subsection (c). 56 H. 552, 545 P.2d 692 (1976).

On review, claimant is entitled to the same presumption claimant is entitled to under §386-85. 57 H. 535, 560 P.2d 1292 (1977).

Request for reopening of case must be supported by showing of substantial evidence. 57 H. 535, 560 P.2d 1292 (1977).

Fair construction of subsection (c) would only prevent reopening when claim for periodic benefits has been "completely 'lump summed' out". 65 H. 415, 653 P.2d 420 (1982).

A motion to reopen a case for newly discovered evidence pursuant to subsection (a) tolls the twenty-day period within which a claimant must appeal the department's decision under §386-87. 85 H. 275, 942 P.2d 539 (1997).

The ten-year limitation provision in subsection (c) is not applicable to an application not based on a change in fact, or on a mistake in a determination of fact, relating to the physical condition of the claimant. 2 H. App. 136, 627 P.2d 288 (1981).

Petitioner's September 7, 2010 appeal was timely, where petitioner's June 14, 2010 letter to the disability compensation division (DCD) objecting to the director's approval of petitioner's attorney's fees and requesting a hearing, followed by petitioner's subsequent letters, was an application to reopen the case pursuant to §386-89(a) to permit the introduction of newly discovered evidence and the DCD's August 30, 2010 letter was the director's final decision denying the application to reopen the case. 132 H. 320, 321 P.3d 671 (2014).

The intermediate court of appeals did not err in concluding that the disability compensation division of the department of labor and industrial relations was not required to hold a contested case hearing on petitioner's request to reopen petitioner's attorney's fees and costs request. 132 H. 320, 321 P.3d 671 (2014).

Cited: 24 H. 731, 735 (1919); 27 H. 476, 485 (1923); 31 H. 672, 673 (1930); 31H. 814, 816 (1931); 32 H. 920, 926 (1933).

" **§386-90 Conforming prior decisions on appeal.** Upon the filing of a certified copy of a decision of the director rendered pursuant to section 386-89 with the appellate board,

the board shall revoke or modify its prior decision so that it will conform to the decision of the director. [L 1963, c 116, pt of §1; Supp, §97-99; HRS §386-90; am L 1969, c 244, §2f]

" **§386-91 Enforcement of decisions awarding compensation; judgment rendered thereon.** (a) Any party in interest or the director may file in the circuit court in the jurisdiction in which the injury occurred, a certified copy of:

(1) A decision of the director assessing penalties, or awarding compensation or other relief, including attorneys fees, from which no appeal has been taken within the time allowed therefor;

(2) A decision of the director assessing penalties, or awarding compensation or other relief, including attorneys fees, from which decision an appeal has been taken but as to which no order has been made by the director or the appellate board or the court that the appeal therefrom shall operate as a supersedeas or stay;

(3) A decision of the appellate board assessing penalties, or awarding compensation or other relief, including attorneys fees, from which no appeal has been taken within the time allowed therefor; or

(4) A decision of the appellate board assessing penalties, or awarding compensation or other relief, including attorneys fees, from which an appeal has been taken but as to which no order has been made by the appellate board or the court that the appeal therefrom shall operate as a supersedeas or stay.

The court shall render a judgment in accordance with the decision and notify the parties thereof. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment had been rendered in an action duly heard and determined by the court, except that there shall be no appeal therefrom.

(b) In all cases where an appeal from the decision concerned has been taken within the time provided therefor, but where no order has been made by the director or the appellate board or the court that the appeal shall operate as a supersedeas or stay, the decree or judgment of the circuit court shall provide that the decree or judgment shall become void if the decision or award of the director or appellate board, as the case may be, is finally set aside.

(c) In addition to the enforcement remedies set forth in subsection (a) above, the director or employee as part of the proceedings set out therein may ask the court to fine the

employer from one per cent to five per cent of the judgment, which fine shall be payable to the employee:

(1) When the employer does not take an appeal from the decision of the director within the time allowed therefor and does not commence making payments within ten days after such appeal period has expired;

(2) When the employer does take an appeal from the decision of the director within the time allowed therefor and the employer does not request from the appellate board a supersedeas or stay of the decision and the employer does not commence making payments within ten days after such appeal period has expired; or

(3) When the employer does take an appeal from the decision of the director within the time allowed therefor and the appellate board denies the employer's request for supersedeas or stay and the employer does not commence making payments within ten days after such a denial by the appellate board.

(d) In addition to the enforcement remedies set forth in subsection (a) above, the employer as part of the proceedings set out therein may ask the court to fine the employee from one per cent to five per cent of the judgment, which fine shall be payable to the employer:

(1) When the employee does not take an appeal from the decision of the director within the time allowed therefor and does not commence making payments within thirty days after such appeal period has expired;

(2) When the employee does take an appeal from the decision of the director within the time allowed therefor and the employee does not request from the appellate board a supersedeas or stay of the decision and the employee does not commence making payments within thirty days after such appeal period has expired; or

(3) When the employee does take an appeal from the decision of the director within the time allowed therefor and the appellate board denies the employee's request for supersedeas or stay and the employee does not commence making payments within thirty days after such a denial by the appellate board. [L 1963, c 116, pt of §1; Supp, §97-100; HRS §386-91; am L 1972, c 3, §1; am L 1979, c 66, §3; am L 1993, c 255, §1]

Revision Note

Pursuant to §23G-15, in:

(1) Subsection (c)(1), "or" deleted and punctuation changed;
(2) Subsection (c)(2), punctuation changed;
(3) Subsection (d)(1), "or" deleted and punctuation changed; and
(4) Subsection (d)(2), punctuation changed.

Case Notes

Proceedings are to be as simple and informal as may be consistent with right and justice. 24 H. 731 (1919).

Plain language of subsection (a) prohibits an appeal from a judgment entered in accordance with this section; county had no right to appeal from the judgments and orders entered; under section's plain language, an appellate court lacks jurisdiction to consider a prohibited appeal. 95 H. 288, 22 P.3d 84 (2001).

Where claimant failed to serve employer and insurer with motion and summons, due process violated; circuit court thus did not acquire personal jurisdiction over employer and insurer and judgment and garnishee summons issued pursuant to this section in absence of personal jurisdiction void. 82 H. 405 (App.), 922 P.2d 1018 (1996).

Cited: 27 H. 431, 432 (1923).

" **§386-92 Default in payments of compensation, penalty.** If any compensation payable under the terms of a final decision or judgment is not paid by a self-insured employer or an insurance carrier within thirty-one days after it becomes due, as provided by the final decision or judgment, or if any temporary total disability benefits are not paid by the employer or carrier within ten days, exclusive of Saturdays, Sundays, and holidays, after the employer or carrier has been notified of the disability, and where the right to benefits are not controverted in the employer's initial report of industrial injury or where temporary total disability benefits are terminated in violation of section 386-31, there shall be added to the unpaid compensation an amount equal to twenty per cent thereof payable at the same time as, but in addition to, the compensation, unless the nonpayment is excused by the director after a showing by the employer or insurance carrier that the payment of the compensation could not be made on the date prescribed therefor owing to the conditions over which the employer or carrier had no control. [L 1963, c 116, pt of §1; Supp, §97-101; HRS §386-92; am L 1971, c 159, §1; am L 1979, c 66, §4; gen ch 1985; am L 1995, c 234, §14]

Case Notes

Administrative penalties authorized by this section and §386-31(b) not intended to provide an injured worker's exclusive remedy for injuries resulting from an insurer's tortious delay or termination of benefits. 83 H. 457, 927 P.2d 858 (1996).

" **§386-93 Costs.** (a) If the director of labor and industrial relations, appellate board, or any court finds that proceedings under this chapter have been brought, prosecuted, or defended without reasonable ground, the whole costs of the proceedings including reasonable attorney's fees may be assessed against the party who has brought, prosecuted, or defended the proceedings.

(b) If an employer appeals a decision of the director or appellate board, the costs of the proceedings of the appellate board or the appellate court, together with reasonable attorney's fees, shall be assessed against the employer if the employer loses; provided that if an employer or an insurance carrier, other than the employer who appealed, is held liable for compensation, the costs of the proceedings of the appellate board or the appellate court, together with reasonable attorney's fees, shall be assessed against the party held liable for the compensation. [L 1963, c 116, pt of §1; Supp, §97-102; am L 1967, c 180, §1; HRS §386-93; am L 1969, c 244, §2g; am L 2004, c 202, §45; am L 2006, c 94, §1; am L 2010, c 109, §1; am L 2012, c 234, §1]

Rules of Court

See HRCP rule 54(d).

Law Journals and Reviews

One-Sided Bargain? Assessing the Fairness of Hawai‘i's Workers' Compensation Law. 31 UH L. Rev. 553 (2009).

Case Notes

Attorney fees. 35 H. 591 (1940).

Reasonable grounds. 38 H. 405 (1949).

Party who prevailed on the crucial issue held to be the prevailing party. 57 H. 535, 560 P.2d 1292 (1977).

Imposes liability for costs and fees incurred by nonappealing employer on appealing employer who loses. 66 H. 290, 660 P.2d 1316 (1983).

An order regarding the award or denial of attorney's fees and costs with respect to subsection (b) is a final order under §91-14(a) for purposes of appeal; this final order rule applies

prospectively to prevent injustice; subsection (b) allows assessment of attorney's fees and costs against an employer if the employer loses the final appeal. 104 H. 164, 86 P.3d 973 (2004).

Where appeals court's opinion regarding attorney's fees and costs under this section was not ripe for decision, constituted an advisory opinion akin to the issuance of an opinion when there was no subject matter jurisdiction, and constituted inappropriate judicial interference with an administrative decision of an entity within a separate, co-equal branch that had not been formalized and had not yet affected the challenging parties in a concrete way, thereby implicating separation-of-powers concerns, the appeals court's exercise of appellate power constituted error. 121 H. 33, 211 P.3d 750 (2009).

Imposes liability for costs and fees incurred by nonappealing employer on appealing employer who loses; "crucial issue" test applied. 5 H. App. 521, 704 P.2d 914 (1985).

When employer appeals decision of director or appeals board and subsequently withdraws either entire appeal or any portion of appeal, or concedes, the decision of director or appeals board becomes final and employer is considered losing party for purposes of subsection (b). 84 H. 390 (App.), 935 P.2d 105 (1997).

Cited: 33 H. 634 (1935).

" **§386-94 Attorneys, physicians, other health care providers, and other fees.** Claims for services shall not be valid unless approved by the director or, if an appeal is had, by the appellate board or court deciding the appeal. Any claim so approved shall be a lien upon the compensation in the manner and to the extent fixed by the director, the appellate board, or the court.

In approving fee requests, the director, appeals board, or court may consider factors such as the attorney's skill and experience in state workers' compensation matters, the amount of time and effort required by the complexity of the case, the novelty and difficulty of issues involved, the amount of fees awarded in similar cases, benefits obtained for the claimant, and the hourly rate customarily awarded attorneys possessing similar skills and experience. In all cases, reasonable attorney's fees shall be awarded.

Any person who receives any fee, other consideration, or gratuity on account of services so rendered, without approval, in conformity with the preceding paragraph, shall be fined by the director not more than $10,000. [L 1963, c 116, pt of §1; Supp, §97-103; HRS §386-94; am L 1985, c 296, §6; am L 1988, c 37, §2; am L 1993, c 301, §1; am L Sp 2005, c 11, §9]

Case Notes

The disability compensation division of the department of labor and industrial relations must set forth its reasons for reducing an attorney's fee request for appropriate appeals board and possible judicial review of the reduction pursuant to §91-14; the format of an order reducing attorney's fees and/or costs need only be sufficient to enable appropriate review for abuse of discretion. 132 H. 320, 321 P.3d 671 (2014).

The intermediate court of appeals did not err in concluding that the disability compensation division of the department of labor and industrial relations was not required to hold a contested case hearing on petitioner's request to reopen petitioner's attorney's fees and costs request. 132 H. 320, 321 P.3d 671 (2014).

" **§386-95 Reports of injuries, other reports, penalty.** Every employer shall keep a record of all injuries, fatal or otherwise, received by the employer's employees in the course of their employment, when known to the employer or brought to the employer's attention.

Within seven working days after the employer has knowledge of such injury causing absence from work for one day or more or requiring medical treatment beyond ordinary first aid, the employer shall make a report thereon to the director. The report shall set forth the name, address, and nature of the employer's business and the name, age, sex, wages, and occupation of the injured employee and shall state the date and hour of the accident, if the injury is produced thereby, the nature and cause of the injury, and such other information as the director may require.

By January 31 of each year, the employer shall file with the director a report with respect to each injury on which the employer is continuing to pay compensation, showing all amounts paid by the employer on account of the injury.

The reports required by this section shall be made on forms to be obtained from the director pursuant to section 386-71 and deposit of reports in the United States mail or by electronic means as approved by the director, addressed to the director, within the time specified shall be deemed compliance with the requirements of this section.

When an injury results in immediate death, the employer shall within forty-eight hours notify personally or by telephone a representative of the department in the county where the injury occurred.

Within thirty days after final payment of compensation for an injury, the employer shall file a final report with the director showing the total payments made, the date of termination of temporary total disability, and such other information as the director may require.

Any employer who wilfully refuses or neglects to file any of the reports or give any notice required by this section shall be fined by the director not more than $5,000.

Copies of all reports, other than those of fatal injuries, filed with the director as required by this section shall be sent to the injured employee by the employer. [L 1963, c 116, pt of §1; am L 1965, c 59, §1; Supp, §97-110; am L 1966, c 7, §2; HRS §386-95; am L 1973, c 10, §1; am L 1982, c 51, §1; gen ch 1985; am L 1988, c 37, §3; am L 1993, c 254, §1; am L 2002, c 221, §1; am L 2016, c 187, §2]

Case Notes

Failure of employer to file form reporting employee's injury does not toll statute of limitations. 68 H. 111, 706 P.2d 13 (1985).

" **§386-96 Reports of physicians, surgeons, and hospitals.** (a) Any physician, surgeon, or hospital that has given any treatment or rendered any service to an injured employee shall make a report of the injury and treatment on forms prescribed by and to be obtained from the department as follows:

(1) Within seven days after the date of first attendance or service rendered, an initial report shall be made to the department and to the employer of the injured employee in the manner prescribed by the department;

(2) Interim reports to the same parties and in the same manner as prescribed in paragraph (1) shall be made at appropriate intervals to verify the claimant's current diagnosis and prognosis, that the information as to the nature of the examinations and treatments performed is complete, including the dates of those treatments and the results obtained within the current reporting period, the execution of all tests performed within the current reporting period and the results of the tests, whether the injured employee is improving, worsening, or if "medical stabilization" has been reached, the dates of disability, any work restrictions, and the return to work date. When an injured employee is returned to full-time, regular, light, part-time, or restricted work, the attending physician shall submit a report to the employer within

seven calendar days indicating the date of release to work or medical stabilization; and

(3) A final report to the same parties and in the same manner as prescribed in paragraph (1) shall be made within seven days after termination of treatment.

No physician, surgeon, or hospital that has given any treatment or rendered any service to an injured employee shall be required to provide any additional reports not otherwise mandated by this section.

(b) No claim under this chapter for medical treatment, surgical treatment, or hospital services and supplies, shall be valid and enforceable unless the reports are made as provided in this section, except that the director may excuse the failure to make the report within the prescribed period or a nonsubmission of the report when the director finds it in the best interest of justice to do so. If the director does not excuse the submission of:

(1) An initial or interim report within the time prescribed in subsection (a)(1) and (2); or

(2) A final report that is thirty days late or a nonsubmission,

the delinquent physician shall be fined not more than $500.

(c) The director shall furnish to the injured employee a copy of the final report of the attending physician or surgeon or, if more than one physician or surgeon should treat or examine the employee, a copy of the final report of each physician or surgeon.

(d) Within fifteen days after being requested to do so by the injured employee or the employee's duly authorized representative, the employer shall furnish the employee or the employee's duly authorized representative with copies of all medical reports relating to the employee's injury that are in the possession of the employer. The copies shall be furnished at the expense of the employer. The employer shall allow the employee or the employee's duly authorized representative to inspect and copy transcripts of depositions of medical witnesses, relating to the employee's injury, in the possession of the employer. Any employer who fails to furnish medical reports or to allow inspection and copying of transcripts of depositions of medical witnesses, as required by this subsection, shall be fined in an amount not to exceed $5,000.

(e) Deposit of the records required by subsection (a)(1) in the United States mail or by electronic means as approved by the director, addressed to the director and to the employer, within the time limit specified, shall be deemed in compliance with the requirements of this section. [L 1963, c 116, pt of §1; Supp, §97-111; am L 1966, c 7, §3; HRS §386-96; am L 1969, c 31,

§1; am L 1972, c 13, §1 and c 60, §1; am L 1973, c 12, §1; gen ch 1985; am L 1988, c 37, §4; am L 1995, c 234, §15; am L Sp 2005, c 11, §10; am L 2016, c 187, §3]

" **§386-97 Inspections.** The director of labor and industrial relations may inspect the plants and establishments of all employers in the State and the inspectors designated by the director shall have free access to such premises during regular working hours, and at other reasonable times. [L 1963, c 116, pt of §1; Supp, §97-112; HRS §386-97]

" **[§386-97.5] Penalties.** (a) Any person who, after twenty-one days written notice and the opportunity to be heard by the director, is found to have violated any provision of this chapter or rule adopted thereunder for which no penalty is otherwise provided, shall be fined not more than $250 for each offense.

(b) All fines collected pursuant to this chapter shall be deposited into the special compensation fund created by section 386-151. [L 1991, c 107, §1]

" **§386-98 Fraud violations and penalties.** (a) A fraudulent insurance act, under this chapter, shall include acts or omissions committed by any person who intentionally or knowingly acts or omits to act so as to obtain benefits, deny benefits, obtain benefits compensation for services provided, or provides legal assistance or counsel to obtain benefits or recovery through fraud or deceit by doing the following:

(1) Presenting, or causing to be presented, any false information on an application;
(2) Presenting, or causing to be presented, any false or fraudulent claim for the payment of a loss;
(3) Presenting multiple claims for the same loss or injury, including presenting multiple claims to more than one insurer except when these multiple claims are appropriate and each insurer is notified immediately in writing of all other claims and insurers;
(4) Making, or causing to be made, any false or fraudulent claim for payment or denial of a health care benefit;
(5) Submitting a claim for a health care benefit that was not used by, or on behalf of, the claimant;
(6) Presenting multiple claims for payment of the same health care benefit;
(7) Presenting for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for

that claimant are presented for reconciliation at that same time;

(8) Misrepresenting or concealing a material fact;

(9) Fabricating, altering, concealing, making a false entry in, or destroying a document;

(10) Making, or causing to be made, any false or fraudulent statements with regard to entitlements or benefits, with the intent to discourage an injured employee from claiming benefits or pursuing a workers' compensation claim; or

(11) Making, or causing to be made, any false or fraudulent statements or claims by, or on behalf of, a client with regard to obtaining legal recovery or benefits.

(b) No employer shall wilfully make a false statement or representation to avoid the impact of past adverse claims experience through change of ownership, control, management, or operation to directly obtain any workers' compensation insurance policy.

(c) It shall be inappropriate for any discussion on benefits, recovery, or settlement to include the threat or implication of criminal prosecution. Any threat or implication shall be immediately referred in writing to:

(1) The state bar if attorneys are in violation;

(2) The insurance commissioner if insurance company personnel are in violation; or

(3) The regulated industries complaints office if health care providers are in violation,

for investigation and, if appropriate, disciplinary action.

(d) An offense under subsections (a) and (b) shall constitute a:

(1) Class C felony if the value of the moneys obtained or denied is not less than $2,000;

(2) Misdemeanor if the value of the moneys obtained or denied is less than $2,000; or

(3) Petty misdemeanor if the providing of false information did not cause any monetary loss.

Any person subject to a criminal penalty under this section shall be ordered by a court to make restitution to an insurer or any other person for any financial loss sustained by the insurer or other person caused by the fraudulent act.

(e) In lieu of the criminal penalties set forth in subsection (d), any person who violates subsections (a) and (b) may be subject to the administrative penalties of restitution of benefits or payments fraudulently received under this chapter, whether received from an employer, insurer, or the special compensation fund, to be made to the source from which the compensation was received, and one or more of the following:

(1) A fine of not more than $10,000 for each violation;
(2) Suspension or termination of benefits in whole or in part;
(3) Suspension or disqualification from providing medical care or services, vocational rehabilitation services, and all other services rendered for payment under this chapter;
(4) Suspension or termination of payments for medical, vocational rehabilitation and all other services rendered under this chapter;
(5) Recoupment by the insurer of all payments made for medical care, medical services, vocational rehabilitation services, and all other services rendered for payment under this chapter; and
(6) Reimbursement of attorney's fees and costs of the party or parties defrauded.

(f) With respect to the administrative penalties set forth in subsection (e), no penalty shall be imposed except upon consideration of a written complaint that specifically alleges a violation of this section occurring within two years of the date of said complaint. A copy of the complaint specifying the alleged violation shall be served promptly upon the person charged. The director or board shall issue, where a penalty is ordered, a written decision stating all findings following a hearing held not fewer than twenty days after written notice to the person charged. Any person aggrieved by the decision may appeal the decision under sections 386-87 and 386-88. [L 1963, c 116, pt of §1; Supp, §97-113; HRS §386-98; am L 1982, c 98, §1; am L 1985, c 296, §7; am L 1995, c 234, §16; am L 1996, c 260, §5; am L Sp 2005, c 11, §11]

Case Notes

A violation of this section, a fraudulent insurance act, must be proven by clear and convincing evidence. 113 H. 1, 147 P.3d 785 (2006).

In the context of subsection (a), for a fraudulent insurance act to occur, the "logical result or purpose" of "acts or omissions" must be "to obtain benefits"; subsection (a) thus does not require that a party actually obtain benefits to be subject to a penalty, it only requires that obtaining benefits was the "logical result or purpose" of the party's acts or omissions. 113 H. 1, 147 P.3d 785 (2006).

Subsection (a)(8) does not require reliance or detrimental reliance by any party for a violation of its terms to occur. 113 H. 1, 147 P.3d 785 (2006).

Where appellant was subjected to the administrative penalties set forth in subsection (e), and not criminal penalties, appellant's arguments that this section unconstitutionally delegates the State's police power to private parties by permitting such parties to file a complaint were unpersuasive. 113 H. 1, 147 P.3d 785 (2006).

Where six out of seven factors weighed against concluding that the sanction of a fine under subsection (e) was punitive, appellant failed to provide the "clearest proof" that the administrative penalties imposed pursuant to subsection (e) were criminal and punitive, despite the legislature's expressed intent to the contrary. 113 H. 1, 147 P.3d 785 (2006).

Discussed: 945 F. Supp. 2d 1133 (2013).

" **[§386-99] Posting of information.** Each employer shall post and maintain in places readily accessible to individuals in the employer's employ printed statements concerning benefit rights, claims for benefits, and such other matters relating to the administration of this chapter as the department of labor and industrial relations may by regulation prescribe. Each employer shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits when and as the department may by regulation prescribe. Such printed statements and other materials shall be supplied by the department to each employer without cost to the employer. [L 1971, c 85, §1; gen ch 1985]

" **§386-100 Deductible option for medical benefits in insurance policy.** (a) Each workers' compensation insurance policy issued by every insurer shall offer, at the option of the insured employer, a deductible for medical benefits in the amount of $100, $150, $200, $300, $400, $500, $2,500, $5,000, or $10,000, or greater if agreed upon by the insurer and the insured employer. The insured employer, if choosing to exercise the option, shall choose only one of the amounts as the deductible. The provisions of this subsection shall be fully disclosed to the prospective purchaser in writing.

(b) If an insured employer exercises the option and chooses a deductible, the insured employer shall be liable for the amount of the deductible for the medical benefits paid for each claim of work injury suffered by an injured employee. The insurer shall not be liable for the deductible.

The insurer shall pay the entire cost of medical bills directly to the provider of services and then seek reimbursement from the insured for the deductible amount.

Deductible medical benefit amounts shall be reported by insurers as required by section 386-95 and shall be included in

the total average annual compensation paid by all insurance carriers in determining the charge against employers not insured under section 386-121(a)(1) for the purpose of the special compensation fund. [L 1985, c 296, §13; am L 1989, c 243, §1; am L 1995, c 234, §17]

"PART IV. SECURITY FOR COMPENSATION; EMPLOYMENT RIGHTS OF INJURED EMPLOYEES; FUNDS

A. Security for Compensation

Case Notes

In the context of the Hawaii workers' compensation scheme, a physician is an incidental beneficiary rather than an intended third-party beneficiary of the employer's workers' compensation insurance policy; thus, as physician was not an intended third-party beneficiary of insurer's insurance policy, physician did not have a cause of action in tort for bad faith against insurer. 114 H. 122 (App.), 157 P.3d 561 (2007).

§386-121 Security for payment of compensation; misdemeanor. (a) Employers, except the State, any county or political subdivision of the State, or other public entity within the State, shall secure compensation to their employees in one of the following ways:

(1) By insuring and keeping insured the payment of compensation with any stock, mutual, reciprocal, or other insurer authorized to transact the business of workers' compensation insurance in the State;

(2) By depositing and maintaining with the state director of finance security satisfactory to the director of labor and industrial relations securing the payment by the employer of compensation according to the terms of this chapter;

(3) Upon furnishing satisfactory proof to the director of the employer's solvency and financial ability to pay the compensation and benefits herein provided, no insurance or security shall be required, and the employer shall make payments directly to the employer's employees, as they may become entitled to receive the same under the terms and conditions of this chapter;

(4) An employer desiring to maintain security for payment of compensation under this section shall file an application with the director on a form provided for

this purpose together with the employer's most current audited annual financial statement;

(5) Where an applicant for self-insurance is a subsidiary and the subsidiary cannot submit an independent current audited annual financial statement, an indemnity agreement approved as to form and content by the director shall be executed by the parent corporation of the subsidiary and submitted with its application;

(6) Each self-insurance authorization shall be effective from the date of issuance until June 30 of each calendar year;

(7) A notice of intention to cancel self-insurance shall be submitted in writing to the director within at least thirty days prior to the effective date of cancellation;

(8) A self-insurance authorization may be revoked by the director for good cause shown upon notification in writing to the self-insurer;

(9) By membership in a workers' compensation self-insurance group with a valid certificate of approval under section 386-194; or

(10) By membership in a workers' compensation group insured by a captive insurer under chapter 431, article 19.

Any person who wilfully misrepresents any fact in order to obtain the benefits of paragraph (3) shall be guilty of a misdemeanor.

(b) Any decision of the director rendered under paragraphs (2) and (3) of subsection (a) of this section with respect to the amount of security required or refusing to permit no security to be given shall be subject to review on appeal in conformity with sections 386-87 and 386-88. [L 1963, c 116, pt of §1; Supp, §97-120; HRS §386-121; am L 1975, c 41, §1; gen ch 1985; am L 1986, c 304, §3; am L 1991, c 79, §1; am L Sp 2005, c 11, §12]

Case Notes

Claimant may make insurance carrier party defendant by original claim or subsequent separate claim. 27 H. 476 (1923).

Procedure informal. 32 H. 162 (1931).

Cited: 31 H. 554 (1930).

" **§386-122 Notice of insurance.** If the insurance so effected is under section 386-121(a)(1), the employer shall file with the director in a form prescribed by the director a notice of the employer's insurance together with a statement of

benefits provided by the policy of insurance. The director may also accept the notice of employer's insurance from approved third party agencies in a manner and form approved by the director. [L 1963, c 116, pt of §1; Supp, §97-121; HRS §386-122; gen ch 1985; am L 1986, c 304, §4; am L 1988, c 35, §1; am L 2012, c 262, §1]

Case Notes

Cited: 27 H. 476, 480 (1923); 32 H. 162 (1931).

" **§386-123 Failure to give security for compensation; penalty; injunction.** If an employer fails to comply with section 386-121, the employer shall be liable for a penalty of not less than $500 or of $100 for each employee for every day during which such failure continues, whichever sum is greater, to be recovered in an action brought by the director in the name of the State, and the amount so collected shall be paid into the special compensation fund created by section 386-151. The director may, however, in the director's discretion, for good cause shown, remit all or any part of the penalty in excess of $500; provided that the employer in default complies with section 386-121. With respect to such actions, the attorney general or any county attorney or public prosecutor shall prosecute the same if so requested by the director.

In addition, if any employer is in default under section 386-121 for a period of thirty days, the employer may be enjoined, by the circuit court of the circuit in which the employer's principal place of business is located, from carrying on the employer's business anywhere in the State so long as the default continues, such action for injunction to be prosecuted by the attorney general or any county attorney if so requested by the director. [L 1963, c 116, pt of §1; Supp, §97-122; HRS §386-123; gen ch 1985; am L 1988, c 37, §5; am L 2016, c 187, §4]

Rules of Court

Injunctions, see HRCP rule 65.

" **§386-124 The insurance contract.** Every policy of insurance issued by an insurer of an employer referred to in section 386-1 which covers the liability of the employer for compensation shall cover the entire liability of the employer to the employer's employees covered by the policy or contract, and provide for the deductible under section 386-100, at the option of the insured. The policy also shall contain a provision

setting forth the right of the employees to enforce in their own names either by filing a separate claim or by making the insurance carrier a party to the original claim, the liability of the insurance carrier in whole or in part for the payment of the compensation. Payment in whole or in part of compensation by either the employer or the insurance carrier shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

All insurance policies shall be of a standard form, the form to be designated and approved by the insurance commissioner. No policy of insurance different in form from the designated and approved form shall be approved by the director. [L 1963, c 116, pt of §1; Supp, §97-123; HRS §386-124; am L 1985, c 296, §19; gen ch 1985]

Attorney General Opinions

Forbids policy insuring employers only at project site or in related operations. Att. Gen. Op. 86-11.

Case Notes

Insurance carrier may be made party defendant, when. 27 H. 476 (1923).

Insurer may not make itself a party to proceedings of its own accord. 32 H. 162 (1931).

In the context of the Hawaii workers' compensation scheme, a physician is an incidental beneficiary rather than an intended third-party beneficiary of the employer's workers' compensation insurance policy; thus, as physician was not an intended third-party beneficiary of insurer's insurance policy, physician did not have a cause of action in tort for bad faith against insurer. 114 H. 122 (App.), 157 P.3d 561 (2007).

Cited: 31 H. 638, 650 (1930); 33 H. 545, 546 (1935).

" **[§386-124.5] Insurer's requirements; failure to maintain claims service office; penalty; injunction.** (a) By January 1, 1992, each insurer shall establish and maintain a complete claims service office or engage an independent claims adjusting service as its claims agent in this State with draft authority for the processing and payment of compensation.

(b) Failure to comply with subsection (a) shall subject the insurer to a civil penalty of not less than $2,500, or $100 for every day during which the failure continues, whichever sum is greater, to be recovered in an action brought by the director in the name of the State in a court of competent jurisdiction. Any amounts so collected shall be paid into the special

compensation fund provided by section 386-151. The director shall have discretion, for good cause shown, to remit all or any part of the penalty in excess of $2,500, if the insurer in default forthwith complies with subsection (a).

(c) If any insurer violates subsection (a) for a period of thirty days, the insurer may be enjoined by the circuit court from carrying on the insurer's business in any place in the State so long as the violation continues.

(d) The attorney general shall enforce this section if so requested by the director. [L 1991, c 78, §1]

" **§386-125 Knowledge of employer imputed to insurance carrier.** Every policy and contract shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all respects be bound by and subject to the orders, findings, and decisions rendered against the employer for the payment of compensation under this chapter. [L 1963, c 116, pt of §1; Supp, §97-124; HRS §386-125]

" **§386-126 Insolvency of employer not to release insurance carrier.** Every policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer and the employer's discharge therein shall not relieve the insurance carrier from the payment of compensation for an injury suffered by a covered employee during the life of the policy or contract. [L 1963, c 116, pt of §1; Supp, §97-125; HRS §386-126; gen ch 1985]

" **§386-127 Cancellation of insurance contracts.** No policy or contract of insurance issued by a stock company or mutual association against liability arising under this chapter shall be canceled within the time limited in the contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in the notice, has been filed with and served on the director of labor and industrial relations and the employer. [L 1963, c 116, pt of §1; Supp, §97-126; HRS §386-127]

" **§386-128 Insurance by the State, counties, and municipalities.** The State, any county or other political subdivision of the State, and any other public entity within the State which is liable to its employees for compensation, may

insure with any authorized insurance carrier. [L 1963, c 116, pt of §1; Supp, §97-127; HRS §386-128]

" **§386-129 Employees not to pay for insurance; penalty.** No agreement by an employee to pay any portion of the premium paid by the employee's employer, or to contribute to a benefit fund or department maintained by the employer, or to the cost of mutual or other insurance maintained for or carried for the purpose of securing compensation as herein required, shall be valid; and any employer who makes a deduction for that purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be fined not more than $5,000. [L 1963, c 116, pt of §1; Supp, §97-128; HRS §386-129; gen ch 1985; am L 1988, c 37, §6; am L 2016, c 187, §5]

"B. Employment Rights of Injured Employees

§386-141 REPEALED. L 1970, c 64, §1.

Cross References

Unlawful suspension, discharge, or discrimination, see §378-32.

" **[§386-142] Employment rights of injured employees.** It shall be unlawful for any employer to suspend or discharge any employee solely because the employee suffers any work injury which is compensable under this chapter and which arises out of and in the course of employment with the employer unless it is shown to the satisfaction of the director that the employee will no longer be capable of performing the employee's work as a result of the work injury and that the employer has no other available work which the employee is capable of performing. Any employee who is suspended or discharged because of such work injury shall be given first preference of reemployment by the employer in any position which the employee is capable of performing and which becomes available after the suspension or discharge and during the period thereafter until the employee secures new employment. This section shall not apply to the United States or to employers subject to part III of chapter 378. [L 1978, c 201, §1; gen ch 1985]

Case Notes

Worker's compensation insurer's settlement offer did not violate public policy or amount to an unlawful retaliatory

discharge by including claimant's resignation as one of its terms. 112 H. 195 (App.), 145 P.3d 738 (2006).

"C. Special Compensation Fund

§386-151 Special compensation fund established and maintained. (a) There is hereby created a trust fund to be known as the special compensation fund which shall consist of payments made to it as provided by law. The director of finance of the State shall be custodian of the fund, and all disbursements therefrom shall be paid by the director of finance upon orders by the director of labor and industrial relations.

(b) Every employer pursuant to an order made by the director, shall pay into the fund the amounts specified in sections 386-34(5) and 386-41(d) under the conditions prescribed for such payment. Whenever such amount is paid into the fund and it is subsequently determined by the director, the appellate board, or a court having jurisdiction that a dependent is entitled to benefits excluding or diminishing the entitlement of the fund, the director, appellate board, or court shall order the refund of the sum to which the fund is not entitled and the director of finance as custodian shall immediately make such refund upon receipt by the director of finance of a certified copy of this order. In cases where an order of the director ordering payment into the fund is reversed on appeal the employer is relieved of any duty to make payments into the fund.

(c) The director shall appoint annually a certified public accountant to examine and audit all the books and records relating to the special compensation fund and shall advise the director as to the fund's solvency, including recommendations as to levies and charges provided for in section 386-152 and the required level of funding. The certified public accountant's fees for this service shall be paid out of the special compensation fund. [L 1963, c 116, pt of §1; Supp, §97-140; HRS §386-151; am L 1973, c 183, §1; gen ch 1985; am L 2013, c 100, §5]

" **§386-152 Levy and charges to finance special compensation fund.** When the cash balance of the special compensation fund established in section 386-151 falls below, as of December 31 of any year, an amount determined by the director to be insufficient to meet the fund's current and projected obligations, then the levy on the gross premiums of insurers of employers insured under section 386-121(a)(1) provided for in section 386-153, and the charge provided in section 386-154 against each employer not insuring and keeping insured, as provided in section 386-121(a)(1), shall be levied and collected

during the succeeding year and each succeeding year thereafter until the cash balance of the fund equals or exceeds as of December 31 of any year an amount determined by the director to be sufficient to meet the fund's current and projected obligations. When the cash balance of the fund equals or exceeds as of December 31 of any year an amount determined by the director to be sufficient to meet the fund's current and projected obligations, then the levy on the gross premiums of insurance companies provided for in section 386-153 and the charge provided in section 386-154 against each employer not insuring and keeping insured as provided in section 386-121(a)(1) shall not be levied and collected during the succeeding year until the cash balance of the fund falls below as of December 31 of any year an amount determined by the director to be insufficient to meet the fund's current and projected obligations.

The director shall annually furnish each insurance company provided for in section 386-153 and each employer provided for in section 386-154 with a copy of the certified public accountant's audit report and recommendations. The cost of furnishing such report shall be paid out of the special compensation fund. [L 1963, c 103, pt of §1; Supp, §97-141; HRS §386-152; am L 1973, c 183, §2]

" **§386-153 Levy on insurers of employers insured under section 386-121(a)(1).** (a) For the calendar year 1974 and for each calendar year thereafter, insurers of employers, as defined in section 386-1, shall pay a levy determined by the director which shall be based on a percentage on gross premiums, as defined in section 431:7-202(a), derived from workers' compensation insurance issued during the prior year in accordance with chapter 386 and chapter 431, if the levying and collecting of such a levy is required pursuant to section 386-152, which levy shall be collected in the same manner as the tax provided for in section 431:7-202 is collected and shall be deposited in the special compensation fund established in section 386-151. This levy shall be in addition to any tax imposed in chapter 431 on gross premiums derived from workers' compensation insurance.

(b) Notwithstanding subsection (a), from its inception through December 31, 2007, the Hawaii Employers' Mutual Insurance Company, Inc., shall be exempt from this levy; provided that this exemption shall apply to the first $25,000,000 of written premiums in each calendar year; and provided further that annual written premiums in excess of $25,000,000 shall be subject to this levy at the same rate as other insurers. Any moneys heretofore paid by Hawaii Employers'

Mutual Insurance Company, Inc., to the special compensation fund shall be retained by the special compensation fund to be credited to future levy balances owed by Hawaii Employers' Mutual Insurance Company, Inc. [L 1963, c 103, pt of §1; Supp, §97-142; HRS §386-153; am L 1973, c 183, §3; am L 1975, c 41, §1; am L 1991, c 165, §1; am L 1999, c 163, §22]

" **§386-154 Charge against employers not insured under section 386-121(a)(1).** (a) As used in this section:

"Anticipated total assessment" means the amount derived by dividing the total amount of the levy to be paid by insurance carriers in a calendar year as required by section 386-153 by the most recent carrier's compensation ratio.

"Average annual compensation" means the average of annual compensation payments made by an employing unit for a period consisting of two consecutive calendar years immediately preceding the year for which the charge is assessed under this section; provided that if, at the end of a calendar year, an employing unit was subject to this chapter for a period less than twelve consecutive months the total amount of compensation payments made by the employing unit during such period shall constitute the employing unit's average annual compensation.

"Carrier's compensation ratio" means the quotient derived by dividing the total average annual compensation paid during the two most recent calendar years by all insurance carriers on behalf of employers insured and keeping insured under section 386-121(a)(1) by the total average annual compensation paid during the same two calendar years by all employers subject to this chapter.

"Employing unit" means an employer who has not secured compensation to the employer's employees under section 386-121(a)(1); except that, for employers who are members of a workers' compensation group under part VI, the term means the group.

"Employing unit's compensation ratio" means the percentage ratio derived by dividing an employing unit's average annual compensation at the end of a calendar year by the total average annual compensation paid during the same two calendar years by all employers subject to this chapter.

(b) For the calendar year 1974 and for each calendar year thereafter an employing unit shall, except as otherwise provided in section 386-152, pay into the special compensation fund a charge in an amount which is equal to the product derived by multiplying the employing unit's most recent compensation ratio by the most recent anticipated total assessment.

For each calendar year the director shall determine the amount of the charge to be paid by each employing unit, and

shall give notice of such charge to each employing unit by August 15 of the year for which the charge is assessed. The amount of the charge shall be paid to the director on or before September 30 following notification.

The director of finance may withhold the additional charge due from a political subdivision from any moneys due the subdivision from the State if the subdivision has not paid its charge as required by this section and shall deposit the withheld amount in the special compensation fund. [L 1963, c 103, pt of §1; Supp, §97-143; HRS §386-154; am L 1973, c 183, §4; am L 1982, c 51, §2 and c 204, §8; am L 1983, c 124, §17; gen ch 1985; am L 1986, c 304, §5; am L 1993, c 123, §1]

Revision Note

In subsection (a), definitions rearranged pursuant to §23G-15.

" **§386-154.5 Special assessments.** (a) For the calendar year 1972 only, insurers of employers as defined in section 386-121(a)(1) shall pay a special assessment of one and one-quarter per cent on gross premiums as defined in section 431:7-202(a) and in accordance with the provisions of section 386-153. For the calendar year 1973 only, such insurers shall pay a special assessment established by rule of the director not to exceed 1.6 times the 1972 special assessment.

(b) For the calendar year 1972 only, employers not insured under section 386-121(a)(1) shall pay a special assessment equal to 1.67 times the special charge as defined and in accordance with the provisions of section 386-154. For the calendar year 1973 only, such employers shall pay a special assessment established by rule of the director not to exceed 1.6 times the 1972 special assessment.

(c) The assessments under this section shall be paid within thirty days from the receipt of notification by the department of commerce and consumer affairs. [L 1972, c 42, §5; am L 1973, c 183, §5; am L 1982, c 204, §8; am L 1993, c 6, §15]

" **§386-155 Expenses.** All litigation expenses, including but not limited to court costs, attorneys' fees, and witness fees incurred by the director in preparation, prosecution, or defense of any action brought on behalf of or against the special compensation fund shall be paid from the fund. Administrative expenses for the protection and preservation of the special compensation fund shall also be paid from the fund. [L 1969, c 21, §1; am L 2000, c 103, §1]

"PART V. APPLICABILITY TO HAWAII GUARD, VOLUNTEER PERSONNEL AND PUBLIC BOARD MEMBERS

A. Hawaii Guard

§386-161 Who entitled to compensation. If a member of the Hawaii national guard or Hawaii state defense force suffers a personal injury arising out of and in the performance of the member's duty therein, compensation shall be paid to the member or the member's dependents by the State for such injury in the manner and in the amounts provided for in this chapter; provided that if in any case arising after May 10, 1951, any such member or the member's dependents receive compensation from the federal government by reason of such injury, the amount of the compensation shall be deducted from the amount which may thereafter become due from the State. [L 1963, c 116, pt of §1; Supp, §97-150; HRS §386-161; gen ch 1985; am L 1988, c 135, §1]

Case Notes

Does not exclude members of the Hawaii National Guard from receiving benefits under state workers' compensation because the members were on federal active duty. 72 H. 157, 809 P.2d 1136 (1991).

" **§386-162 Terms defined.** "Personal injury", "compensation", and "dependents" within the meaning of section 386-161 has the same meaning as is given to these terms in sections 386-1 and 386-42. [L 1963, c 116, pt of §1; Supp, §97-151; HRS §386-162]

" **§386-163 Administration.** This part shall be administered by the director of labor and industrial relations. The director may promulgate such additional rules and regulations relative thereto as the director deems necessary or convenient for carrying out the purposes of this part. Procedure in respect of claims hereunder, including procedure upon appeals, shall correspond to the procedure provided in this chapter, except that notice of injury shall be given to the commanding officer of the unit to which the injured person is attached and the commanding officer shall in turn report the same to the division. [L 1963, c 116, pt of §1; Supp, §97-152; HRS §386-163; gen ch 1985]

" **§386-164 Appropriation.** So much of the state insurance fund as may be necessary is hereby appropriated for the purpose of section 386-161 and for the purpose of paying compensation awarded under Act 131 of the Session Laws of Hawaii 1943, Act 160 of the Session Laws of Hawaii 1945, and Act 169 of the

Session Laws of Hawaii 1947. [L 1963, c 116, pt of §1; Supp, §97-153; HRS §386-164]

"B. Volunteer Personnel

§386-171 Volunteer personnel, medical, etc., expenses. Any person who is injured in performing service for the State or any county in any voluntary or unpaid capacity under the authorized direction of a public officer or employee, and who has not secured payment of the person's hospital and medical expenses from the State or the county under any other provision of law and has not secured payment thereof from any third person, shall be paid the person's reasonable hospital and medical expenses under this chapter. [L 1963, c 116, pt of §1; Supp, §97-160; HRS §386-171; gen ch 1985]

Attorney General Opinions

State or county's liability for volunteer's medical expenses where all or part paid by third person. Att. Gen. Op. 86-6.

" **§386-172 Administration and procedure.** Section 386-171 shall be administered by the director of labor and industrial relations. Procedure in respect of claims hereunder, including procedure upon appeals, shall correspond to the procedure provided under this chapter. Notice of injury shall be given to the head of the department for which the injured person is performing service, and the department head shall report the injury to the director. The director may make such rules and regulations as the director may deem necessary or convenient for carrying out section 386-171. [L 1963, c 116, pt of §1; Supp, §97-161; HRS §386-172; gen ch 1985]

Cross References

Rulemaking, see chapter 91.

" **§386-173 Time for giving notice, etc.** Any time fixed for giving of notice of injury or for any other substantive purpose as to any injuries within the purview of section 386-171 which may have occurred prior to May 25, 1945, but subsequent to December 7, 1941, shall be construed to run from May 25, 1945. [L 1963, c 116, pt of §1; Supp, §97-162; HRS §386-173]

" **§386-174 Appropriation.** So much of the state insurance fund as may be necessary is hereby appropriated and shall, with the approval of the governor, be expended to pay claims found to

be due under section 386-171 for services performed under the authorized direction of a public officer or employee. [L 1963, c 116, pt of §1; Supp, §97-163; HRS §386-174]

"C. Public Board Members, Reserve Police Officers, Police Chaplains, Volunteer Firefighters, Volunteer Boating Enforcement Officers, and Volunteer Conservation and Resources Enforcement Officers

Note

Subpart heading amended by L 1987, c 121, §1; L 1996, c 260, §6.

Subpart heading on page 609 of the main volume is reproduced to correct printing error.

§386-181 Generally. (a) As used in this section:

"Police chaplain" means a member of an authorized chaplaincy program of a county police department who performs services in a voluntary and unpaid capacity under the authorized direction of an officer of the department.

"Public board" means a governmental body, regardless of its designation, duly created under authority vested by law for the purposes of performing quasi-judicial, administrative, or advisory functions.

"Reserve police officer" means a member of an authorized reserve force of a county police department who performs services in a voluntary and unpaid capacity under the authorized direction of an officer of the department.

"Sheriffs' chaplain" means a member of an authorized chaplaincy program of the department of public safety who performs functions similar to a police chaplain in a voluntary and unpaid capacity for the sheriff division.

"Volunteer boating enforcement officer" means a member of the authorized volunteer enforcement force of the harbors division, department of transportation, who performs services in a voluntary and unpaid capacity under the authorized direction of an officer of the department.

"Volunteer conservation and resources enforcement officer" means a member of the authorized volunteer enforcement force of the division of conservation and resources enforcement, department of land and natural resources, who performs services in a voluntary and unpaid capacity under the authorized direction of an officer of the department.

"Volunteer firefighter" means a person who performs services for a county fire department in a voluntary and unpaid

capacity under the authorized direction of an officer of the department.

(b) If a member of a public board, a reserve police officer, a police chaplain, sheriffs' chaplain, a volunteer firefighter, a volunteer boating enforcement officer, or a volunteer conservation and resources enforcement officer is injured while performing services for the board, county police department, county fire department, department of public safety, harbors division of the department of transportation, or division of conservation and resources enforcement of the department of land and natural resources, under the conditions specified in section 386-3, the person or the person's dependents shall be entitled to all compensation in the manner provided by this chapter and, for the purposes of this chapter, the person shall, in every case, be deemed to have earned wages for the services.

(c) In computing the average weekly wages of an injured public board member, reserve police officer, police chaplain, sheriffs' chaplain, volunteer firefighter, volunteer boating enforcement officer, or volunteer conservation and resources enforcement officer:

(1) The person's income from self-employment shall be considered wages;

(2) The person shall, in no event, be considered to have earned less than the minimum hourly wage prescribed in chapter 387;

(3) Wages of other employees in comparable employment shall not be considered; and

(4) All provisions of section 386-51 not inconsistent with this section shall apply; provided that section 386-51(5) shall not apply. [L 1968, c 57, §2; am L 1970, c 208, §1; am L 1972, c 54, §1; am L 1977, c 191, §2; am L 1983, c 124, §15; am L 1987, c 121, §1; am L 1996, c 260, §7; am L 2009, c 138, §1]

"PART VI. SELF-INSURANCE GROUPS

§386-191 Scope. This part shall apply to workers' compensation self-insurance groups. This part shall not apply to public employees or governmental entities. Groups which are issued a certificate of approval by the insurance commissioner shall not be deemed to be insurers or insurance companies and shall not be subject to the provisions of the insurance laws and rules, except as otherwise provided in this part. [L 1986, c 304, pt of §1]

Cross References

Insurer's requirements; failure to maintain claims service office; penalty; injunctions, see §386-124.5.

" **§386-192 Definitions.** For the purpose of this part:

"Administrator" means an individual, partnership, or corporation engaged by a workers' compensation self-insurance group's board of trustees to carry out the policies established by the group's board of trustees and to provide day-to-day management of the group.

"Insolvent" or "insolvency" means the inability of a workers' compensation self-insurance group to pay its outstanding lawful obligations as they mature in the regular course of business, as may be shown either by an excess of its required reserves and other liabilities over its assets or by its not having sufficient assets to reinsure all of its outstanding liabilities after paying all accrued claims owed by it.

"Net premium" means premium derived from standard premium adjusted by any advance premium discounts.

"Service company" means a person or entity which provides services which are not provided by the administrator. The services which may be provided by a service company include but are not limited to:

(1) Claims adjustment;
(2) Safety engineering;
(3) Compilation of statistics and the preparation of premium, loss, and tax reports;
(4) Preparation of other required self-insurance reports;
(5) Development of members' assessments and fees; and
(6) Administration of a claims fund account.

"Standard premium" means the premium derived from the manual rates adjusted by experience modification factors but before advance premium discounts.

"Workers' compensation self-insurance group" or "group" means a not-for-profit unincorporated association consisting of five or more employers who:

(1) Are engaged in the same or similar type of business;
(2) Are members of the same bona fide trade or professional association which has been in existence for not less than five years; and
(3) Enter into agreements to pool their liabilities for workers' compensation benefits in this State. [L 1986, c 304, pt of §1]

" **§386-193 Authority to act as workers' compensation self-insurance group.** No person, association, or other entity shall

act as a workers' compensation self-insurance group unless it has been issued a certificate of approval by the insurance commissioner. [L 1986, c 304, pt of §1]

" **§386-194 Qualifications for initial approval and continued authority to act as a workers' compensation self-insurance group.** (a) A proposed workers' compensation self-insurance group shall file with the insurance commissioner its application for a certificate of approval accompanied by a nonrefundable filing fee in the amount of $300. The application shall include the group's name, location of its principal office, date of organization, name and address of each member, and such other information as the insurance commissioner may reasonably require, together with the following:

(1) Proof of compliance with subsection (b);
(2) A copy of its articles of association, if any;
(3) A copy of agreements with the administrator and any service company;
(4) A copy of the bylaws of the proposed group;
(5) A copy of the agreement between the group and each member securing the payment of workers' compensation benefits, which shall include provision for payment of special compensation fund assessments as provided for under chapter 386, part IV, subpart C;
(6) Designation of the initial board of trustees and administrator;
(7) The address in this State where the books and records of the group will be maintained at all times;
(8) A pro forma financial statement on a form acceptable to the insurance commissioner showing the financial ability of the group to pay the workers' compensation obligations of its members; and
(9) Proof of payment to the group by each member of not less than twenty-five per cent of that member's first year estimated annual net premium on a date prescribed by the insurance commissioner. Each payment shall be considered part of the first year premium payment of each member if the proposed group is granted a certificate of approval.

(b) To obtain and maintain its certificate of approval, a workers' compensation self-insurance group shall comply with the following requirements as well as any other requirements established by law or rule:

(1) A combined net worth of all members of at least $1,000,000;
(2) Security in the form and amount prescribed by the insurance commissioner which shall be provided by

either a surety bond, security deposit, financial security endorsement, or any combination thereof. If a surety bond is used to meet the security requirement, it shall be issued by a corporate surety company authorized to transact business in this State. If a security deposit is used to meet the security requirement, securities shall be limited to bonds or other evidences of indebtedness issued, assumed, or guaranteed by the United States or any agency or instrumentality thereof; certificates of deposits in a federally insured bank; shares or savings deposits in a federally insured savings and loan association or credit union; or any bond or security issued by any state and backed by the full faith and credit of that state. Any such securities shall be deposited with the director of finance and assigned to and made negotiable by the director of labor and industrial relations pursuant to a trust document acceptable to the insurance commissioner. Interest accruing on a negotiable security so deposited shall be collected and transmitted to the depositor, provided the depositor is not in default. A financial security endorsement, issued as part of an acceptable excess insurance contract, may be used to meet all or part of the security requirement. The bond, security deposit, or financial security endorsement shall be for the benefit of the State solely to pay claims and associated expenses and payable upon the failure of the group to pay workers' compensation benefits it is legally obligated to pay. The insurance commissioner may establish and adjust from time to time requirements for the amount of security based on differences among groups in their size, types of employment, years in existence, and other relevant factors;

(3) Specific and aggregate excess insurance in a form, in an amount, and by an insurance company acceptable to the insurance commissioner. The insurance commissioner may establish minimum requirements for the amount of specific and aggregate excess insurance based on differences among groups in their size, types of employment, years in existence, and other relevant factors, and may permit a group to meet this requirement by placing in a designated depository securities of the type referred to under paragraph (2);

(4) An estimated annual standard premium of at least $250,000;

(5) An indemnity agreement jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member. The indemnity agreement shall be in a form prescribed by the insurance commissioner and shall include minimum uniform substantive provisions prescribed by the insurance commissioner. Subject to the insurance commissioner's approval, a group may add other provisions needed because of its particular circumstances;

(6) A fidelity bond for the administrator in a form and amount prescribed by the insurance commissioner; and

(7) A fidelity bond for the service company in a form and amount prescribed by the insurance commissioner. The insurance commissioner may also require the service company providing claim services to furnish a performance bond in a form and amount prescribed by the insurance commissioner.

(c) A group shall notify the insurance commissioner of any change in the information required to be filed under subsection (a) or in the manner of the group's compliance with subsection (b) no later than thirty days after such change.

(d) The insurance commissioner shall evaluate the information provided by the application required to be filed under subsection (a) to assure that no gaps in funding exist and that funds necessary to pay workers' compensation benefits will be available on a timely basis.

(e) The insurance commissioner shall act upon a completed application for a certificate of approval within sixty days. If, because of the number of applications, the insurance commissioner is unable to act upon an application within this period, the insurance commissioner shall have an additional sixty days to act under this subsection.

(f) The insurance commissioner shall issue to the group a certificate of approval upon finding that the proposed group has met all requirements or the insurance commissioner shall issue an order refusing such certificate setting forth reasons for such refusal upon finding that the proposed group does not meet all requirements.

(g) Each workers' compensation self-insurance group shall be deemed to have appointed the insurance commissioner as its attorney to receive service of legal process issued against it in this State. The appointment shall be irrevocable, shall bind any successor in interest, and shall remain in effect as long as

there is in this State any obligation or liability of the group for workers' compensation benefits.

(h) Each group shall establish and maintain a safety and accident prevention program for which the insurance commissioner shall prescribe minimum requirements. [L 1986, c 304, pt of §1]

" **§386-195 Certificate of approval; termination.** (a) The certificate of approval issued by the insurance commissioner to a workers' compensation self-insurance group authorizes the group to provide workers' compensation benefits. The certificate of approval shall remain in effect until terminated at the request of the group or revoked by the insurance commissioner pursuant to section 386-211.

(b) The insurance commissioner shall not grant the request of any group to terminate its certificate of approval unless the group has insured or reinsured all incurred workers' compensation obligations with an authorized insurer under an agreement filed with and approved in writing by the insurance commissioner. The obligations shall include both known claims and expenses associated therewith and claims incurred, but not reported, and expenses associated therewith.

(c) Subject to the approval of the insurance commissioner, a group may merge with another group engaged in the same or similar type of business only if the resulting group assumes in full all obligations of the merging groups. The insurance commissioner may hold a hearing on the merger and shall do so if any party, including a member of either group, so requests. [L 1986, c 304, pt of §1]

" **§386-196 Examinations.** The insurance commissioner may examine the affairs, transactions, accounts, records, and assets and liabilities of each group as often as the insurance commissioner deems advisable. The expense of examinations shall be assessed against the group in the same manner that insurers are assessed for examinations. [L 1986, c 304, pt of §1]

" **§386-197 Board of trustees; membership, powers, duties, and prohibitions.** Each group shall be operated by a board of trustees, which shall consist of not less than five persons whom the members of a group elect for stated terms of office. At least two-thirds of the trustees shall be employees, officers, or directors of members of the group. The group's administrator, service company, or any owner, officer, employee of, or any other person affiliated with, the administrator or service company shall not serve on the board of trustees of the group. All trustees shall be residents of this State or officers of corporations authorized to do business in this

State. The board of trustees of each group shall ensure that all claims are paid promptly and take all necessary precautions to safeguard the assets of the group, including all of the following:

(1) The board of trustees shall:

(A) Maintain responsibility for moneys collected or disbursed from the group and segregate all moneys into a claims fund account and an administrative fund account. At least seventy per cent of the net premium shall be placed into a designated depository for the sole purpose of paying claims, allocated claims expenses, reinsurance or excess insurance, and special compensation fund assessments. This account shall be called the claims fund account. The remaining net premium shall be placed in a designated depository for the payment of taxes, general regulatory fees and assessments, and administrative costs. This account shall be called the administrative fund account. The commissioner may approve an administrative fund account of more than thirty per cent and a claims fund account of less than seventy per cent only if the group shows to the insurance commissioner's satisfaction that more than thirty per cent is needed for an effective safety and loss control program or that the group's aggregate excess insurance attaches at less than seventy per cent;

(B) Maintain minutes of its meetings and make the minutes available to the insurance commissioner;

(C) Retain an independent certified public accountant to prepare the statement of financial condition required by section 386-201(a); and

(D) Designate an administrator to carry out the policies established by the board of trustees and to provide day to day management of the group and delineate in the written minutes of its meetings the areas of authority it delegates to the administrator.

(2) The board of trustees shall not:

(A) Extend credit to a member for payment of a premium, except pursuant to payment plans approved by the insurance commissioner; and

(B) Borrow moneys from the group or in the name of the group, except in the ordinary course of business, without first advising the insurance commissioner of the nature and purpose of the

loan and obtaining prior approval from the insurance commissioner. [L 1986, c 304, pt of §1]

" **§386-198 Group membership; termination, liability.** (a) An employer joining a workers' compensation self-insurance group after the group has been issued a certificate of approval shall submit an application for membership to the board of trustees or its administrator and enter into the indemnity agreement required by section 386-194(b). Membership shall take effect no earlier than each member's date of approval. The application for membership and its approval shall be maintained as permanent records of the board of trustees.

(b) Each member of a group shall be subject to cancellation by the group pursuant to the bylaws of the group. In addition, each member may elect to terminate participation in the group. The group shall notify the insurance commissioner and department of labor and industrial relations of the termination or cancellation of a member within ten days. The group shall maintain coverage of each canceled or terminated member for thirty days after the notice, at the terminating member's expense, unless the group is notified sooner by the department that the canceled or terminated member has procured workers' compensation insurance, has become an approved self-insurer, or has become a member of another group.

(c) The group shall pay all workers' compensation benefits for which each member incurs liability during the member's period of membership. A member who elects to terminate its membership or is canceled by a group remains jointly and severally liable for workers' compensation obligations of the group and its members which were incurred during the canceled or terminated member's period of membership.

(d) A group member is not relieved of its workers' compensation liabilities incurred during its period of membership, except through payment by the group or the member of required workers' compensation benefits.

(e) The insolvency or bankruptcy of a member does not relieve the group or any other member of liability for the payment of any workers' compensation benefits incurred during the insolvent or bankrupt member's period of membership. [L 1986, c 304, pt of §1]

" **§386-199 Service companies.** (a) No service company or its employees, officers, or directors shall be an employee, officer, or director of, or have either a direct or indirect financial interest in, an administrator. No administrator or its employees, officers, or directors shall be an employee,

officer, or director of, or have either a direct or indirect financial interest in, a service company.

(b) The service contract shall state that unless the insurance commissioner permits otherwise the service company shall handle all claims and other obligations incurred during the contract period to their conclusion. [L 1986, c 304, pt of §1]

" **§386-200 Licensing of producer**. Except for a salaried employee of a group, its administrator, or its service company, any person soliciting membership in a workers' compensation self-insurance group shall be licensed as a producer under chapter 431:9A. [L 1986, c 304, pt of §1; am L 2003, c 212, §5]

" **§386-201 Financial statements and other reports.** (a) Each group shall submit to the insurance commissioner a statement of financial condition audited by an independent certified public accountant on or before the last day of the sixth month following the end of the group's fiscal year. The financial statement shall be on a form prescribed by the insurance commissioner and shall include, but not be limited to, actuarially appropriate reserves for:

(1) Known claims and expenses associated therewith;
(2) Claims incurred but not reported and expenses associated therewith;
(3) Unearned premiums; and
(4) Bad debts, reserves for which shall be shown as liabilities.

An actuarial opinion regarding reserves for known claims and expenses associated therewith and claims incurred but not reported and expenses associated therewith shall be included in the audited financial statement. The actuarial opinion shall be given by a member of the American Academy of Actuaries or other qualified loss reserve specialist as defined in the annual statement adopted by the National Association of Insurance Commissioners.

(b) No person shall make any untrue statement of a material fact in connection with the solicitation of membership of a group. No person shall omit to state a material fact which makes the statement misleading, in light of the circumstances under which it is made, in connection with the solicitation of membership of a group.

(c) The insurance commissioner may prescribe the format and frequency of other reports which may include, but shall not be limited to, payroll audit reports, summary loss reports, and quarterly financial statements. [L 1986, c 304, pt of §1]

" **§386-202 Misrepresentation prohibited.** No person shall make a material misrepresentation or omission of a material fact in connection with the solicitation of membership of a group. [L 1986, c 304, pt of §1]

" **§386-203 Investments.** Funds not needed for current obligations may be invested by the board of trustees in accordance with sections 431-281 to 431-312. [L 1986, c 304, pt of §1]

Note

Sections 431-281 to 431-312 referred to in text are repealed.

" **§386-204 Rates and reporting of rates.** (a) Every workers' compensation self-insurance group shall adhere to the uniform classification system, uniform experience rating plan, and manual rules filed with the insurance commissioner by an advisory organization designated by the insurance commissioner.

(b) Premium contributions to the group shall be determined by applying the manual rates and rules to the appropriate classification of each member which shall be adjusted by each member's experience credit or debit. Subject to approval by the insurance commissioner, premium contributions may also be reduced by an advance premium discount reflecting the group's expense levels and loss experience.

(c) Notwithstanding subsection (b), a group may apply to the insurance commissioner for permission to make its own rates. The rates shall be based on at least five years of the group's experience.

(d) Each group shall be audited at least annually by an auditor acceptable to the insurance commissioner to verify proper classifications, experience rating, payroll, and rates. A report of the audit shall be filed with the insurance commissioner in a form acceptable to the insurance commissioner. A group or any member thereof may request a hearing on any objections to the classifications. If the insurance commissioner determines that, as a result of an improper classification, a member's premium contribution is insufficient, the insurance commissioner shall order the group to assess that member an amount equal to the deficiency. If the insurance commissioner determines that, as a result of an improper classification, a member's premium is excessive, the insurance commissioner shall order the group to refund to the member the excess collected. The audit shall be at the expense of the group. [L 1986, c 304, pt of §1]

" **§386-205 Refunds.** (a) Any moneys for a fund year in excess of the amount necessary to fund all obligations for that fund year may be declared to be refundable by the board of trustees not less than twelve months after the end of the fund year.

(b) Each member shall be given a written description of the refund plan at the time of application for membership. A refund for any fund year shall be paid only to those employers who remain participants in the group for the entire fund year. Payment of a refund based on a previous fund year shall not be contingent on continued membership in the group after that fund year. [L 1986, c 304, pt of §1]

" **§386-206 Premium payment; reserves.** (a) Each group shall establish to the satisfaction of the insurance commissioner a premium payment plan which shall include an initial payment by each member of at least twenty-five per cent of that member's annual premium before the start of the group's fund year and payment of the balance of each member's annual premium in monthly or quarterly installments.

(b) Each group shall establish and maintain actuarially appropriate loss reserves, which shall include reserves for known claims and expenses associated therewith and claims incurred but not reported and expenses associated therewith.

(c) Each group shall establish and maintain bad debt reserves based on the historical experience of the group or other groups. [L 1986, c 304, pt of §1]

" **§386-207 Deficits and insolvencies.** (a) If the assets of a group are at any time insufficient to enable the group to discharge its legal liabilities and other obligations and to maintain the reserves required of it under this chapter, the group shall forthwith make up the deficiency or levy an assessment upon its members for the amount needed to make up the deficiency.

(b) In the event of a deficiency in any fund year, the deficiency shall be made up immediately, either from:

(1) Surplus from a fund year other than the current fund year;
(2) Administrative funds;
(3) Assessment of the membership, if ordered by the group; or
(4) An alternate method as the insurance commissioner may approve or direct.

The insurance commissioner shall be notified prior to any transfer of surplus funds from one fund year to another.

(c) If the group fails to assess its members or to otherwise make up the deficit within thirty days, the insurance commissioner shall order it to do so.

(d) If the group fails to make the required assessment of its members within thirty days after the insurance commissioner orders it to do so or if the deficiency is not fully made up within sixty days after the date on which the assessment is made or within a longer period of time as may be specified by the insurance commissioner, the group shall be deemed to be insolvent.

(e) The insurance commissioner shall proceed against an insolvent group in the same manner as the insurance commissioner would proceed against an insolvent domestic insurer in this State as prescribed in chapter 431, article 15. The insurance commissioner shall have the same powers and limitations in the proceedings as are provided under those laws, except as otherwise provided in this chapter.

(f) In the event of the liquidation of a group, the insurance commissioner shall levy an assessment upon its members for an amount as the insurance commissioner determines to be necessary to discharge all liabilities of the group, including the reasonable cost of liquidation. [L 1986, c 304, pt of §1; am L 1990, c 34, §24]

" **§386-208 Guaranty mechanism.** In the event of a liquidation pursuant to section 386-207, after exhausting the security required pursuant to section 386-194(b)(2), the insurance commissioner shall levy an assessment against all groups to assure prompt payment of benefits. The assessment on each group shall be based on the proportion that the premium of each group bears to the total premium of all groups. The insurance commissioner may exempt a group from assessment upon finding that the payment of the assessment would render the group insolvent. The assessment shall not relieve any member of an insolvent group of its joint and several liability. After any assessment is made, the insurance commissioner shall take action to enforce the joint and several liability provisions of the insolvent group's indemnity agreement and shall recoup:

(1) All costs incurred by the insurance commissioner in enforcing the joint and several liability;

(2) Amounts that the insurance commissioner assessed any other groups pursuant to this section; and

(3) Any obligation included within section 386-207(f). [L 1986, c 304, pt of §1]

" **§386-209 Monetary penalties.** After notice and opportunity for a hearing, the insurance commissioner may impose a monetary

penalty on any person or group found to be in violation of any provision of this chapter or any rule adopted thereunder. The monetary penalty shall not exceed $1,000 for each act or violation and shall not exceed $10,000 in the aggregate. The amount of any monetary penalty shall be paid to the insurance commissioner and transmitted to the director of finance for deposit into the general fund. [L 1986, c 304, pt of §1]

" **§386-210 Cease and desist orders.** (a) After notice and opportunity for a hearing, the insurance commissioner may issue an order requiring a person or group to cease and desist from engaging in an act or practice found to be in violation of any provision of this chapter or any rule adopted under this chapter.

(b) Upon a finding, after notice and opportunity for a hearing, that any person or group has violated any cease and desist order, the insurance commissioner may do either or both of the following:

(1) Impose a monetary penalty of not more than $10,000 for each and every act or violation of the order, but not to exceed an aggregate monetary penalty of $100,000; or

(2) Revoke the group's certificate of approval or any insurance license held by the person. [L 1986, c 304, pt of §1]

" **§386-211 Revocation of certificate of approval.** (a) After notice and opportunity for a hearing, the insurance commissioner may revoke a group's certificate of approval if the group:

(1) Is found to be insolvent;

(2) Fails to pay any premium tax, regulatory fee or assessment, or special compensation fund assessments imposed upon it; or

(3) Fails to comply with any provision of this chapter or any rule adopted under this chapter or with any lawful order of the insurance commissioner within the time prescribed.

(b) In addition, the insurance commissioner may revoke a group's certificate of approval if, after notice and opportunity for hearing, the insurance commissioner finds that:

(1) Any certificate of approval that was issued to the group was obtained by fraud;

(2) There was a material misrepresentation in the application for the certificate of approval; or

(3) The group or its administrator has misappropriated, converted, illegally withheld, or refused to pay over

upon proper demand any moneys that belong to a member, an employee of a member, or a person otherwise entitled thereto and that have been entrusted to the group or its administrator in its fiduciary capacities. [L 1986, c 304, pt of §1]

" **§386-212 Notice and hearing.** The insurance commissioner in the administration of this chapter shall comply with chapters 91 and 92 when applicable. [L 1986, c 304, pt of §1]

" **§386-213 Rules.** The insurance commissioner shall adopt rules in accordance with chapter 91 for the purposes of this chapter. [L 1986, c 304, pt of §1]

" **§386-214 Severability.** If any provision of this chapter, or the application thereof, to any person or circumstance, is subsequently held to be invalid, the invalidity shall not affect other provisions or applications of this chapter. [L 1986, c 304, pt of §1]