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February 11, 2020

To: The Honorable Brian T. Taniguchi, Chair,
The Honorable Les Ihara, Jr., Vice Chair, and
Members of the Senate Committee on Labor, Culture and the Arts

The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair and
Members of the Senate Committee on Judiciary

Date: Tuesday, February 11, 2020

Time: 10:05 a.m.

Place: Conference Room 016, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

SB2641 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.

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 authored seminal studies on Workers' Compensation (leading to the major overhaul in 1963), and two on health care that served as the basis and framework of the Prepaid Health Care and Temporary Disability Insurance

Laws. Riesenfeld noted the following, “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.¹”

III. COMMENTS ON THE HOUSE BILL

DLIR is not clear on the intent of this measure that would eliminate the time frame (date of injury) from which the average weekly wages are calculated.

DLIR recognizes there are some common scenarios in computing an employee’s average weekly wages such as:

- employees have injured themselves within the first week of working or on the first day on the job;
- not all employees earn fifty-two weeks of consecutive wages up to the date of injury;
- employees work part-time hours when they are injured;
- employees work for more than one employer when they sustain an injury with another employer; and
- employees are on-call basis or considered seasonal when injured.

In all cases the “time of injury” is the marker used to determine the employee’s average weekly wages no matter what the worker’s payroll scenario is. Section 386-51 allows the director to determine an injured workers average weekly wages by recognizing the amount that most fairly takes into account the employee’s work pattern and other nuances of wages earned under covered employment at the time of the injury.

By removing that marker, the average weekly wage could possibly be based upon wages earned on covered employment at “any time” in the employee’s work history. To then order the employer of injury to pay benefits based upon wages not earned or paid by that employer at the time of injury is not fair or reasonable.

¹ “*Efficacy and Costs of Workmen’s Compensation*,” California Law Review; Vol. 49, No. 4 (1961).

The Thirtieth Legislature
Regular Session of 2020

THE SENATE

Committee on Labor, Culture and the Arts

Senator Brian T. Taniguchi, Chair

Senator Les Ihara, Jr., Vice Chair

Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

State Capitol, Conference Room 016

Tuesday, February 11, 2020; 10:05 a.m.

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

The ILWU Local 142 supports S.B. 2641, 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 is paid at their current salary or hourly rate when a workers' compensation doctor determines surgery is the best course of action to resolve an injury.

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.

TESTIMONY OF ALISON UEOKA

COMMITTEE ON LABOR, CULTURE AND THE ARTS

Senator Brian T. Taniguchi, Chair

Senator Les Ihara, Jr., Vice Chair

COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

Tuesday, February 11, 2020

10:05 a.m.

SB 2641

Chair Taniguchi, Vice Chair Ihara, and members of the Committee on Labor, Culture and the Arts, and Chair Rhoads, Vice Chair Keohokalole, and members of the Committee on Judiciary, 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.

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

The impact on insurers and self-insureds could be large. There is no practical way for an insurer to determine an injured worker's highest wage over their work history. This effort would be required for each of the thousands of currently open workers compensation claims in Hawaii where indemnity benefits are payable. Additionally, the insurer would be required to estimate the injured worker's future wages and future length of disability.

Therefore, the open-ended backwards and forwards liability would mean that insurers could be operating without proper loss reserves on its outstanding claims. 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.

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.

The increased retroactive liabilities created by this bill would mean that insurers will have underpriced their business. There was no way of knowing at the time policies were issued that they would be subject to this *new, retroactive* liability for open claims. Insurers will need to estimate the going-forward 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.

IRON WORKERS STABILIZATION FUND

February 11, 2020
10:05 am

Senate Committee on Labor, Culture, and the Arts
Senate Committee on Judiciary
Conference Room 016
State Capitol
415 South Beretania Street

Re: SB2641 – RELATING TO WORKERS’ COMPENSATION

Aloha Chair Brian Taniguchi, Chair Karl Rhoads, Vice-Chair Les Ihara, Jr., Vice-Chair Jarrett Keohokalole and members of the Senate Committees on Labor, Culture, and the Arts and Judiciary:

We **SUPPORT** SB2641. 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,

T. George Paris
Managing Director

TGP: MP



Chamber of Commerce HAWAII

The Voice of Business

Testimony to the Senate Committees on Labor, Culture and the Arts, and Judiciary

**Tuesday, February 11, 2020 at 10:05 A.M.
Conference Room 016, State Capitol**

RE: SB 2641, RELATING TO WORKERS' COMPENSATION

Chairs Taniguchi and Rhoads, Vice Chairs Ihara and Keohokalole, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **has concerns with** SB 2641, 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 or on an employer's current policy. Current insurance policies have not taken into account this proposal and it is likely that employers may see an increased cost for these policies.

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

SB-2641

Submitted on: 2/11/2020 7:50:22 AM

Testimony for LCA on 2/11/2020 10:05:00 AM

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

Comments: