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February 20, 2020

To: The Honorable Donovan M. Dela Cruz, Chair,  
The Honorable Gilbert S.C. Keith-Agaran, Vice Chair, and  
Members of the Senate Committee on Ways and Means

Date: Thursday, February 20, 2020  
Time: 10:35 a.m.  
Place: Conference Room 211, State Capitol

From: Scott T. Murakami, Director  
Department of Labor and Industrial Relations (DLIR)

**Re: S.B. No. 2641 S.D. 1 RELATING TO WORKERS' COMPENSATION**

**I. OVERVIEW OF PROPOSED LEGISLATION**

SB2641 SD1 proposes to amend Section 386-51, Hawaii Revised Statutes (HRS) by adjusting the method used to calculate the average weekly wages for workers' compensation claims by eliminating the provision that an injured employee's average weekly wages are computed from all covered employment at the time of injury. The measure includes a clause that specifies the proposal would only take effect going forward from its effective date.

DLIR strongly opposes this measure.

**II. CURRENT LAW**

Section 386-51, HRS, provides in part that when the injured employee's average weekly wages are computed, the resulting amount represents most fairly, in the light of the employee's employment pattern and the duration of the employee's disability, the injured employee's average weekly wages from all covered employment at the time of the personal injury.

Stefan A. Riesenfeld, author of the seminal studies on Workers' Compensation (leading to the major overhaul in 1963) that served as the basis and framework of the

Prepaid Health Care Law and Temporary Disability Insurance, noted “To be sure, there exists nearly complete agreement on one important principle, i.e., that disability payments are *geared to the previous earning record* (emphasis in the original) of the injured worker.”<sup>1</sup>

Section 386-31(a), HRS, states that if a work injury causes permanent total disability, the employer shall pay the injured employee a weekly benefit, equal to sixty-six and two-thirds per cent of the employee’s average weekly wages, subject to the following limitation:

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

Section 386-31 (b), HRS, states that if a work injury causes total disability not determined to be permanent, the employer, for the duration of the disability, but not including the first three calendar days, shall pay the injured employee weekly benefits at the rate of sixty-six and two-thirds per cent of the employee’s average weekly wages, subject to the limitation on weekly benefit rates prescribed in subsection (a), or if the employee’s average weekly wages are less than the minimum weekly benefit rate prescribed in subsection (a), at the rate of one hundred per cent of the employee’s average weekly wages.

Section 386-32 (a), HRS, states that if a work injury causes permanent partial disability, the employer shall pay the injured worker an amount determined by multiplying the effective maximum weekly benefit rate prescribed in section 386-31 by the number of weeks specified for the disability.

Section 386-32 (b), HRS, states that if a work injury causes partial disability, not determined to be permanent, which diminishes the employee’s capacity for work, the employer, beginning with the first day of the disability and during continuance thereof, shall pay the injured employee weekly benefits equal to sixty-six and two-thirds per cent the difference between the employee’s average weekly wages before the injury and the employee’s weekly earning thereafter, subject to the schedule for the maximum and minimum weekly benefit rates prescribed in section 386-31.

Section 386-25, HRS, Vocational Rehabilitation, provides vocational rehabilitation services to restore an injured employee’s earning capacity as nearly as possible to that level that the worker was earning at the time of injury and to return the injured worker to suitable and gainful employment in the active labor force as quickly as possible in a cost-effective manner.

Section 386-51.5, HRS, limits liability in concurrent employment in which an employee is concurrently engaged in more than one employment with the balance of the employee’s benefits shall be paid from the Special Compensation Fund.

Section 386-56, HRS, Payment from the Special Compensation Fund in case of default. Where an injured employee or the employee's dependents fail to receive prompt and proper compensation, the director shall pay the full amount of all compensation awards and benefits from the special compensation fund to the employee or dependent.

### **III. COMMENTS ON THE SENATE BILL**

The legislative intent of the Workers' Compensation Law is to make the injured worker "whole" and to return him or her to work as quickly as possible in a cost-effective manner. As such, the Department has the following grave concerns about the bill:

- An injured employee's average weekly wage, which is currently based upon the date of injury, touches on almost every aspect of the employee's benefits to which they are entitled including temporary and permanent disability, temporary and permanent partial disability, concurrent temporary and partial disability, benefit adjustments to employees receiving permanent disability, death benefits such as funeral and burial expenses, benefits paid to dependent widows or widowers or reciprocal beneficiaries, dependent children, dependent parents, dependent grandparents, and dependent brothers and sisters.
- Many sections within Chapter 386, HRS and its associated Hawaii Administrative Rules will also be affected by this measure and require further legislative and departmental action to address the change proposed in this measure.
- Insurers will be faced with the uncertainty of costs, which will likely result in increased premiums to employers that will be passed onto customers and employees.
- If an insurer does not have the proper resources, the state-funded Special Compensation Fund will step-in to manage and pay all benefits associated with injured workers' claims.
- Removing the date of injury "marker" in determining the worker's average weekly wages will likely result in more disputes and hearings as well as create delays for injured workers in receiving prompt payment of benefits for possibly the life of their claim.

Therefore, the Department believes there are too many uncertainties in this measure and believes that the current method used to determine a worker's average weekly wage is fair and consistent for all parties, especially the injured worker, employer, and insurers.

<sup>1</sup> "*Efficacy and Costs of Workmen's Compensation*," California Law Review; Vol. 49, No. 4 (1961).

**SB-2641-SD-1**

Submitted on: 2/18/2020 9:26:28 AM

Testimony for WAM on 2/20/2020 10:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Pride at Work - Hawaii	Testifying for Pride @ Work - Hawaii	Support	No

Comments:

**SB-2641-SD-1**

Submitted on: 2/18/2020 9:28:01 AM

Testimony for WAM on 2/20/2020 10:35:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Michael Golojuch Jr	Testifying for LGBT Caucus of the Democratic Party of Hawaii	Support	No

Comments:

## TESTIMONY OF ALISON UEOKA

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COMMITTEE ON WAYS AND MEANS  
Senator Donovan M. Dela Cruz, Chair  
Senator Gilbert S. C. Keith-Agaran, Vice Chair

Thursday, February 20, 2020  
10:35 a.m.

### **SB 2641, SD1**

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the Committee on Ways and Means, 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. This bill would change the basis for calculating the average weekly wage to determine indemnity and other benefits from all covered employment at the time of the personal injury to the totality of covered employment as of the effective date of the Act.

This amendment significantly changes the workers' compensation system and would increase all indemnity benefits, including TTD, PPD, and PTD as well as death benefits.

The impact on insurers and self-insureds could be large. Insured would be required to estimate the injured worker's future wages and future length of disability.

The open-ended future liability would mean that insurers could be operating without proper loss reserves. The result may adversely impact insurer solvency. Proper loss reserving is critical for the state to ensure that insurers, captive insurers and self-insureds have adequate funds to pay its liabilities. If an insurer becomes insolvent, the losses will be borne by other premium payers, in this case, businesses.

The rate-making process in Hawaii is complicated and requires prior approval of the Insurance Division before revised rates are applied. Insurers have one opportunity to charge an appropriate price and future premiums cannot be applied to past policies.

Insurers will need to estimate future unknown costs and receive approval from the Insurance Division for increased rates to cover those costs. This increases uncertainty in the market and increases costs to employers, self-insureds and insurers.

The social impact of such a large change is also unknown. For instance, if injured workers' indemnity benefits are increased, it creates a larger population of workers who may be able to return to work, but because of the increase in wage loss, choose not to because it is close enough to what they were earning prior and they don't have to perform work to get the money. This creates a larger moral hazard than exists today and could add to continued TTD without justification.

Finally, we believe the Department of Labor and Industrial Relations would experience increased hearings if this bill becomes a law because there will be new conflicts regarding the appropriate basis for the average weekly wage.

For these reasons, we ask that this bill be held. Thank you for the opportunity to testify.



# INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS

Affiliated with A.F.L.-C.I.O.

**LOCAL UNION NUMBER 625**

94-497 UKEE STREET • WAIPAHU, HAWAII 96797

**T.G. Paris**

President Emeritus

February 20, 2020

10:35 am

Senate Committee on Ways and Means

Conference Room 211

State Capitol

415 South Beretania Street

Re: SB2641, SD1 – RELATING TO WORKERS' COMPENSATION

Aloha Chair Dela Cruz and members of the Senate Committees on Ways and Means:

We **SUPPORT** SB2641, SD1. This bill, if enacted, will adjust the method of calculating average weekly wages for workers' compensation claims

The purpose of this bill is remove the limitation on compensation calculation that is currently set to the time of injury and allows for a compensation to be more flexible, allowing for adjustment to comparable salary and hourly rates at the time of treatment or determination of award which may be months if not years later.

We hope that this will provide more equitable support for workers and their families during this time of hardship.

Sincerely,

Joseph V. O'Donnell

Business Manager/Financial Secretary-  
Treasurer

JVO: MP



The Thirtieth Legislature  
Regular Session of 2020

THE SENATE

Committee on Ways and Means

Senator Donovan M. Dela Cruz, Chair

Senator Gilbert S.C. Keith-Agaran, Vice Chair

Thursday, February 20, 2020; 10:35 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2641, S.D.1  
RELATING TO WORKERS' COMPENSATION**

The ILWU Local 142 supports S.B. 2641, S.D.1, which adjusts the method of calculating average weekly wages for workers' compensation claims.

The purpose of this bill is to ensure a worker with a legitimate workers' comp injury has their temporary total disability calculated at their current salary or hourly rate when a workers' compensation doctor determines surgery is the best course of action to resolve an injury and requires the worker to be out of the job for a period of time.

We have had several cases where an employee was given the option of physical therapy or other less invasive options to avoid surgery but ultimately after years of physically therapy it was determined surgery was the only option to correct the workers' comp injury. Unfortunately, the Temporary Total Disability (TTD) was calculated on their wages based at the time of injury even though they have received a wage increase since the time of injury.

This bill simply ensures the workers TTD payments will be calculated at the current salary or hourly rate if a situation like this occurs.

Thank you for the opportunity to offer testimony on this measure. The ILWU recommends passage of S.B. 2641, S.D.1.



# Chamber of Commerce HAWAII

*The Voice of Business*

**Testimony to the Senate Committee on Ways and Means  
Thursday, February 20, 2020 at 10:35 A.M.  
Conference Room 211, State Capitol**

**RE: SB 2641 SD1, RELATING TO WORKERS' COMPENSATION**

Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **has concerns with** SB 2641 SD1, which adjusts the method of calculating average weekly wages for workers' compensation claims.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber has concerns about the unintended consequences that this bill could have as it significantly changes the workers' compensation system and could result in an increase to the cost of indemnity benefits, such as temporary total disability, permanent partial disability, or permanent total disability. Additionally, it is not clear what type of an impact this would have on insurers.

Thank you for this opportunity to share our concerns about SB 2641 SD1.