SB 2364
SD-2

RELATING TO WORKERS' COMPENSATION

THE SENATE
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

S.B. NO. 2364 S.D. 2

A BILL FOR AN ACT

RELATING TO WORKERS' COMPENSATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that Hawaii's existing workers' compensation system has been plagued by delays and denials, and in many of those cases, insurers seem to automatically deny the claim pending investigation. These investigations may include reviewing reports from independent medical examiners, interviewing other employees, looking at videotapes, or combing through old medical records for evidence as to whether the workplace injury was related to a preexisting condition. While insurers consider, sometimes for months, how to proceed on claims, patients are at times unable to receive compensation.

The purpose of this Act is to prohibit any employer from denying a workers' compensation claim without reasonable cause or while the claim is pending investigation and to impose fines and other penalties on any employer who continues to do so without reasonable cause.

SECTION 2. Chapter 386, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§386- Payment by employer; duty to service provider; disagreement with service provider; resolution procedures.** (a) Notwithstanding any other law to the contrary, the employer shall pay for all medical services required by the employee for the compensable injury and the process of recovery. The employer shall not be required to pay for care unrelated to the compensable injury.

(b) The employer shall not dispute a claim for services:

(1) Without reasonable cause; or

(2) While the claim is pending investigation;

provided that a claim shall be presumed compensable when submitted by an employee who is excluded from health care coverage under chapter 393, the Hawaii Prepaid Health Care Act.

(c) If an employer disputes a claim for services rendered or a bill received, the employer shall notify the provider of services of that fact within thirty calendar days of receipt of the claim for services or bill. Failure by the employer to submit timely notice to the provider of services shall render the employer liable for the services provided or bill received until the employer satisfies the notice requirement and except as provided in subsection (d).

(d) Any employer who has received a claim for services rendered or a bill from a provider of services shall be liable for the claim or bill and, within sixty calendar days of receipt of the claim or bill, shall pay all charges listed in the claim for services rendered or the bill, except for items for which there is reasonable disagreement. After expiration of the sixty-calendar-day time period for payment, the provider of services may increase the total outstanding balance owed for undisputed services or charges by one per cent per month.

(e) If reasonable disagreement occurs, the employer shall:

(1) Pay all undisputed charges;

(2) Notify the provider of services of the denial of payment of any disputed charges and the reason for the denial within thirty calendar days of receipt of the bill or claim for services rendered; and

(3) Provide a copy of the denial to the employee.

The employer's denial shall include a statement as follows:

"IF THE PROVIDER OF SERVICES DOES NOT AGREE WITH THE EMPLOYER'S STATED REASON FOR DENIAL OF PAYMENT, THE PROVIDER OF SERVICES MAY FILE A BILL DISPUTE REQUEST WITH THE DIRECTOR OF THE HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS. THE BILL DISPUTE REQUEST SHALL BE CLEARLY IDENTIFIED AS 'BILL DISPUTE REQUEST' IN CAPITAL LETTERS AND IN NO LESS THAN TEN POINT FONT ON THE FRONT OF THE FIRST PAGE OF THE REQUEST AND ON THE FRONT OF THE ENVELOPE IN WHICH THE REQUEST IS SENT. ANY BILL DISPUTE REQUEST SHALL BE FILED WITHIN THIRTY CALENDAR DAYS AFTER THE POSTMARK DATE OF THE EMPLOYER'S DENIAL OF PAYMENT. IF THE PROVIDER OF SERVICES FAILS TO SUBMIT A TIMELY BILL DISPUTE REQUEST, THE PROVIDER SHALL FORFEIT THE RIGHT TO DISPUTE THE EMPLOYER'S DENIAL OF PAYMENT."

(f) Upon receipt of a bill dispute request, the director shall send notice to the parties and the parties shall negotiate to resolve the disputed services or charges during the thirty-one calendar days following the date of the notice from the director. If the parties fail to enter into an agreement within the thirty-one calendar days, then within fourteen calendar days thereafter, either party may file a request in writing to the director to review the bill dispute request; provided that the requesting party shall send a notice of the request to the non-requesting party. Upon receipt of the request for review, the director shall send the parties a second notice requesting each party to file a position statement with the director, including substantiating documentation that describes the services and amounts in dispute and all actions taken to resolve the dispute during the thirty-one calendar day period of negotiation under this subsection. The director shall review the positions of the parties and render an administrative decision without a hearing. The director may assess a fine of up to $1,000 payable to the general fund against any party if the director finds that the party has failed to negotiate in good faith. Denial of payment without reasonable cause shall be considered a failure to negotiate in good faith.

(g) An employee shall be liable for reimbursement of benefits or payments received under this section for any disputed claim that is found to be not compensable, whether received from an employer, insurer, or the special compensation fund. Reimbursement shall be made to the source from which the

<u>compensation was received, and may include 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 section.</u>"

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1, 2050.

S.B. NO. 2364 S.D. 2

Report Title:
Workers' Compensation; Compensable Claims; Employer Payment

Description:
Prohibits employer disputes of workers' compensation claims without reasonable cause or while the claim is pending investigation. Establishes negotiation, notice, and review procedures for disputed claims. Establishes penalty for failure to negotiate in good faith. Permits service providers to charge interest on late bill payments. Effective 7/1/2050. (SD2)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

SB 2364
SD-2

TESTIMONY

DAVID Y. IGE
GOVERNOR

RYKER WADA
INTERIM DIRECTOR

JASON MINAMI
DEPUTY DIRECTOR

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

March 19, 2018

TESTIMONY TO THE
HOUSE COMMITTEE OF LABOR AND PUBLIC EMPLOYMENT

For Hearing on March 20, 2018
10:00a.m., Conference Room 309

BY

RYKER WADA
INTERIM DIRECTOR

Senate Bill No. 2364 SD2
Relating to Workers' Compensation; Medical Examination

(WRITTEN TESTIMONY ONLY)

TO CHAIRPERSON JOHANSON, VICE CHAIR HOLT AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide **comments** on S.B. 2364 SD2.

The purpose of S.B. 2364 SD2 relating to workers' compensation claims are to establish that employers shall pay all workers' compensation claims for compensable injuries and shall not deny claims without reasonable cause or during a pending investigation; create a presumption of compensability for claims submitted by employees excluded from coverage under the Hawaii Prepaid Health Care Act; establish that employers shall notify providers of service of any billing disagreements and allows providers to charge an additional rate to employers for outstanding balances owed for undisputed services or charges; establish resolution procedures for employers and providers who have a reasonable disagreement over liability for services rendered; and require an employee whose claim is found to be not compensable to submit reimbursements for services rendered.

The Department of Human Resources Development ("DHRD") has a fiduciary duty to administer the State's self-insured workers' compensation program and its expenditure of public funds.

First, in light of the statutory presumption of compensability in Section 386-85, HRS, DHRD accepts liability for the vast majority of the approximately 600 new workers' compensation claims it receives each fiscal year. Only a minority of claims require some additional investigation to confirm that the alleged injury arose out of and in the course of employment.

Second, the proviso following the proposed subsection (b)(2), which presumes a claim compensable if the employee is excluded from health care coverage under the Hawaii Prepaid Health Care Act, appears superfluous because Section 386-85, already presumes that in the absence of substantial evidence to the contrary, a claim is for a covered work injury.

Third, the proposed new subsection in Chapter 386, HRS, is internally inconsistent because subsection (a) provides that "the employer shall pay for all medical services required by the employee for the compensable injury" and that "[t]he employer shall not be required to pay for care unrelated to the compensable injury." However, proposed subsection (b) states that the employer shall not controvert a claim for services while the claim is being "pending investigation." We note that a claim that is pending investigation is not a "compensable injury" because the employer has not yet accepted the claim as compensable and/or it has not yet been ruled compensable by the Department of Labor.

Fourth, Section 12-12-45, <u>Controverted workers' compensation claims</u>, Hawaii Administrative Rules, mandates that the private insurer to pay for medical care during the pendency of a workers' compensation claim, is not applicable to the State and other governmental employers.

Fifth, subsection (c) shortening the time period from the current sixty calendar days for an employer to contest and/or pay the provider may have unintended consequences leading to further delays in treatment and payment of claims.

Sixth, regarding subsection (g) requiring the injured employees liable to reimburse benefits received if the claim is found not compensable, the employees may not have the resources to reimburse employers.

Finally, in lieu of passing this bill with all of its unresolved issues, we respectfully request consideration be given to deferring this measure pending completion of the working group report and the workers' compensation closed claims study mandated by Act 188 (SLH 2016), wherein the legislature found that "a closed claims study is warranted to objectively review whether specific statutory changes are necessary" to the workers' compensation law. Upon delivery of the respective reports to the legislature, the empirical findings and specific recommendations of the working group and closed claims study can inform any legislative initiatives on workers' compensation.

Thank you for the opportunity to testify on this bill.

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
LIEUTENANT GOVERNOR

LEONARD HOSHIJO
DIRECTOR

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March 20, 2018

To: The Honorable Aaron Ling Johanson, Chair,
The Honorable Daniel Holt, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Tuesday, March 20, 2018
Time: 10:00 a.m.
Place: Conference Room 309, State Capitol

From: Leonard Hoshijo, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. No. 2364 SD2 RELATING TO WORKERS' COMPENSATION

I. OVERVIEW OF PROPOSED LEGISLATION

This proposal seeks to add a new section to chapter 386, Hawaii Revised Statutes (HRS), relating to payment of bills by the employer and specifies a process for bill dispute resolution by the Director. This bill is similar to section 12-15-94, Hawaii Administrative Rules (HAR), which requires the employer to pay for all medical services, which the nature of the compensable injury and the process of recovery requires. Provisions include the following:

- Prohibits the employer from contesting a claim for services without reasonable cause or while the claim is pending investigation.
- Requires that a claim for service is presumed compensable when submitted by an employee who is excluded from health care coverage under the Hawaii Prepaid Health Care Act.
- Section 2 Subsection (c) amends the period for an employer to contest a claim for services rendered or a bill received from sixty calendar days (referenced in §12-15-94 to thirty calendar days from receipt.
- Subsection (d) requires the employer to pay the bill within sixty calendar days of receipt, except for items where there is a reasonable disagreement. Failure to do so allows the provider to increase the total outstanding balance by one per cent per month. Subsection (e) requires the employer to notify the provider of service

within thirty calendar days of receipt of the bill if the bill is denied and the reason for denial.

- Specifies the process for bill dispute resolution and increases the penalty from $500 (§12-15-94) to $1,000 that the DLIR Director may assess for failure to negotiate in good faith.
- Holds the employee liable for reimbursement of benefits or payments received under this section to an employer, insurer, or the Special Compensation Fund or to any other source from which the compensation was received when a controverted claim is found non-compensable.

The Department opposes the measure, especially as key provisions are contradictory and would likely result in legal ambiguities and more disputes in a workers' compensation system already burdened by litigiousness. The statutory presumption law dictates that coverage is presumed at the outset, subject to rebuttal by substantial evidence to the contrary. Therefore, the employer has the right under the presumption law for discovery, otherwise, their due process rights may be violated. Moreover, statute and administrative rules already provide a process for bill disputes and there has been a dramatic drop off in the number of disputes before the Director as a result of the administrative process.

II. CURRENT LAW

Section **§386-85 Presumptions** provides a strong presumption of compensability for work injury claims.

Section §386-21 states in part, "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."

Section §386-26 states in part, "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…" The Workers' Compensation Medical Fee Schedule (WCMFS) §**12-15-94 Payment by employer**[2], allows for the following bill dispute process:

When a provider of service notifies or bills the employer, the employer shall inform the provider of service within sixty calendar days of such billing should the employer contest the claim for services. Failure by the employer to notify the provider shall make the employer liable for services rendered until the employer contests further services.

The employer, after accepting liability, shall pay all charges billed within sixty calendar days of receipt of the charges, except for items where there is reasonable disagreement. If more than sixty-calendar days lapse between the employer's receipt of an undisputed bill and date of payment, the billing can be increased by one percent per month of the outstanding balance.

If there is a disagreement, within sixty calendar days of receipt of the bill, the employer shall notify the provider of service of the denial and the reason for the denial, and provide a copy to the claimant. The denial must state that if the provider does not agree with the denial, they may file a bill dispute with the DLIR Director within sixty calendar days after postmark of employer's denial and failure to do so shall be construed as acceptance of the denial. If the disagreement cannot be resolved between the employer and provider of service, either party may make a written request for intervention to the Director. The Director then sends the parties a notice and the parties can negotiate for thirty-one calendar days to resolve the dispute upon receipt of the Director's notice. If the parties fail to come to an agreement during the thirty-one calendar days, then within fourteen calendar days following the thirty-one day negotiating period, either party can request the Director to review the dispute.

The next step in the process involves the Director sending both parties a second notice requesting they submit position statements and documentation within fourteen days following the receipt of this second notice. The Director reviews the positions of both parties and renders an administrative decision. A service fee of $500 can be assessed at the discretion of the Director against either or both parties who fail to negotiate in good faith.

Prepaid Health Care, §12-12-45 regarding Controverted workers' compensation claims, allows for the following:

"In the event of a controverted workers' compensation claim, ***the health care contractor shall pay or provide*** for the medical services in accordance with the health care contract and notify the Department of such action. If workers' compensation liability is established, the ***health care contractor shall be reimbursed*** by the workers' compensation carrier such amounts authorized by chapter 386, HRS, and chapter 10 of title 12, administrative rules."

Under the Hawaii Prepaid Health Care Act, employers are required to provide healthcare coverage for their eligible employees. However, employees who do not work 20 hours per week for 4 consecutive weeks are not entitled to PHC coverage because they have not met the eligibility requirement for health care coverage, but they are not "excluded" from coverage. In addition, employees may sign a waiver saying they do not want PHC coverage from the employer because they have other PHC coverage. It is not clear why a presumption of compensability should be created in such cases.

III. COMMENTS ON THE SENATE BILL

DLIR opposes the measure as its intent is already provided for in the law and offers the following comments:

- The proposed subsections 386 (a) and (b) of this proposal are contradictory. Paragraph (a) states the employer shall pay, but (b) allows the employer to deny a claim with reasonable cause. DLIR is concerned with the administrative or adjudicatory complications this contradiction will cause. Further confusing the matter is that presumably an employer will not know if it had reasonable cause to dispute until it investigates.

- DLIR suggests the measure should address the Prepaid healthcare contracts that exclude WC in violation of §12-12-45. When the employer denies compensability and the PHC provider denies coverage, then the employer has both significant leverage and the economic advantage over the worker. DLIR suggests the measure be replaced with the codification of the Prepaid HAR in chapter 386, HRS.

- Subsection (b) of this proposal adds that the claim is presumed compensable when submitted by an employee excluded by the PHC Act (there are numerous exclusions). The Department does not believe the intent of the measure is to be all-inclusive.

- DLIR notes that claims for compensation are already presumed, in the absence of substantial evidence to the contrary, to be claims for covered work injuries (§386-85). To rebut the presumption of compensability, employers have the initial burden of going forward with the evidence, which is the burden of production, as well as the burden of persuasion (***Panoke v. Development of Hawaii, Inc., 136 Hawaii 448, 461 (2015)***). The burden of production means that the employer bears the burden of introducing substantial evidence, which, if true, could rebut the presumption that an injury is work-related.

- If the employer meets the burden of production, the burden of persuasion requires the trier of fact to weigh the evidence elicited by the employer against the evidence elicited by the claimant (***Igawa v. Koa House Rest., 97 Hawaii 402 (2001***). The pending investigation clause in the proposed section (b) (2) adds a <u>second presumption</u> and DLIR does not understand the intent of the second presumption. Moreover, it is unclear what the relationship is between that clause and the Prepaid HAR 12-12-45 Controverted workers' compensation claims whereby the health care contractor shall pay or provide for the medical services.

- The Department opines that the current dispute resolution procedure and timelines in §12-15-94 Payment by employer, are adequate when properly implemented. Because the Department realizes that certain insurers, attorneys, and claimants may not negotiate in good faith to delay the resolution process, the Department has sought after and received approval for two DCD Facilitator positions starting mid-year FY2018. These positions will have the primary responsibility of ensuring proper implementation of the statutes and timely advancement of case investigations.

- The number of bill disputes before the Director has been significantly resolved through applying the aforementioned administrative remedy—in 2014 there were over 2,100 disputes. That number fell to 334 in 2016 and 162 in 2017.

- Subsection (g) of this bill requires employees to reimburse all benefits or payments received under this section back to the employer, insurer, or the Special Compensation Fund, or to the source from which payment was received if the claim is found to be non-compensable. However, it is often the case that the injured employee may not have the resources to reimburse the payers.

- DLIR notes that administrative decisions require a hearing. Subsection (f), references an old rule §12-15-94, HAR, where the medical fee disputes were final and not appealable. In 2009 the rule was found invalid by the ICA, (***Jou v. Hamada, 201 P3d 614,120 Hawaii 101****)* (see attached*)*.

201 P.3d 614
120 Haw. 101
Emerson M.F. JOU, M.D., Provider-Appellant,
v.
Gary S. HAMADA, Administrator, Disability Compensation Division, and Darwin

[201 P.3d 615]

Ching,[1] Director, Department of Labor and Industrial Relations, State of Hawai`i, Appellees-Appellees and
Argonaut Insurance Company, Respondent-Appellee. and
Emerson M.F. Jou, M.D., Provider-Appellant,
v.
Gary S. Hamada, Administrator, Disability Compensation Division, and Darwin Ching, Director, Department of Labor and Industrial Relations, State of Hawai`i, Appellees-Appellees and
Marriott Claim Services Corporation, Respondent-Appellee.
No. 27491.
No. 27539.
Intermediate Court of Appeals of Hawai`i.
January 26, 2009.
As Corrected March 5, 2009.

[201 P.3d 617]

Stephen M. Shaw, on the briefs, for provider-appellant.

Frances E.H. Lum, Herbert B.K. Lau, Deputy Attorneys General, Department of Attorney General, State of Hawai'i, on the briefs, for appellee-appellee.

Robert A. Chong, Steven L. Goto, Honolulu, on the briefs, for respondent-appellee Marriott Claim Services Corporation.

Kenneth T. Goya, Steven L. Goto, Honolulu, on the briefs, for respondent-appellee Argonaut Insurance Company.

FOLEY, Presiding Judge, NAKAMURA, and FUJISE, JJ.

Opinion of the Court by NAKAMURA, J.

Under the provisions of Hawaii Revised Statutes (HRS) §§ 386-73 (Supp.2007) and 386-87 (1993) of the Hawai`i workers' compensation law, the parties to a decision by the Director of the Department of Labor and Industrial Relations (the Director) have the right to appeal the Director's decision to the Labor and Industrial Relations Appeals Board (LIRAB). The Director has promulgated a rule, Hawaii Administrative Rules (HAR) § 12-15-94(d), prohibiting any appeal of the Director's decisions in billing disputes between employers and medical service providers in workers' compensation cases. HAR § 12-15-94(d) authorizes the Director to resolve such billing disputes without a hearing and provides that "[t]he decision of the [D]irector is final and not appealable."

The question presented in these consolidated appeals[2] is whether the Director was authorized to promulgate a rule prohibiting any appeal of the Director's decisions in billing disputes between employers and medical service providers. We conclude that the Director's no-appeal rule is inconsistent with the statutory right granted to parties to appeal the Director's decisions under HRS §§ 386-73 and 386-87.

We hold that: 1) the provision prohibiting appeal of the Director's decisions in HAR § 12-15-94(d) is invalid as beyond the Director's rulemaking power; 2) Provider-Appellant Emerson M.F. Jou, M.D., (Dr. Jou) is entitled to a declaratory judgment that the no-appeal provision of HAR § 12-15-94(d) is invalid; 3) the Circuit Court of the First Circuit (circuit court)[3] erred in dismissing Dr. Jou's claims for declaratory relief; and 4) although Dr. Jou cannot pursue the merits of his appeals of the Director's decisions before the circuit court, he is entitled to file appeals of the Director's decisions with the LIRAB.

BACKGROUND

Dr. Jou is a licensed medical doctor who specializes in physiatry—the diagnosis and treatment of disease by physical methods, including massage, manipulation, exercise, heat, and water. In the two cases underlying these consolidated appeals, Civil No. 05-1-0375 and Civil No. 05-1-1079, Dr. Jou treated patients that had sustained work-related injuries. Respondent-Appellee Argonaut Insurance Company (Argonaut) was the workers' compensation insurance carrier for the patient's employer in Civil No. 05-1-0375, and Respondent-Appellee Marriott Claim Services Corporation (Marriott) was the workers' compensation insurance adjuster for the patient's employer in Civil No. 05-1-1079.

Dr. Jou billed Argonaut and Marriott for his treatments, which included massage therapy performed by licensed massage therapists employed by Dr. Jou. Argonaut and Marriott initially denied payment for the massage therapy on the ground that Dr. Jou did not have a massage establishment ("MAE") license.[4] Dr. Jou responded that as

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a licensed physician, he did not need an MAE license.

In each case, the billing dispute remained at a standstill for several years. In November 2004, Dr. Jou filed a request for a hearing before the Director on the denials of reimbursement by Argonaut and Marriott. The Director instructed the parties to negotiate and attempt to resolve the billing dispute pursuant to HAR § 12-15-94.[5] Dr. Jou wrote to Argonaut and Marriott and demanded payment of the full amount of the disputed bills plus interest. Argonaut agreed to pay the outstanding bill of $293.33, which was for services rendered by Dr. Jou's massage-therapist employees. Marriott agreed to pay $2,217.85 for the services rendered by the massage-therapist employees, which comprised the lion's share of the outstanding bill,

[201 P.3d 619]

but refused to pay for two office visits claimed by Dr. Jou.[6] Both Argonaut and Marriott rejected Dr. Jou's demand for payment of interest.

After obtaining position statements from the parties, the Director issued decisions in both cases.[7] The Director resolved the dispute over the fees billed by Dr. Jou for the two office visits in favor of Dr. Jou and ordered Marriott to pay for those visits. The Director denied Dr. Jou's request that Argonaut and Marriott be required to pay interest. HAR § 12-15-94(c) provides that after accepting liability, an employer shall pay all charges billed within sixty days of receipt "except for items where there is a reasonable disagreement," and that if an "undisputed billing" remains unpaid for more than sixty days, the amount owed "shall be increased by one per cent per month of the outstanding balance." In Dr. Jou's dispute with Marriott, the Director found that "there was a reasonable disagreement over Dr. Jou's fees" and therefore ruled that the employer was not liable for the assessment of one per cent per month for late payment of the disputed fees. In Dr. Jou's dispute with Argonaut, the Director initially issued a decision finding that the "employer's earlier denial of payment for lack of an MAE license [was] a reasonable dispute of fees." The Director subsequently issued an amended decision which deleted this finding and simply ruled that "with the employer's payment of the disputed fees ... employer shall not be liable for an assessment of one per cent per month simple interest."

Dr. Jou appealed the Director's decisions to the circuit court pursuant to HRS § 91-14 (1993 & Supp.2007)[8] and Hawai'i Rules of Civil Procedure (HRCP) Rule 72 (2005).[9] Appellees-Appellees the Administrator of the Disability Compensation Division (DCD) of the Department of Labor and Industrial Relations (DLIR) and the Director (collectively referred to herein as the "DLIR Appellees") were Appellees in both Civil No. 05-1-0375 and Civil No. 05-1-1079. Argonaut was the Respondent-Appellee in Civil No. 05-1-0375

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and Marriott the Respondent-Appellee in Civil No. 05-1-1079. In his notices of appeal and statements of the case to the circuit court, Dr. Jou raised numerous claims, including that the DLIR was biased in favor of insurance companies, that the Director's decisions were made upon unlawful procedure, and that the Director's decisions violated various constitutional and statutory provisions.

In his notice of appeal to the circuit court in Civil No. 05-1-1079, Dr. Jou requested that the circuit court "treat this filing as an action for declaratory judgment that the rules relating to billing disputes, are unconstitutional or invalid pursuant to HRS § 91-7."[10] In his statement of the case accompanying that notice of appeal, Dr. Jou alleged, among other things, that "HAR § 12-15-94 violates statutes relating to pre-judgment interest and *appellate review of DLIR matters*." (Emphasis added.)

Similarly, in his notice of appeal to the circuit court in Civil No. 05-1-0375, Dr. Jou requested that the circuit court "treat this filing as an action for declaratory judgment that the rules relating to billing disputes, particularly HAR § 12-15-94(c), are unconstitutional or invalid pursuant to HRS § 91-7." He also gave notice that his grounds for appeal included a claim that the Director's decision "is affected by other errors of law, particularly denial of the right to appeal to the appellate board." In his statement of the case accompanying the appeal in Civil No. 05-1-0375, Dr. Jou attacked the Director's representation that Argonaut's dispute with Dr. Jou over whether physicians must have an MAE license was reasonable, and then noted that "[b]y agency rule, no appeal to the appellate board may be taken."

The DLIR Appellees, Marriott, and Argonaut moved to dismiss Jou's appeals to the circuit court for lack of jurisdiction. Among the grounds they urged was that HAR § 12-15-94(d) does not permit appeals of the Director's decisions in billing disputes over medical fees in workers' compensation cases. The DLIR Appellees, in particular, provided a detailed analysis of why the Director believes the no-appeal provision in HAR § 12-15-94(d) is authorized by and not inconsistent with the Hawai'i workers' compensation law. The circuit court in each case dismissed Dr. Jou's appeal for lack of jurisdiction. The Final Judgment in Civil No. 05-1-0375 was entered on August 18, 2005, and the Final Judgment in Civil No. 05-1-1079 was entered on September 9, 2005.

STANDARD OF REVIEW

We apply the following standard in interpreting statutes:

In construing statutes, we have recognized that

our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....

In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

[201 P.3d 621]

Gray [v. Administrative Dir. of the Court], 84 Hawai'i [138,] 148, 931 P.2d [580,] 590 [(1997)] (quoting *State v. Toyomura,* 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Barnett v. State, 91 Hawai'i 20, 31, 979 P.2d 1046, 1057 (1999) (quoting *State v. Davia,* 87 Hawai'i 249, 254, 953 P.2d 1347, 1352 (1998)).

If we determine, based on the foregoing rules of statutory construction, that the legislature has unambiguously spoken on the matter in question, then our inquiry ends. (*See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). When the legislative intent is less than clear, however, this court will observe the "well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Brown v. Thompson,* 91 Hawai'i 1, 18, 979 P.2d 586, 603 (1999) (quoting *Keliipuleole v. Wilson,* 85 Hawai'i 217, 226, 941 P.2d 300, 309 (1997)). *See also Government Employees Ins. Co. v. Hyman,* 90 Hawai'i 1, 5, 975 P.2d 211, 215 (1999) ("[J]udicial deference to agency expertise is a guiding precept where the interpretation and application of broad or ambiguous statutory language by an administrative tribunal are the subject of review." (quoting *Richard v. Metcalf,* 82 Hawai'i 249, 252, 921 P.2d 169, 172 (1996))). Such deference "reflects a sensitivity to the proper roles of the political and judicial branches," insofar as "the resolution of ambiguity in a statutory text is often more a question of policy than law." *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 696, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991).

The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. *See Camara v. Agsalud,* 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, ... the agency's decision must be consistent with the legislative purpose."); *State v. Dillingham Corp.,* 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) ("[N]either official construction or usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity...."). Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation. *See, e.g.,* *Government Employees Ins. Co. v. Dang,* 89 Hawai'i 8, 15, 967 P.2d 1066, 1073 (1998); *In re Maldonado,* 67 Haw. 347, 351, 687 P.2d 1, 4 (1984).

In re Water Use Permit Applications, 94 Hawai'i 97, 144-45, 9 P.3d 409, 456-57 (2000) (brackets and ellipsis points in original) (footnote omitted).

DISCUSSION

On appeal to this court, Dr. Jou raises numerous claims attacking the merits of the Director's decision and the circuit court's dismissal for lack of jurisdiction. However, we focus on the issue of whether the no-appeal provision in HAR § 12-15-94(d) is valid because we conclude that this is the pivotal issue. As explained below, we hold that the Director exceeded the Director's statutory authority in promulgating a rule making the Director's decisions in medical fee disputes "final and not appealable."

I. Applicable Law

HRS § 386-73 (Supp.2007) grants the Director original jurisdiction over disputes arising under the Hawai'i workers' compensation

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law, HRS Chapter 386, and establishes the right to appeal from the Director's decisions.[11] HRS § 386-73 provides:

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*[[12]] 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.

(Emphasis added.)

HRS § 386-87 (1993) establishes procedures for a party to appeal a decision of the Director to the LIRAB and for the LIRAB to decide that appeal. HRS § 386-87 states in relevant part:

(a) A decision of the director shall be final and conclusive between the parties, except as provided in section 386-89,[[13]] *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[[14]] case and may affirm, reverse or modify any compensation case upon review, or remand the case to the director for further proceedings and action.

The decision or order of the LIRAB may, in turn, be appealed to the Intermediate Court of Appeals by the

Director or any other party. HRS § 386-88 (Supp.2007).

HRS § 386-21(c) (Supp.2007) provides in relevant part:

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.

This portion of HRS § 386-21(c) was enacted in 1995 as part of Act 234 which made comprehensive changes to the workers' compensation law.[15] 1995 Haw. Sess. L. Act 234, § 7 at 607-08. The conference committee report accompanying the legislation stated that "[t]he purpose of this bill is to amend Hawai'i's workers' compensation and insurance laws to improve efficiency and cost-effectiveness in the workers' compensation system." Conf. Comm. Rep. No. 112, in 1995 House Journal, at 1005, 1995 Senate Journal, at 810.[16] However, there was no specific

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mention in any of the committee reports of the purpose for the above-quoted amendment to HRS § 386-21(c).

The Director is granted administrative responsibility and rulemaking power with respect to HRS Chapter 386 through HRS § 386-71 (1993) and HRS § 386-72 (Supp. 2007), which provide in relevant part as follows:

§ 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.

....

§ 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.

The Director promulgated HAR § 12-15-94 pursuant to the Director's rulemaking power. HAR § 12-15-94 requires an employer to pay for all necessary medical services related to a compensable injury suffered by its employees. *See supra* note 5. It sets deadlines, imposes interest penalties for the non-payment of "undisputed" bills, and establishes procedures for resolving disputes between employers and medical service providers over charges that are billed. *See id.* HAR § 12-15-94(d), which provides for the intervention of the Director where the parties cannot resolve such disputes, states as follows:

(d) In the event a reasonable disagreement relating to specific charges cannot be resolved, the employer or provider of service may request intervention by the director in writing with notice to the other party. Both the front page of the billing dispute request and the envelope in which the request is mailed shall be clearly identified as a "BILLING DISPUTE REQUEST" in capital letters and in no less than ten point type. The director shall send the parties a notice and the parties shall negotiate during the thirty-one calendar days following the date of the notice from the director. If the parties fail to come to an agreement during the thirty-one calendar days, then within fourteen calendar days following the thirty-one day negotiating period, either party may file a request, in writing, to the director to review the dispute with notice to the other party. The director shall send the parties a second notice requesting the parties file position statements, with substantiating documentation to specifically include the amount in dispute and a description of actions taken to resolve the dispute, within fourteen calendar days following the date of the second notice from the director. The director shall review the positions of both parties and render an administrative decision without hearing. A service fee of up to $500 payable to the State of Hawaii General Fund will be assessed at the discretion of the director against either or both parties who fail to negotiate in good faith. *The decision of the director is final and not appealable.*

(Emphasis added.)

For its statutory authority, HAR § 12-15-94 identifies HRS §§ 386-71 and 386-72, which grants the Director general administrative and rulemaking power, as well as HRS §§ 386-21 (Supp.2007) and 386-26 (Supp.2007). HAR § 12-15-94 identifies HRS §§ 386-21 and 386-26 as the statutes HAR § 12-15-94 attempts to implement.[17]

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II. The No-Appeal Provision is Invalid

HRS §§ 386-73 and 386-87 set forth the right to appeal from the decisions of the Director in workers' compensation cases. Construing the words of HRS §§ 386-73 and 386-87 according to their ordinary meaning, we conclude that they give a party, such as Dr. Jou, the right to appeal the decision of the Director in a medical fee dispute to the LIRAB. Thus, the no-appeal provision of HAR § 12-15-94(d) is invalid as inconsistent with HRS Chapter 386, and the Director exceeded the Director's rulemaking authority in making the Director's decisions in medical fee disputes final and non-appealable.

HRS § 386-73 provides in relevant part: "There shall be a right of appeal from the decisions of the director to the appellate board ... as provided in sections 386-87...." HRS § 386-87, in turn, authorizes "either party" to a decision of the Director to appeal that decision to the LIRAB.

HRS Chapter 386 does not define the term "party." We generally interpret words that are not specifically defined by a statute according to their ordinary meaning. *Wright v. Home Depot U.S.A., Inc.,* 111 Hawai`i 401, 412 n. 9, 142 P.3d 265, 276 n. 9 (2006); *see State v. Hicks,* 113 Hawai'i 60, 71, 148 P.3d 493, 504 (2006) ("[C]ourts are to give words their ordinary meaning unless something in the statute requires a different interpretation." (brackets omitted)). HRS § 1-14 (1993) provides that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."

Merriam-Webster's Collegiate Dictionary defines the word "party" as "1: a person or group taking one side of a question, dispute, or contest ... 4: a particular individual: PERSON." *Merriam-Webster's Collegiate Dictionary* 904 (11th ed.2003); *see Leslie v. Bd. of Appeals of County of Hawai'i,* 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) (stating that when a term is not statutorily defined, courts "may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of [the term]" (internal quotation marks omitted). Dr. Jou was clearly a "party" to the Director's decisions in Dr. Jou's fee disputes with Marriott and Argonaut under this definition. Thus, construing the term "party" according to its ordinary meaning, we conclude that Dr. Jou was entitled to appeal the Director's decisions to the LIRAB pursuant to HRS §§ 386-73 and 386-87.

Our conclusion is supported by the principle that the right to appeal is not a common law right, but is statutory and subject to control by the Legislature. *See In re Tax Appeal of Lower Mapunapuna Tenants Ass'n,* 73 Haw. 63, 69, 828 P.2d 263, 266 (1992); *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Concerned Citizens of Palolo,* 107 Hawai'i 371, 380, 114 P.3d 113, 122 (2005). It was the Legislature's prerogative, and not the prerogative of the Director, to determine the extent to which the decisions of the Director could be appealed to the LIRAB.

Hawai`i courts have also adopted the principle of statutory construction that "[s]tatutes governing appeals are liberally construed to uphold the right of appeal." *Credit Associates of Maui, Ltd. v. Montilliano,* 51 Haw. 325, 329, 460 P.2d 762, 765 (1969); *Jordan v. Hamada,* 62 Haw. 444, 448, 616 P.2d 1368, 1371 (1980); *see Ariyoshi v. Hawaii Pub. Employment Relations Bd.,* 5 Haw.App. 533, 538, 704 P.2d 917, 923 (1985) (stating that "in this jurisdiction there is a policy favoring judicial review of administrative decisions"); *In re Hawaii Gov't Employees' Ass'n,* 63 Haw. 85, 87, 621 P.2d 361, 363 (1980) (same). "[O]ur policy ... has always been to permit litigants, where possible, to appeal[.]" *Jordan,* 62 Haw. at 451, 616 P.2d at 1373 (internal quotation marks and citation omitted). This principle of statutory construction supports our interpretation of the term "party" as used in HRS § 386-87.

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The DLIR Appellees, however, argue that Dr. Jou was not a "party" to the Director's decisions within the meaning of HRS § 386-87 and thus did not have the right to appeal the Director's decisions. The DLIR Appellees contend that there is a distinction between the term "party" and the term "person" as used in HRS Chapter 386. According to the DLIR Appellees, the term "party" as used in HRS Chapter 386 has a specialized meaning and it only refers to "the claimant, his/her dependents, the employer, and its insurance carrier or adjuster, and sometimes, the Special Compensation Fund."

In support of their claim, the DLIR Appellees cite HRS §§ 386-27 (1993) and 386-98 (Supp.2007), which specifically authorize a "person" aggrieved by a decision of the Director issued pursuant to those sections to appeal.[18] The DLIR Appellees contend that there would be no need for HRS §§ 386-27 and 386-98 to give specific authorization for an aggrieved "person" to appeal if all decisions of the Director were appealable. The DLIR Appellees further argue that the use of the term "person" in these sections demonstrates that there is a distinction between "party" and "person" under HRS Chapter 386 and shows that the Legislature did not intend to give every participant in the workers' compensation system the right to appeal pursuant to HRS §§ 386-73 and 386-87.

We are not persuaded by the DLIR Appellees' arguments. The DLIR Appellees' claim that the term "party" has a specialized meaning under HRS Chapter 386 that excludes a "person" who is a medical service provider, such as Dr. Jou, is belied by the Director's own use of the term "party" in the Director's rules. In HAR § 12-15-94(d), the provision at issue in this appeal, the Director repeatedly uses the term "party" to refer to a medical service provider involved in a billing fee dispute. HAR § 12-15-94(d) states:

(d) In the event a reasonable disagreement relating to specific charges cannot be resolved, the employer or provider of service may request intervention by the director in writing with notice to the other *party*. ... The director shall send the *parties* a notice and the *parties* shall negotiate during the thirty-one calendar days following the date of the notice from the director. If the *parties* fail to come to an agreement during the thirty-one calendar days, then within fourteen calendar days following the thirty-one day negotiating period, either *party* may file a request, in writing, to the director to review the dispute with notice to the other *party*. The director shall send the *parties* a second notice requesting the *parties* file position statements, with substantiating documentation .... The director shall review the positions of both *parties* and render an administrative decision without hearing. A service fee of up to $500 payable to the State of Hawaii General Fund will be assessed at the discretion of the director against either or both *parties* who fail to negotiate in good faith. The decision of the director is final and not appealable.

(Emphases added.) The Director's use of the term "party" in HAR § 12-15-94(d) to refer to a medical service provider supports our view that Dr. Jou qualifies as a "party" under HRS § 386-87.

The inclusion within HRS §§ 386-27 and 386-98 of references to the right of an aggrieved "person" to appeal decisions of the Director made under those sections does not change our analysis. HRS §§ 386-73 and 386-87 broadly authorize a party to appeal the Director's decisions, which, under the ordinary meaning of the term "party," includes medical service providers involved in fee disputes decided by the Director. The Legislature's particular reference to the right of an aggrieved "person" to appeal decisions made by the Director under HRS

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§§ 386-27 and 386-98 does not mean that other decisions, such as those involving billing fee disputes, are not subject to appeal pursuant to the general provisions of HRS §§ 386-73 and 386-87.

The DLIR Appellees, Argonaut, and Marriott claim that HRS § 386-21(c) provides specific authorization for the Director's promulgation of the no-appeal provision in HAR § 12-15-94(d). We reject this claim. The DLIR Appellees, Argonaut, and Marriott rely upon the portion of HRS § 386-21(c) that states: "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[.]" We read this provision as authorizing the Director to promulgate rules permitting *the Director's decisions* in medical fee disputes to be rendered in a summary manner. HRS § 386-21(c), however, does not state that the Director can insulate the Director's own decisions from appeal.

As previously stated, the right to appeal is statutory and it is the Legislature's prerogative to determine the extent to which the decisions of the Director may be appealed. Viewed in the context of the broad grant of the right to appeal the decisions of the Director set forth in HRS §§ 386-73 and 386-87, we conclude that the Legislature would have spoken in more definitive terms had the Legislature intended to authorize the Director by rule to preclude appeal of the Director's own decisions in medical fee disputes. Our conclusion is consistent with the liberal construction of appeal statutes to uphold the right of appeal and the judicial policy permitting litigants, where possible, to appeal. *See Jordan,* 62 Haw. at 448, 451, 616 P.2d at 1371, 1373.

We note that in a different context, the Legislature had no difficulty in clearly expressing its intent to make an administrative decision non-appealable. HRS § 128D-34 (Supp.2007) provides that decisions of the Department of Health on an application to conduct a voluntary response action "shall be final, with no right of appeal." Thus, the Legislature knows how to definitively eliminate the right to appeal an administrative decision when that is its intent.

III. The Remedy

The Director's decisions in Dr. Jou's medical fee disputes with Marriott and Argonaut were not pursuant to an agency hearing and were not rendered in contested cases. *See* HRS § 386-21(c) (authorizing the Director to resolve medical fee disputes in a summary manner); HAR § 12-15-94(d) ("The director shall review the positions of both parties and render an administrative decision without hearing."); HRS § 91-1 (1993) (defining "[c]ontested case" to mean "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing"). Thus, Dr. Jou was not entitled to appeal the *merits* of the Director's decisions to the circuit court pursuant to HRS § 91-14, which, in relevant part, permits appeals of final decisions in contested cases. Dr. Jou's right to appeal the merits of the Director's decisions was limited to appeals filed with the LIRAB. Accordingly, the circuit court did not have jurisdiction to resolve the merits of Dr. Jou's appeals of the Director's decisions.

Dr. Jou's appeals to the circuit court, however, included claims for declaratory relief pursuant to HRS § 91-7, such as the claim for a judicial declaration that the no-appeal provision of HAR § 12-15-94(d) was invalid. There is no suggestion that the circuit court lacked jurisdiction to resolve Dr. Jou's claims for declaratory relief. Because the no-appeal provision of HAR § 12-15-94(d) is inconsistent with and not authorized by HRS Chapter 386, it is invalid as beyond the scope of the Director's rulemaking authority. Accordingly, we conclude that the circuit court erred in dismissing Dr. Jou's claims for declaratory relief and in failing to declare the no-appeal provision to be invalid.

The DLIR Appellees argue that even if we conclude that Dr. Jou had the right to appeal the Director's decisions to the LIRAB, Dr. Jou's appeals were untimely because they were not filed within twenty days of the Director's decisions as required by HRS § 386-87. Instead, Dr. Jou followed the time period for appealing a contested

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case under HRS § 91-14 and filed his notices of appeal with the circuit court within the thirty-day time period established by HRS § 91-14. We conclude, under the rather unique circumstances of this case, that Dr. Jou cannot be faulted for failing to file his notices of appeal with the LIRAB within the twenty-day time limit as required by HRS § 386-87. At the time his appeals matured, Dr. Jou was precluded by HAR § 12-15-94(d) from appealing the Director's decisions to the LIRAB. We hold that Dr. Jou shall have twenty days from the effective date of our judgment in these consolidated appeals to file appeals of the Director's decisions with the LIRAB. We express no opinion on the merits of Dr. Jou's challenges to the Director's decisions in these cases.

CONCLUSION

For the foregoing reasons, we affirm the Judgments in Civil No. 05-1-0375 and Civil No. 05-1-1079, except that we vacate the portions of the Judgments that dismissed Dr. Jou's claims for declaratory relief. We direct the circuit court to enter judgment in favor of Dr. Jou declaring that the no-appeal provision of HAR § 12-15-94(d) is invalid, and we remand the cases to the circuit court for further proceedings consistent with this opinion. Dr. Jou shall be permitted to file appeals of the Director's decisions with the LIRAB within twenty days of the effective date of our judgment in these appeals.[19]

Notes:

1. Darwin Ching (Ching) succeeded Nelson Befitel (Befitel) as the Director of the Department of Labor and Industrial Relations. Pursuant to Hawai`i Rules of Appellate Procedure Rule 43(c), Ching has been substituted for Befitel as a party in these consolidated appeals.

2. By order dated October 28, 2008, we consolidated Appeal Nos. 27491 and 27539 for disposition.

3. The Honorable Eden Hifo presided.

4. HRS § 452-1 (1993) defines the terms "massage therapy," "massage therapist," and "massage therapy establishment" in relevant part as follows:

"[M]assage therapy" ... means any method of treatment of the superficial soft parts of the body, consisting of rubbing, stroking, tapotement, pressing, shaking, or kneading with the hands, feet, elbow, or arms, and whether or not aided by any mechanical or electrical apparatus, appliances, or supplementary aids such as rubbing alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar preparations commonly used in this practice....

"Massage therapist" means any person who engages in the occupation or practice of massage for compensation.

. . . .

"Massage therapy establishment" means premises occupied and used for the purpose of practicing massage therapy or massage therapy training; provided that when any massage therapy establishment is situated in any building used for residential purposes, the massage therapy establishment premises shall be set apart and shall not be used for any other purpose.

HRS § 452-2 (1993) makes it unlawful for "any person in the State to engage in or attempt to engage in the occupation or practice of massage for compensation without a current massage therapist license issued pursuant to this chapter." HRS § 452-3 (1993) provides that "[n]o massage therapy establishment shall be operated unless it has been duly licensed as provided for in this chapter."

5. HAR § 12-15-94 provides as follows:

§ 12-15-94 *Payment by employer*. (a) The employer shall pay for all medical services which the nature of the compensable injury and the process of recovery require. The employer is not required to pay for care unrelated to the compensable injury.

(b) When a provider of service notifies or bills an employer, the employer shall inform the provider within sixty calendar days of such notification or billing should the employer controvert the claim for services. Failure of the employer to notify the provider of service shall make the employer liable for services rendered until the provider is informed the employer controverts additional services.

(c) The employer, after accepting liability, shall pay all charges billed within sixty calendar days of receipt of such charges except for items where there is a reasonable disagreement. If more than sixty calendar days lapse between the employer's receipt of an undisputed billing and date of payment, payment of billing shall be increased by one per cent per month of the outstanding balance. In the event of disagreement, the employer shall pay for all acknowledged charges and shall notify the provider of service, copying the claimant, of the denial of payment and the reason for denial of payment within sixty calendar days of receipt. Furthermore, the employer's denial must explicitly state that if the provider of service does not agree, the provider of service may file a "BILL DISPUTE REQUEST" to include a copy of the original bill with the director within sixty calendar days after postmark of the employer's objection, and failure to do so shall be construed as acceptance of the employer's denial.

(d) In the event a reasonable disagreement relating to specific charges cannot be resolved, the employer or provider of service may request intervention by the director in writing with notice to the other party. Both the front page of the billing dispute request and the envelope in which the request is mailed shall be clearly identified as a "BILLING DISPUTE REQUEST" in capital letters and in no less than ten point type. The director shall send the parties a notice and the parties shall negotiate during the thirty-one calendar days following the date of the notice from the director. If the parties fail to come to an agreement during the thirty-one calendar days, then within fourteen calendar days following the thirty-one day negotiating period, either party may file a request, in writing, to the director to review the dispute with notice to the other party. The director shall send the parties a second notice requesting the parties file position statements, with substantiating documentation to specifically include the amount in dispute and a description of actions taken to resolve the dispute, within fourteen calendar days following the date of the second notice from the director. The director shall review the positions of both parties and render an administrative decision without hearing. A service fee of up to $500 payable to the State of Hawaii General Fund will be assessed at the discretion of the director against either or both parties who fail to negotiate in good faith. The decision of the director is final and not appealable.

6. Argonaut and Marriott explained that their change of position on payment for the services performed by Dr. Jou's massage-therapist employees was based on the Director's change of position on this issue. Argonaut and Marriott contended that the Director had previously taken the position that services performed by Dr. Jou's massage-therapist employees were not reimbursable because Dr. Jou did not have an MAE license, but that the Director later changed the Director's position and was no longer treating the lack of an MAE license as precluding reimbursement.

7. The decisions were issued by Gary S. Hamada (Hamada), Administrator of the Disability Compensation Division (DCD) of the Department of Labor and Industrial Relations (DLIR). Because Hamada was acting on behalf of the Director, we will not distinguish between Hamada and the Director and will attribute decisions made by Hamada to the Director.

8. HRS § 91-14 provides in relevant part:

§ 91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

9. HRCP Rule 72 provides in relevant part:

Rule 72. Appeal to a circuit court.

(a) *How taken*. Where a right of redetermination or review in a circuit court is allowed by statute, any person adversely affected by the decision, order or action of a governmental official or body other than a court, may appeal from such decision, order or action by filing a notice of appeal in the circuit court having jurisdiction of the matter. As used in this rule, the term "appellant" means any person or persons filing a notice of appeal, and "appellee" means every governmental body or official (other than a court) whose decision, order or action is appealed from, and every other party to the proceedings.

. . . .

(e) *Statement of case*. The appellant shall file in the circuit court concurrently with the filing of appellant's designation, a short and plain statement of the case and a prayer for relief. Certified copies of such statement shall be served forthwith upon every appellee. The statement shall be treated, as near as may be, as an original complaint and the provision of these rules respecting motions and answers in response thereto shall apply.

10. HRS § 91-7 (1993) provides:

§ 91-7 Declaratory judgment on validity of rules. (a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) herein by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. The action may be maintained whether or not petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures.

11. In discussing the relevant sections in HRS Chapter 386, we will refer to the current version of the statutes. There are no material differences for purposes of our analysis between the current statutes and any prior versions of the statutes in effect during the course of Dr. Jou's cases.

12. HRS § 386-1 (1993) defines the term "appellate board" to mean the LIRAB.

13. HRS § 386-89 (1993) permits the Director to reopen a case under certain conditions.

14. HRS § 386-1 defines the term "compensation" to mean "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."

15. As enacted in 1995, the above-quoted portion of HRS § 386-21(c) used the term "medical service provider," which was changed to "medical services provider" by an amendment enacted in 2006. 2006 Haw. Sess. L. Act 191, § 1 at 831.

16. One of the significant amendments made by Act 234 was to change the method for determining the schedule of medical fees applicable to workers' compensation cases. *See* 1995 Haw. Sess. L. Act 234, § 7 at 607-08.

17. The argument of the DLIR Appellees, Marriott, and Argonaut that HRS § 386-21(c) provides statutory authority for the no-appeal provision of HAR § 12-15-94(d) will be discussed *infra*. None of the parties, however, refer to HRS § 386-26 in their briefs. HRS § 386-26 provides that the Director 1) "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"; and 2) shall adopt updated medical fee schedules and, "where deemed appropriate, shall establish separate fee schedules for services of health care providers." Because HRS § 386-26 was not cited by the parties and is not pertinent to our analysis of whether the no-appeal provision of HAR § 12-15-94(d) is valid, we will not further discuss HRS § 386-26.

18. HRS § 386-27 authorizes the Director to qualify health care providers rendering services under HRS Chapter 386 and to sanction them for non-compliance with established requirements. HRS § 386-27(d) provides that "[a]ny person aggrieved by a decision of the director may appeal the decision under section 386-87." HRS § 386-98(e) authorizes the Director to impose administrative penalties on any person committing fraud. HRS § 386-98(f) provides that "[a]ny person aggrieved by the [Director's] decision [to impose administrative penalties] may appeal the decision under sections 386-87 and 386-88."

19. Hawai'i Rules of Appellate Procedure (HRAP) Rule 36(c) (2008) provides:

(c) *Effective date of intermediate court of appeals' judgment*. The intermediate court of appeals' judgment is effective upon the ninety-first day after entry or, if an application for a writ of certiorari is filed, upon entry of the supreme court's order dismissing or rejecting the application or, upon entry of supreme court's order affirming in whole the judgment of the intermediate court of appeals.

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU
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KIRK CALDWELL
MAYOR

CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

March 20, 2018

The Honorable Aaron Ling Johanson, Chair
The Honorable Daniel Holt, Vice Chair
and Members of the Committee
on Labor & Public Employment
The House of Representatives
State Capitol, Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Johanson, Vice Chair Holt, and Members of the Committee:

SUBJECT: Senate Bill No. 2364, S.D. 2
Relating to Workers' Compensation

S.B. 2364, S.D. 2, prohibits employer disputes of workers' compensation claims without reasonable cause or while the claim is pending investigation; establishes negotiation, notice, and review procedures for disputed claims; establishes a penalty for failure to negotiate in good faith; and permits service providers to charge interest on late bill payments.

The City and County of Honolulu, Department of Human Resources (DHR), supports the intent of this measure to the extent it intended to provide more timely medical care, services, and supplies to injured employees. The City also offers the comments below.

First, notwithstanding the premise of this bill, DHR accepts liability outright for the vast majority of new workers' compensation claims it receives each year. For example, in calendar year 2017, DHR accepted liability on 95 percent of the 1,300 new claims filed. However, a small minority of claims do require some additional investigation to confirm that the alleged injury arose out of and in the course of employment. As an alternative to the convoluted revisions to Chapter 386 that are proposed in this bill, consideration should be given to codifying the salient provisions of the following administrative rule, promulgated by the Director of Labor, which already applies to employers and health care contractors under the Hawaii Prepaid Health Care Act:

> **§12-12-45 Controverted workers' compensation claims.** In the event of a controverted workers' compensation claim, the health care contractor <u>shall</u> pay or provide for the medical services in accordance with the health care contract and notify the department of such action. <u>If workers' compensation liability is established, the health care contractor shall be reimbursed by the workers' compensation carrier</u> such amounts authorized by chapter 386, HRS, and chapter 10 of title 12, administrative rules. (Bold emphasis in original, underscored emphases added.)

By adopting this rule as a statutory provision within Chapter 386, an injured or ill employee whose claim is initially controverted can still obtain, without delay, all necessary medical care through the private carrier during the pendency of the workers' compensation administrative process. Thus, if the claim is subsequently determined to be work-related, the workers' compensation carrier can then reimburse the private medical carrier.

Second, the proposed provision that "a claim shall be presumed compensable when submitted by an employee who is excluded from health care coverage under chapter 393, the Hawaii Prepaid Health Care Act" is superfluous language. The Hawaii Workers' Compensation Law already presumes that every claim is for a covered work injury, regardless of the employee's health care coverage status.

Thank you for the opportunity to testify.

Sincerely,

Carolee C. Kubo
Director

HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

Pauahi Tower, Suite 2010
1003 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 525-5877

Alison H. Ueoka
President

TESTIMONY OF ALISON UEOKA

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair

Tuesday, March 20, 2018
10:00 a.m.

SB 2364, SD2

Chair Johanson, Vice Chair Holt, and members of the Committee on Labor and Public Employment, my name is Alison Ueoka, President of the Hawaii Insurers Council. The Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately forty percent of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** this bill.

Violates insurersô due process rights. In Section 2 of the bill where a new section of law is proposed, the language under (a) and (b) conflict and would impede an insurer from their due process rights. Subsection (a) says in part, ñThe employer shall not be required to pay for care unrelated to the compensable injury.ò We agree with this statement as the system of workersô compensation is for those who are injured on the job and not elsewhere. However, subsection (b)(2) says in part, ñThe employer shall not dispute a claim for services while the claim is pending investigation;é ò If the employer is forced to pay for a claim while they are determining if the claim is work related, this violates their due process rights. The remedy in the bill in subsection (g) where the bill requires an employee to reimburse the payor for benefits unduly received is not realistic and insurers will in all likelihood never receive reimbursement for medical care, medical services, and vocational rehabilitation services. The insurer is the only payor. This list is not exhaustive as workersô compensation benefits are not limited to services, however, the point is moot if nothing is recoverable as a practical matter.

<u>Unrelated expansion of the workersô compensation law</u>. Also, in Section (b)(2) of the bill, claims are presumed compensable for employees excluded from Hawaiiôs Prepaid Health Care Act. This is an expansion to the workersô compensation law that goes far beyond its purpose, which is to rehabilitate injured workers. This provision mandates that a workersô compensation claim be accepted merely because the injured is excluded from the *healthcare law in Hawaii*. We believe this provision also violates an insurersô due process rights as the insurer has no ability to deny a claim, even if the injury is not work related.

We ask that this bill be held or in the alternative, language in Section 2 of the bill, subsection (b)(2) be stricken as well as language in subsection (g).

Thank you for the opportunity to testify.

The House of Representatives
The Twenty-Ninth Legislature
Regular Session of 2018

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson Chair
Rep. Daniel Holt, Vice Chair

Date: Monday, March 20, 2018
Time: 10:00 a.m.
Place: Conference Room 309

STATEMENT OF ILWU LOCAL 142 ON S.B. 2364, SD 2,
RELATING TO WORKERS' COMPENSATION

Thank you for allowing us the opportunity to testify regarding S.B. 2364, S.D. 2. We are in general agreement with the concept of this bill but questions some aspects of it.

The attempt to require employer payment for medical care unless it has reasonable cause for disputing the claim in Section 2 of the bill is a positive feature. This is a salutary attempt to expedite the delivery of medical and vocational services to injured workers.

Subsection (c) of Section 2 sets a thirty day deadline for employers to notify providers that they dispute claims. Subsection (d) sets a sixty day deadline for paying any bill for services. Subsection (e) sets forth a procedure for denying claims and Subsection (f) provides for a 31 day negotiation period follow by an option for review by the director of the department of labor to resolve the disputes. All of these provisions create constructive pathways for resolving billing disagreements.

We do question, however, whether employees should be made responsible for reimbursement of benefits or payments received if the claim is not compensable as provided by subsection (g). Where the employer has prepaid health insurance, the employee will not be responsible for reimbursement, his or her health insurance plan will be responsible. It is not clear whether decisions of the director under subsection (f) can be appealed. If so, must the employee reimburse the insurer during the time following appeal of the Director's decision? Can a decision ordering reimbursement be stayed pending appeal? A hearing is in all probability necessary for this procedure to meet constitutional requirements of due process outlined in the Goldberg v. Kelly line of U.S. Supreme Court cases. Vital considerations such as this must be considered and resolved before S.B.2364, S.D. 2 can be enacted.

ILWU Local 142 supports SB2364 S.D. 2 but believes attention must be directed to the concerns we have raised in order that the constructive features of the bill can be fully implemented and realized.

SB 2364
SD-2

LATE TESTIMONY

Testimony to the
House Committee on Labor & Public Employment
March 20, 2018
10:00 a.m.
State Capitol - Conference Room 329

LATE

RE: SB 2364, SD2, RELATING TO WORKERS' COMPENSATION

Aloha Chair Johanson, Vice Chair Holt, and members of the committee:

On behalf of the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"), we are writing in opposition to SB 2364, SD2, relating to workers' compensation. This bill prohibits employer disputes of workers' compensation claims without reasonable cause or while the claim is pending investigation. We believe that this bill as currently written will create barriers to appropriately resolving claims and will not accomplish the goal of promoting justice, fairness and transparency.

Human resource management professionals are responsible for the alignment of employees and employers to achieve organizational goals. HR professionals seek to balance the interests of employers and employees with the understanding that the success of each is mutually dependent. We believe that this bill will alter the balance of employer and employee interests in the resolution of claims in a manner that does not advance the overall public purpose of ensuring workplace safety. We respectfully ask that you do not advance this bill.

SHRM Hawaii represents more than 800 human resource professionals in the State of Hawaii. We look forward to contributing positively to the development of sound public policy and continuing to serve as a resource to the legislature on matters related to labor and employment laws.

Mahalo for the opportunity to testify.

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SHRM Hawaii, P. O. Box 3175, Honolulu, Hawaii (808) 447-1840

SB-2364-SD-2
Submitted on: 3/19/2018 2:50:08 PM
Testimony for LAB on 3/20/2018 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Delle Tanioka	Individual	Support	No

Comments:

LATE

To: **Rep. Aaron Ling Johanson, Chair**
Rep. Daniel Holt, Vice Chair
Members of the Committee on Labor & Public Employment

Date: Tuesday, March 20, 2018
Time: 9:00 a.m.
Place: State Capitol, Conference Room 309

LATE

<u>Strong Support for SB2364 SD2</u>

- Injured worker or injured patient; regardless of it being a work injury or not, injured worker/patient needs medical treatment.
- Insurance policies are paid to cover these costs. The insurance companies should pay for the medical treatments so that patients can get back to work and back to their lives.
- Most patients don't have the money to cover full medical treatment costs out of pocket, nor should they have to when they have insurance coverage. That is the reason they pay for medical insurance.
- Hawaii law doesn't recognize "Denied Pending Investigation", yet work comp insurance companies (or payors) use this term frequently. The term should be treated as "Denied", because technically, that is what the work comp payor is doing, denying payment for treatment.
- When an injured workers' claim is "denied pending investigation", there is no sense of urgency to investigate the claim, therefore some patients wait for very long lengths of time. This is not right, nor should it be allowed to continue.

I respectfully ask the **House Labor and Public Employment** to **<u>please pass SB 2364 SD2</u>**, so that injured worker patients' claims that are made to be "denied pending investigation", will be able to receive medical treatment paid for by their private insurance company.

Thank you,

Cathy Wilson

Injured Worker Advocate

WAYNE H. MUKAIDA
Attorney at Law
888 MILILANI STREET, PH 2
HONOLULU, HAWAI'I 96813
TEL & FAX: (808) 531-8899

March 19, 2018

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson, Chair

Re: S.B. No. SB 2364, SD2
Hearing: March 20, 2018, 10:00 a.m.

Chairmen, and members of the Committee, I am attorney Wayne Mukaida. I have been in practice since 1978. Since 1989, I have devoted a substantial portion of my legal practice to representing injured workers. I strongly support amendments which expedite the medical treatment of injured workers under HRS Chapter 386 regarding Workers' Compensation. However, unless major amendments to S.B. 2364, SD2 are made, the measure must not pass.

I. Injured workers must receive immediate medical care.

It is in society's interests and the interests of an injured worker that the injured worker receive immediate medical care, and to that end, HRS Chapter 386 regarding Workers' Compensation was drafted as a no-fault statute. In return for losing the right to sue to recover for injuries, injured workers were given certain rights, including the right to medical care.

The no-fault aspect of the chapter was written in part in HRS §386-85 which provides that in any proceeding to enforce a WC claim, it is presumed that the claim is a covered WC claim. The appellate courts have held that this presumption is applicable from the outset, that is, from the time a claim is filed. With this presumption, and reading Chapter 386 as a whole, the statute contemplates that an injured worker is to receive immediate medical care.

Unfortunately, employers and their WC carriers have used the artifice of a "denial pending investigation" which turns Chapter 386 upside down and which results in many, many months of delay before an injured worker can receive care. This delay even occurs in cases where an injury is witnessed, the employer does not contest the injury, but where the insurer asserts that it has to conduct an investigation.

Any provision in the bill which incorporates the concept of a "denial pending investigation" must be stricken. The concept of a "denial pending investigation" involves a major restructuring of Chapter 386. The language "denial pending investigation" should never be given recognition Chapter 386.

II. Balancing of interests; Static period to investigate.

Before one tries to fix anything, a precise diagnosis should be obtained. It is submitted that a carrier may be afraid to start immediate payments for medical care because the carrier is afraid that any payment means acceptance of the claim forever and a waiver of all defenses to compensability. This concern must be balanced against an employee's need for immediate care.

There is nothing in Chapter 386 which provides that if a carrier pays a claim, that all defenses to compensability are waived, however there is some case law which provides that a carrier might be estopped from belatedly contesting a claim.

To address these concerns of carriers, and to balance the need for immediate treatment, some states have adopted a statutory investigation period. An injured worker makes a claim, the carrier makes immediate payment and has a statutory fixed period to investigate. See for example Florida Statute, § 440.20(4), which provides that a carrier shall pay, " benefits and compensation as if the claim had been accepted as compensable, without prejudice and without admitting liability" and then have a 120 day period within which to investigate and possibly deny.

This type of statutory scheme addresses carrier's about unwarranted claims, and has the added benefit to an injured worker of providing the carrier with an incentive to conduct its investigation expeditiously.

This scheme provides more certainty to the process and balances the injured worker's need for immediate medical care and carrier's need to investigate.

III. <u>The amendment adds unnecessary ambiguities to Chapter 386.</u>

The first 2 sentences in the bill provide:

> Notwithstanding any other law to the contrary, the employer shall pay for all medical services required by the employee for the **compensable injury** and the process of recovery. The employer shall not be required to pay for care unrelated to the **compensable injury**.

These 2 sentences may be interpreted to take away some medical benefits.

Under current law, an employer takes a worker as is. If the worker has a medical condition unrelated to work, but which prevents treatment of the work injury, the carrier may be liable for the unrelated medical condition which is preventing treatment of the work injury. The phrase "medical services required by the employee for the compensable injury" may be interpreted to take away treatment of an underlying condition that prevents treatment of the worker's work injury. The second sentence likewise contains the same troublesome language restricting care solely to the "compensable injury".

As an example, where a worker had a pre-existing knee condition, and then suffered a work related injury to his hip, an surgeon may opine that the knee has to be repaired first. Under this bill the worker may be required to pay for his knee repair before he could have the WC carrier pay for this hip repair.

As another example, if a worker was obese and suffered a work injury which required surgery, a surgeon may opine that the worker has to loose weight before an operation can be done. Under this bill, the worker would have to pay for his own weight reduction program before the WC carrier would be liable for surgery.

Under current law, an injured worker is entitled to care for consequences of his work injury. For example, if a worker suffers from a work related infection which leads to a multi-organ shutdown, the worker would be entitled to care of his organs. The bill may be unfairly interpreted to limit the WC carrier's liability to only care of the infection.

Under current law, and injured worker is entitled to all reasonable medical care for the injury. The last phrase of the bills first sentence, which limits medical care only to care which is required by the "process of recovery", might be interpreted to take away care for pain relief, for maintenance or for periodic testing.

IV. Paragraph b is unnecessary as it is tautological and already covered by Chapter 386.

It is understood that all parties must act reasonably. However, there are instances in which a WC carrier must act under an even higher standard of care. A WC carrier must act very diligently to see that an injured worker receives benefits. To insert paragraph b(1) which provides that a carrier need act only with reasonable cause may be interpreted to reduce that duty.

Paragraph b(2) which concerns workers who are not covered by the Hawai'i Prepaid Health Care Act adds unnecessary complexity to Chapter 386. Firstly, such part-time workers are already covered by present presumptions in Chapter 386. Secondly, having to determine whether a worker is excluded from coverage under the Hawai'i Prepaid Health Care Act may require proceedings under 2 separate sections of the Disability Compensation Division. One proceeding in the Enforcement Section to decide coverage under the Prepaid Health Care Act, and another proceeding to determine the WC issues. This special presumption section for part-time workers could be interpreted to mean that part-time workers are not covered by the present HRS §386-85 presumption and must go through a determination by the Enforcement Section first before being covered by a presumption that the work injury is compensable.

V. Payment to medical providers.

Provisions for payment to medical providers must be kept simple. Present WC Medical Fee Schedule regulations are complex and are used by carriers as a checkoff list to deny care and payment. WC medical providers have to submit treatment plans in advance of providing care. The present regulations provide that treatment plans are deemed approved until the carrier objects. However, medical providers have been treated so unfairly in the past that they require an affirmative response from carriers before services are provided.

This creates a Catch-22 for injured workers and for medical providers. An injured worker cannot request a hearing until the carrier objects to a treatment plan. If a carrier chooses not to respond to a treatment plan, the injured worker cannot get treated, but at the same time cannot bring the issue before the Disability Compensation Division.

The Catch-22 for the medical provider is that if the services be rendered, and if the carrier subsequently denies the treatment plan, the medical provider might not get paid.

Requirements for treatment plans in the no-fault motor vehicle arena were eliminated. The requirement for treatment plans in the WC arena should likewise be eliminated, together with the complex provision for bill dispute resolution.

There is no good reason that a medical provider should have to follow different procedures for WC patients and non-WC patients.

VI. Conclusion.

If the above concerns are not addressed, please do not allow S.B. No. 2364, S.D.2 to move forward.

Thank you for considering my testimony.

WAYNE H. MUKAIDA

LATE

LATE

LATE

LATE (or updated) TESTIMONY

for Measure: SB 2364

Committee	LAB
Committee Referrals	LAB
Date of Hearing	3/20/18
Organization	Sky Ohana Administrator
Name of Testifier	ARVID T. YOUNGQUIST
Job Title of Testifier	Moderator & Founder
Position – Circle One	Support / Oppose / Comments
Category – Circle One	Fed Govt. / State Govt. / County Govt. / Industry / Private Citizen
Notes:	~~Ann Freed~~

DENNIS W.S. CHANG

Attorney at Law, A Limited Liability Law Corporation

WORKERS' RIGHTS – LABOR LAW
WORKERS' COMPENSATION
SOCIAL SECURITY DISABILITY
LABOR UNION REPRESENTATION
EMPLOYEES RETIRMENT SYSTEM
BODILY INJURIES

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATRUE
REGULAR SESSION OF 2018

TO: COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair

Rep. Cindy Evans — Rep. Kyle T. Yamashita
Rep. Linda Ichiyama — Rep. Lauren Kealohilani Matsumoto
Rep. Jarrett Keohokalole

FROM: Dennis W. S. Chang, Attorney-at-Law

DATE: Tuesday, March 20, 2018

TIME: **10:00 AM**

RE: <u>SB 2364</u>, <u>SD2 (SSCR2713)</u> <u>Status</u>
RELATING TO WORKERS' COMPENSATION

STATEMENT OF SUPPORT OF SB 2364, SB 2

Dear Chair Johansson and Vice Chair Holt:

I. INTRODUCTION

I have been a practicing attorney in labor law with a heavy emphasis handling the workers' compensation ("WC") claims for injured workers for more than four decades. I have served in many roles in my career as an advocate in complex WC claims for injured workers, as a speaker for the general public and professionals, as an expert and as a consultant. SB 2364 as currently proposed is unquestionably intended to expedite the critical delivery of medical care, services, and supplies for injured workers pursuant to Chapter 386, Hawai'i Revised Statutes ("HRS").

II. DISCUSSION

The Workers' Compensation ("WC") statute was enacted in Hawai'i more than 100 years ago with a simple logical purpose: if a worker became injured in the course of his or her employment, the injury was presumed compensable and the employer was obligated to provide vital medical care for the injury and other compensation as broadly

DENNIS W.S. CHANG
Attorney at Law, A Limited Liability Law Corporation

WORKERS' RIGHTS – LABOR LAW
WORKERS' COMPENSATION
SOCIAL SECURITY DISABILITY
LABOR UNION REPRESENTATION
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BODILY INJURIES

defined, including lost wages. In exchange, the injured worker was barred from suing the employer for the work related injury. When first enacted in 1915 and for many years, the spirit of the WC statute worked well. Since my early career, the WC process has become increasingly complicated, with regressive statutory amendments and burdensome administrative rules and our "grand bargain," which was intended to be a no-fault system, is now highly adversarial.

Despite the presumption that a work injury should be deemed compensable and WC benefits should be paid expeditiously, the existing WC system now persistently has claims routinely delayed or denied and injured workers needlessly suffer as repeatedly found by the Legislature in proposed amendments over the last 20 years or so. The current proposed amendment could help correct the abuses and delays or outright denial of prompt payment of benefits, especially essential medical care, services, and supplies.

That said, I do have reservations regarding this proposed amendment, as my colleague Wayne Mukaida in his scholarly testimony has identified. Without additional changes we may be causing more harm than good with the passage of the current proposed amendment as drafted.

I submit that we move in a very deliberate small step by simply imposing and incorporating into the WC statute the following:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity involving the WC statute. This provision overrides any other provision or administrative rule contained in the workers' compensation process.

We should strive for human decency and I thank you very much for the opportunity to testify on this proposal.

Respectfully submitted,

Dennis W. S. Chang

DILLINGHAM TRANSPORTATION BUILDING

735 BISHOP STREET • SUITE 320 • HONOLULU, HAWAI'I 96813 • TELEPHONE: (808) 521-4005

AHCS
Automated HealthCare Solutions

To: Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair
Members of the Committee on Labor & Public Employment

Date: Tuesday, March 20, 2018
Time: 9:00 a.m.
Place: Conference Room 309
State Capitol
415 South Beretania Street

SUPPORT FOR SENATE BILL 2364 SD2

Automated HealthCare Solutions (AHCS) submits the following testimony in support of Senate Bill 2364.

SB 2364 establishes that employers shall pay all workers compensation claims for compensable injuries and shall not deny claims without reasonable cause or during a pending investigation. It codifies into statute Hawaii Administrative Rules 12-15-94 (Payment by Employer) and amends and clarifies it as follows:

(a) Requires that the employer shall not controvert a claim for services:
(1) Without reasonable cause; or
(2) While the claim is pending investigation.

(b) Requires that the employer shall notify the provider within thirty calendar days, instead of sixty, should the employer controvert the claim for services.

(c) Increases the maximum service fee from $500 to $1,000 for which the director may assess against a party who fails to negotiate in good faith.

(d) Provides that denial of payment without reasonable cause shall be considered a failure to negotiate in good faith.

As Section 1 of SB 2364 states, Hawaii's existing workers' compensation has been plagued by delays and denials, and in many of those cases, insurers seem to automatically deny the claim "pending investigation". These investigations may include reviewing reports from an independent medical examiner, interviewing other employees, looking at videotapes, or combing through old medical records for evidence that the workplace injury was related to a pre-existing condition. While the insurer considers, sometimes for months, the patient is at times unable to use private insurance or get money for which to live. Although there is no statute, administrative rule or judicial ruling permitting this practice of “denying pending investigation,” insurers continue to abuse this practice. Therefore, the intent of this bill, to limit employers' use of denying a claim pending investigation and impose fines and penalties for those employers who continue doing so without reasonable cause, is laudable.

We would note that HB 1640 HD1 (the House companion version of SB 2364) appears to reasonably address DLIR’s objections to this measure.

Thank you for your consideration.

Jennifer Maurer, Esq.
Vice President of Government Affairs
Automated HealthCare Solutions, LLC

Scott McCaffrey, MD
91-2135 Fort Weaver Rd., Suite 170
Ewa Beach, HI/Oahu 96706
(808) 676-5331

To: Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair
Members of the Committee on Labor & Public Employment

Date: Tuesday, March 20, 2018
Time: 9:00 a.m.
Place: State Capitol, Conference Room 309

SUPPORT FOR SENATE BILL 2364 SD2

Scott McCaffrey, MD submits the following testimony in support of Senate Bill 2364 SD2.

SB2364 establishes that employer shall pay all workers compensation claims for compensable injuries and shall not deny claims without reasonable cause or during a pending investigation. It codifies into statute Hawaii Administrative Rules 12-15-94 (Payment by Employer) and amends and clarifies it as follows:

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  (1) Without reasonable cause; or
  (2) While the claim is pending investigation.

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(c) Increases the maximum service fee from $500 to $1,000 for which the director may assess against a party who fails to negotiate in good faith.

(d) Provides that denial of payment without reasonable cause shall be considered a failure to negotiate in good faith.

Scott McCaffrey, MD
91-2135 Fort Weaver Rd., Suite 170
Ewa Beach, HI/Oahu 96706
(808) 676-5331

As Section 1 states, Hawaii's existing workers' compensation has been plagued by delays and denials, and in many of those cases, insurers seem to automatically deny the claim "pending investigation". These investigations may include reviewing reports from an independent medical examiner, interviewing other employees, looking at videotapes, or combing through old medical records for evidence that the workplace injury was related to a pre-existing condition. While the insurer considers, sometimes for months, the patient is at times unable to use private insurance or get money for which to live. Although there is no statute, administrative rule or judicial ruling permitting this practice of "denying pending investigation," insurers continue to abuse this practice. Therefore, the intent of this bill, to limit employers' use of denying a claim pending investigation and impose fines and penalties for those employers who continue doing so without reasonable cause, is laudable.

Thank you for your consideration.

Scott McCaffrey, MD

Past President of HMA
Founding member of Work Injury Medical Association of Hawaii (WIMAH)