



GOV. MSG. NO. 898

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

July 8, 2008

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fourth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

I am transmitting herewith HB2386 SD2 CD1, without my approval, and with the statement of objections relating to the measure.

HB2386 SD2 CD1

A BILL FOR AN ACT RELATING TO WORKERS'
COMPENSATION.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Lingle".

LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

July 8, 2008

STATEMENT OF OBJECTIONS TO HOUSE BILL NO. 2386

Honorable Members
Twenty-Fourth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, House Bill No. 2386, entitled "A Bill for an Act Relating to Workers' Compensation."

The purposes of this bill are to provide for the payment of temporary disability benefits regardless of whether the employer disputes whether the injury was work-related, to change procedures by which an employer may terminate temporary total disability benefits and by which an employer may seek a credit for overpayment of temporary total disability benefits, to require the employer to pay for attorney's fees and costs to the employee for enforcement of temporary total disability payment, and to provide for increased weekly benefit rates if temporary total disability benefits are not begun within thirty days of the date of injury.

While I support the intent to ensure injured workers receive timely benefits or benefits that are justly due, this bill is objectionable because it requires an employer or employer's insurer to pay temporary total disability benefits regardless of whether the employer or employer's insurer challenges the workers' compensation claim. Requiring an employer or employer's insurer to pay for temporary total disability benefits on disputed claims until a determination is made that such benefits are not due, will likely result in higher workers' compensation premiums because this adds to the workers'

compensation risk exposure of all businesses in Hawaii.

While the bill provides that the employer may request a credit for temporary total disability benefits paid but not due, if the claim is deemed not compensable, there is nothing against which to apply a credit and the employer or employer's insurer will probably not be able to recoup such payments. De facto, the employee is allowed to retain benefits to which he or she was not entitled.

The bill would also create a disincentive to return to work. More specifically, it may encourage certain employees to continue to contest returning to work because even if the Director determines the employee should and could have returned to work, the employee bears no risk for failing to do so, as the benefits the employee was paid are non-recoverable by the employer.

Further, the measure provides a process for an employee, but not an employer, to request a review. Pursuant to this bill, an employer cannot terminate TTD benefits unless the Director orders the termination of benefits or the employee's treating physician determines that the employee is able to resume work and the employer has made a bona fide offer of work within the employee's medical restrictions. The bill, however, does not provide a specific process for the employer to request a review, establishing inequitable treatment of the employer versus the employee through this provision.

This bill establishes disincentives for employees to return to work within a reasonable time since their wage benefits continue as long as they stay away from their job and their treating medical provider allows them to do so. Since the employee must initiate the request for a Department of Labor and

Industrial Relations review, the bill is silent as to what happens if the employee fails to request a review.

The bill itself recognizes it cannot be effectively implemented as written and calls for the convening of a working group to address and make recommendations to resolve concerns raised by the legislation. If no consensus is reached on resolving such concerns, then the substantive provisions of the bill will become effective on July 1, 2009. As written, the bill provides no incentive for proponents of the bill to reach a consensus, but mandates that the legislation take effect even if the problems cannot be resolved.

For the foregoing reasons, I am returning House Bill No. 2386 without my approval.

Respectfully,



LINDA LINGLE
Governor of Hawaii

A BILL FOR AN ACT

RELATING TO WORKERS' COMPENSATION.

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

1 SECTION 1. Section 386-31, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§386-31 Total disability. (a) Permanent total
4 disability. Where a work injury causes permanent total
5 disability the employer shall pay the injured employee a weekly
6 benefit equal to sixty-six and two-thirds per cent of the
7 employee's average weekly wages, subject to the following
8 limitation:

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

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

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

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



- 1 (3) The loss of both hands at or above the wrist;
- 2 (4) The loss of one hand and one foot;
- 3 (5) An injury to the spine resulting in permanent and
- 4 complete paralysis of both legs or both arms or one
- 5 leg and one arm; or
- 6 (6) An injury to the skull resulting in incurable
- 7 imbecility or insanity.

8 In all other cases the permanency and totality of the

9 disability shall be determined on the facts. No adjudication of

10 permanent total disability shall be made until after two weeks

11 from the date of the injury.

12 (b) Temporary total disability. Where a work injury

13 causes total disability not determined to be permanent in

14 character, the employer, for the duration of the disability, but

15 not including the first three calendar days thereof, shall pay

16 the injured employee a weekly benefit at the rate of sixty-six

17 and two-thirds per cent of the employee's average weekly wages,

18 subject to the limitations on weekly benefit rates prescribed in

19 subsection (a), or if the employee's average weekly wages are

20 less than the minimum weekly benefit rate prescribed in

21 subsection (a), at the rate of one hundred per cent of the

22 employee's average weekly wages.



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

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

14 The payment of these benefits shall ~~[only]~~ be terminated
15 only upon order of the director or if the employee's treating
16 physician determines that the employee is able to resume work~~[-]~~
17 and the employer has made a bona fide offer of suitable work
18 within the employee's medical restrictions. The order shall
19 only be issued after the director has reviewed the case file and
20 position papers submitted by the employee and the employer.

21 When the employer is of the opinion that temporary total
22 disability benefits should be terminated ~~[because the injured~~



1 ~~employee is able to resume work]~~, the employer shall notify the
2 employee and the director in writing of an intent to terminate
3 the benefits at least two weeks prior to the date when the last
4 payment is to be made. The notice shall give the reason for
5 stopping payment and shall inform the employee that the employee
6 may make a written request to the director for a ~~[hearing]~~
7 review if the employee disagrees with the employer. Upon
8 receipt of the request from the employee, the director shall
9 ~~[conduct a hearing as expeditiously as possible and render a~~
10 ~~prompt decision as specified in section 386-86.]~~ direct the
11 employee and employer to submit the position papers within
12 fourteen days of the request from the employee. The director
13 shall then review the case file and position papers and issue a
14 decision, without a hearing, within thirty days, indicating
15 whether temporary total disability benefits should have been
16 discontinued and, if so, a date shall be designated after which
17 temporary total disability benefits should have been
18 discontinued. The employer may request in writing to the
19 director that the director issue a credit for the amount of
20 temporary total disability benefits paid by an employer after
21 the date which temporary total disability benefits should have
22 been discontinued. If the employee is unable to perform light



1 work, if offered, temporary total disability benefits shall not
2 be discontinued based solely on the inability to perform or
3 continue to perform light work.

4 An employer or insurance carrier who fails to comply with
5 this section shall pay not more than \$2,500 into the special
6 compensation fund upon the order of the director, in addition to
7 attorney's fees and costs to the employee for enforcement of
8 this section and other penalties prescribed in section 386-92.

9 (1) If the director determines, based upon a review of
10 medical records and reports and other relevant
11 documentary evidence, that an injured employee's
12 medical condition may be stabilized and the employee
13 is unable to return to the employee's regular job, the
14 director shall issue a preliminary decision regarding
15 the claimant's entitlement and limitation to benefits
16 and rights under Hawaii's workers' compensation laws.
17 The preliminary decision shall be sent to the affected
18 employee and the employee's designated representative
19 and the employer and the employer's designated
20 representative and shall state that any party
21 disagreeing with the director's preliminary findings
22 of medical stabilization and work limitations may



1 request a hearing within twenty days of the date of
2 the decision. The director shall be available to
3 answer any questions during the twenty-day period from
4 the injured employee and affected employer. If
5 neither party requests a hearing challenging the
6 director's finding, the determination shall be deemed
7 accepted and binding upon the parties. In any case
8 where a hearing is held on the preliminary findings,
9 any person aggrieved by the director's decision and
10 order may appeal under section 386-87.

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

17 (A) That the injured employee may invoke the
18 employee's rights under section 378-2, 378-32, or
19 386-142, or all of them, in the event of unlawful
20 discrimination or other unlawful employment
21 practice by the employer; and



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

7 (2) If the rehabilitation unit determines that an injured
8 employee is not a feasible candidate for
9 rehabilitation and that the employee is unable to
10 resume the employee's regular job, it shall promptly
11 certify the same to the director. Soon thereafter,
12 the director shall conduct a hearing to determine
13 whether the injured employee remains temporarily
14 totally disabled, or whether the employee is
15 permanently partially disabled, or permanently totally
16 disabled.

17 (c) Subsection (b) notwithstanding, where a work injury
18 causes temporary total disability and payment of compensation
19 due under this chapter does not begin within thirty days of the
20 date of injury, the injured employee shall be entitled to
21 receive a weekly benefit equal to seventy per cent of the
22 injured employee's average weekly wages, subject to the



1 limitations on weekly benefit rates prescribed in subsection
2 (a), or if the employee's average weekly wages are less than the
3 maximum weekly benefit rate prescribed in subsection (a), at the
4 rate of one hundred percent of the employee's average weekly
5 wages."

6 SECTION 2. The director of labor and industrial relations
7 shall convene a working group within thirty days of the
8 effective date of this section. The working group shall consist
9 of the director of labor and industrial relations and other
10 members selected by the director from representatives of
11 employer and employee organizations, including labor unions.
12 The number of working group members shall be as determined by
13 the director. The director shall serve as the chairperson of
14 the working group.

15 The working group shall address and make recommendations to
16 resolve any concerns raised by this Act.

17 The working group shall submit findings and recommendations,
18 including proposed legislation, to the legislature no later than
19 twenty days prior to the convening of the regular session of
20 2009.



1 SECTION 3. This Act shall apply to any employee receiving
2 temporary total disability benefits on or after its effective
3 date.

4 SECTION 4. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 5. This Act shall take effect upon its approval;
7 provided that sections 1, 3, and 4 shall take effect on July 1,
8 2009, if the working group established in section 2 of this Act
9 submits a report to the legislature that it has not reached a
10 consensus in resolving the concerns raised by this Act.

