

March 23, 2007

RE: Senate Bill 1060, S.D. 1, H.D. 1

Honorable Calvin K.Y. Say  
Speaker, House of Representatives  
Twenty-Fourth State Legislature  
Regular Session of 2007  
State of Hawaii

Sir:

I respectfully dissent from the recommendation of your Committee on Consumer Protection and Commerce favoring passage of Senate Bill No. 1060, S.D. 1, H.D. 1, "A BILL FOR AN ACT RELATING TO WORKERS' COMPENSATION LAW". The purpose of the bill is to:

- (1) Allow for alternative dispute resolution for workers' compensation claims;
- (2) Establish criteria for the use of optional evidence-based guidelines for treatment and for the denial and dispute processes;
- (3) Exempt individuals holding ownership of at least 50% in an employing unit, including corporations, partnerships, limited liability partnerships, and sole proprietorships from workers' compensation requirements if the individual chooses to be excluded, provided that the exclusion shall be irrevocable for five years;
- (4) Exempt service performed by a partner for the for the partnership, a partner of a limited liability partnership, and sole proprietor for the sole proprietorship from workers' compensation requirements;
- (5) Prevent essential medical services from being discontinued in the event of a dispute, until the Director of Labor renders a decision on whether medical treatment should be continued;
- (6) Allow for the recovery of costs from a claimant's personal health care provider or other appropriate occupational or non-occupational insurer by an employer

or employer's insurer in the event unwarranted medical treatment was provided;

- (7) Allow injured workers to be referred for vocational rehabilitation where the employee has achieved maximum medical improvement and the employer has made no offer of permanent suitable work;
- (8) Allow for requests for hearings by employees and employers;
- (9) Provide for reimbursement of medical treatment expenses which should have been denied;
- (10) Limit the rulemaking powers of the Director;
- (11) Establishes requirements and standards for independent medical examiners to perform independent medical exams;
- (12) Clarifies authorization for claims for attorney's services; and
- (13) Require the submission of annual reports by workers' compensation insurers to the Director of Department of Commerce and Consumer Affairs and the Insurance Commissioner.

The Committee on Consumer Protection and Commerce passed the bill in an unamended form.

I do not agree with many of the provisions of the bill in its current form. The language in Section 8 of this bill alters the selection process for an independent medical examiner. Under current law, the employer designates and pays for the independent medical examiner. It is one of the few cost-managing options for the employer in the workers' compensation arena. The proposed language calls for the independent medical examiner to be selected by mutual agreement of the claimant and employer, removing a cost-containment tool for the employer.

The language is also ambiguous as to what will happen if there is no mutual agreement between the parties as to the independent medical examiner. The proposed language calls for the director to provide the parties "with the names of three duly qualified independent medical examiners within ten

calendar days from the notification of failure to reach mutual agreement, compiled and maintained by the director, to the employer and employee from which they shall choose." However, what happens upon further disagreement is unclear. The language on page 27-28 states, "If the employer and employee, within ten calendar days." Without statutory guidance, this situation would go unresolved, resulting in no resolution for the employer, and no care for the employee.

In addition, current law allows for the employee to have their own physician present at the examination. This is to allow the employee verification of the medical examination conducted by the employer's IME and allows for balance in the process. Current law mandates that the employer has the right to select the physician, but also has the obligation to pay. The language of this section switches the burden of payment onto the employer, further weakening cost containment potential, and creating a conflict of interest situation for the employee's physician and a punitive situation for the employer.

Second, the proposed language in Section 4 of the bill creates a situation that further penalizes the employer. Under the proposed language, even if the physician determines that the employee can return to work, by disputing the opinion, the employee can continue to receive medical services until the Director of Labor and Industrial Relations renders a ruling to the contrary. This continuing medical care contributes to higher costs to the system and in insurance premiums.

In addition, should the Director rule in favor of an employer, the employer or the employer's insurer may initiate an action to recover all of the sums paid for medical services rendered after the date designated by the Director. However, the recovery can only be made against the claimant's personal health care provider, or any appropriate occupational or non-occupational insurer, not the claimant themselves. This will have the effect of further increasing health insurance premiums, which are paid by the employer. In other words, the employer will end up paying either way under these provisions.

Third, the language in Section 6 of the bill allows an employer to request in writing for the issuance of a credit for the amount of temporary total disability benefits paid by an employer after the date which the Director of Labor and Industrial Relations determines should have been the last date

of payment of benefits. This language supposedly allows a credit against future medical or indemnity payments. What remains unanswered is where such a credit will come from. If the credit is to come from the injured employee's future settlement, the procedure for such recovery is not specified in this bill. Without such specification, the employer has no realistic possibility of reimbursement for paying future medical or indemnity benefits.

Fourth, the National Council on Compensation Insurance, Inc., in their testimony on House Bill 763, H.D. 2, which is the language currently adopted in Senate Bill 1060, S.D. 1, H.D. 1, stated that the language in Section 5 of the bill, allowing the Director of Labor and Industrial Relations to refer workers who are not permanently disabled but have reached maximum medical improvement and whose employers have not offered them permanent employment as nearly as possible to their pre-injury wage level for vocational rehabilitation services, and the language in Section 10 of the bill, expanding the prohibition on unscheduled reporting, will increase costs. Specifically, the National Council on Compensation Insurance, Inc. testified that, under the scenarios run by the council, the combined overall impact of just these two proposed sections could range from a potential cost impact of \$6 to \$20 million. At a time when the direction should be to lower the cost of workers' compensation insurance premiums and system expenses, this is a move in the wrong direction.

Additionally, the expansion of the prohibition on unscheduled reporting in Section 10 may conflict with the language of Section 1 of the bill, starting on page 5, which requires the attending physician to submit a treatment plan to the employer.

Finally, the language in Sections 2, 7, and 12, combine to severely restrict the rulemaking authority of the Director of Labor and Industrial Relations. Legislative approval of proposed rules merely frustrates and prevents the ability of the Director to perform. Such a system will prevent prompt responses to the changing needs of the workers' compensation program. This proposed inefficiency only serves to frustrate the Director's ability to facilitate and promote the efficient execution of the workers' compensation laws, hurting both employer and injured employee.

Many others have drawn the same conclusions regarding this bill. Among those who testified against the bill include the Retail Merchants of Hawaii, the National Council on Compensation Insurance, Inc., the State Attorney General, the Department of Human Resources Development, the Hawaii Insurers Council, the Hawaii Medical Association, the National Federation of Independent Businesses, Klein Chiropractic Center, the Department of Human Resources of the City and County of Honolulu, Bay Harbor Honolulu, LLC, Pearl County Club, Zippy's Restaurants, the Chamber of Commerce of Hawaii, Itoen, ILWU Local 142, HEMIC, and the Hawaii Government Employees Association. Several chiropractors also testified in limited opposition to the bill.

For the reasons discussed above, I cannot, in good conscience, support the proposed legislation.

Respectfully submitted by the  
following member of your  
Committee on Consumer  
Protection and Commerce

  
Barbara Marumoto, Ranking  
Minority Member