STAND. COM.
REP. NO. 1527

Honolulu,
Hawaii

, 2005

RE: S.B. No.
1808

S.D. 1

H.D. 1

Honorable Calvin K.Y. Say

Speaker, House of Representatives

Twenty-Third State Legislature

Regular Session of 2005

State of Hawaii

Sir:

Your Committee on Finance, to which was referred S.B. No. 1808, S.D. 1, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO WORKERS' COMPENSATION LAW,"

begs leave to report as follows:

The purpose of this bill is to protect the balance between the interests of injured workers and their employers and carriers, and to protect the integrity of the separation of powers between the Legislature and the Executive Branch. To achieve this purpose, your Committee determines that the law, under the current administrative rules regarding the disability compensation division, should be maintained through codification, as well as amended through the inclusion of provisions that allow for further refinement of the law and the system.

The Hawaii State Teachers Association, Hawaii State AFL-CIO, ILWU, Local 142, Hawaii State Chiropractic Association, Brewer Consulting Services, Inc., Hilo Chiropractic Clinic, Lynn C. Fox & Associates Inc., TJK

Rehabilitation Services, Spine Care Hawaii, Inc., Waimea Chiropractic, Wilcox Chiropractic, Pukalani Chiropractic Inc., Discover Chiropractic Hawaii, Klein Chiropractic Center, American Chiropractic Association, Rehabilitation Association of Hawaii, Hawaii Rehabilitation Counseling Association, International Association of Rehabilitation Professionals, Aim For Family Health with Chiropractic, and a multitude of concerned individuals supported this bill. Hawaii Government Employees Association supported the intent of this measure. The Department of Labor and Industrial Relations (DLIR), Chamber of Commerce of Hawaii, National Federation of Independent Businesses, Hawaii Insurers Council, Retail Merchants of Hawaii, Building Industry Association – Hawaii, Employers' Chamber of Commerce, Hawaii Business Roundtable, Hawaii Employers' Mutual Insurance Company, Inc., Willocks Construction Corporation, Hawaii Island Contractors' Association, Haseko Construction, Inc., ML Pacific, Inc., Coastal Windows, Inc., Kiyosaki Tractor Works Inc., Alan Shintani, Inc., Hidano Construction, Inc., Island Insurance Companies, First Insurance Company of Hawaii, Ltd., Co-Ha Builders, Inc., Robert M. Kaya Builders, Inc., Atlas Construction Services, Mouse Builders, Inc., Jas. W. Glover, Ltd. – General Contractors, CC Engineering & Construction, Inc., Access Lifts of Hawaii, Inc., and several concerned individuals opposed this bill. The Department of Human Resources Development, Attorney General, and Hawaii Chapter of Physical Therapy Association provided comments.

Your Committee notes that the intent of this measure is to protect the constitutional mandate that the Legislature draft the laws to establish policies governing the people of Hawaii. Any delegation of our legislative powers to the Executive Branch for rulemaking is administrative in nature and does not give the Executive Branch the power to make or change the laws through rulemaking. (See *1 Am. Jur. 2d, Administrative Laws, §132 (1962)).* In the area of workers' compensation, the Legislature has balanced the interest of society to return gainfully employed workers to the workforce after an injury; the interest of the injured worker; and the liability interest of the employer.

Last year, the Administration proposed an omnibus bill to reform the State's workers' compensation system, purporting to reduce the average cost of workers' compensation premiums. By seeking the enactment of the Workers' Compensation Omnibus Bill during the Regular Session of 2004, the Administration implicitly recognized that without changes in chapter 386, Hawaii Revised Statutes (HRS), the Executive Branch lacked sufficient authority to implement policy changes in the foregoing areas. Lawmakers found that the omnibus bill would disrupt the balance achieved in the existing statutes and rules and rejected the omnibus bill resoundingly. Yet, now in 2005, the Director of Labor and Industrial Relations (Director) and the Administration are seeking to amend the administrative rules to do, through rulemaking in 2005, what it could not achieve during the 2004 legislative session.

The proposed changes to the Hawaii Administrative Rules (HAR) on workers' compensation, if promulgated and adopted, would represent substantial changes in the law regarding compensability, medical care and treatment, vocational rehabilitation and other benefits, attorney's fees, and create formalized procedures for investigating and handling claims through arbitration. The proposed rule changes would constitute a substantial departure from the legislative purpose and intent as is now found in chapter 386, HRS, and the existing administrative rules. Furthermore, the

Administration has given every indication that it intends to cut workers' rights and benefits retroactively by applying the proposed rules to all claims regardless of when the claims were filed.

Your Committee believes this action by DLIR, seeking to significantly change HAR §§12-10-1 et seq., 12-14-1 et seq., and 12-15-1 et seq., represents a usurpation of legislative authority. In a democratic system, the role of formulating policy is reserved exclusively for those in the Legislative Branch. (See *Sherman v. Sawyer*, 63 Haw. 55, 621 P.2d 349 (1980).) ("Legislative power" is defined as power to enact laws and to declare what law shall be.) Under the separation of powers doctrine, the authority of the executive branch is restricted to executing and applying the laws enacted by the legislature.

The Administration's changes to administrative rules, usurps legislative authority and are proposed at a time of conflicting economic indicators that contradicts the need for promulgating procedures that violate the existing law. Your Committee has learned that in October 2004, the Insurance Commissioner approved a proposed change in workers' compensation loss costs that realized a three percent decrease in loss costs, associated with medical costs, disability benefit payments, vocational and other rehabilitation costs, and survivor benefits.

Where the Administration exceeds the boundaries of executive powers and encroaches upon legislative prerogatives, the Legislature must protect its constitutional charge to create the laws, pursuant to the "separation of powers" doctrine outlined in the Constitution of the State of Hawaii. The goal of this bill is to protect the Legislature's authority in making the law and to incorporate, into the existing law, provisions to assure that the intent of the Legislature is achieved in the area of workers' compensation. To achieve these goals this bill, among other things:

(1) Codifies into law the existing HAR that reflect the purpose and intent of the Legislature in enacting chapter 386, HRS;

(2) Assures that the Administration does not usurp the authority of the Legislature in creating laws by limiting the Director's rulemaking authority; and

(3) Otherwise describes requirements and procedures for vocational rehabilitation services and filing claims generally.

Specifically, the Administration's proposed changes to existing administrative rules relating to workers' compensation is in direct conflict with existing statutory law, rules, policies, and case law on workers' compensation as shown by the following examples:

(1) The Legislature specifically rejected a broad exclusion of stress claims under workers' compensation in 1998 when it limited the exclusion to mental stress claims arising solely from disciplinary action. (Section 386-3(c), HRS. See Act 224, SLH 1998.) The legislative intent was recognized by the Intermediate Court of Appeal in *Davenport v. City and County of Honolulu*, 100

Haw. 297 (2002), and by the Hawaii Supreme Court in affirming the ICA in 100 Haw. 481. The Administration now seeks to define "disciplinary action" to include what are essentially non-disciplinary, personnel matters. See proposed change to section 12-10-1, HAR (definition of "disciplinary action" includes action where "no sanction or punishment is ultimately imposed."). The proposed change would result in injuries otherwise compensable under the law being excluded from workers' compensation coverage;

(2) An injured worker is entitled to temporary disability benefits so long as the worker is unable to resume work. (Section 386-31(b), HRS.) The legislative intent has been recognized by the courts. See *Atchley v. Bank of Hawai`i*, 80 Haw. 239 (1996). The Administration seeks a subtle but substantial change in the definition of "able to resume work" that would terminate benefits if the employee was unable to perform light duty work but the employer offered light duty. (See proposed change to section 12-10-1, HAR, definition of "able to resume work".) The commercial guidelines the Director seeks to apply in all workers' compensation cases (see proposed change to sections 12-15-30(d) and 12-15-32, HAR,) could also create presumptions on the maximum number of days an employee should miss from work for any given type of injury. The current law provides no presumption for how long an employee can remain out on disability before being "able to resume work." (See section 386-85, HRS);

(3) The Legislature intended that all processing of claims at the Disability Compensation Division (DCD) level and proceedings before the Director be informal, not contested case hearings under chapter 91, HRS. To the degree possible, this allows claimants to represent themselves at the DCD level. For that reason, the Labor and Industrial Relations Appeals Board was given de novo review on any appeal. (Section 386-87, HRS.) The administrative rules until the present have been consistent with this intent by narrowly allowing certain discovery and other procedures that would otherwise be allowed in civil litigation. (Sections 12-10-65 to 12-10-67, HAR.) The administration seeks formal discovery and hearing procedures that impose waivers of statutory rights if the claimant fails to comply with the procedures. (See proposed changes to sections 12-10-65 and 12-10-72.1, HAR.) The Administration seeks the power to impose similar waivers of statutory rights in the area of vocational rehabilitation if a party fails to specify in detail arguments and evidence on why it is seeking reconsideration of determinations by the Vocational Rehabilitation Unit of the Administration. Such procedural requirements necessitate that the claimant seek legal representation in any dispute with

the employer that requires a hearing. These proposed changes are in conflict with the legislative intent of an informal process at the DCD level;

(4) The Legislature requires the Director to conduct a hearing on any dispute between the claimant and the employer. (Section 386-86, HRS, decisions to be rendered after a hearing.) The Administration proposes the use of summary judgment which would deny the parties a right to a hearing. (See proposed changes to section 12-10-72.1, HAR.) The proposed use of alternative dispute resolution (ADR) or mediation could also preclude a hearing, and would impose waivers of statutory rights if the claimant enters into some form of ADR or mediation. (See proposed changes to section 12-10-66, HAR);

(5) The Legislature provided for payment of attorney fees upon review by the Director. (Section 386-94, HRS.) That review, however, was not unfettered and fees that were reasonable were to be approved. (See section 386-93(a), HRS.) The Administration proposes to impose factors that are not relevant in determining if fees are reasonable. (See proposed changes to section 12-10-69(b), HAR.) Arbitrarily limiting claimant attorney fees to 15 percent of the compensation paid would result in no payment if the claimant loses on compensability and artificially reduce legal payments in other disputed areas of a claim. In practicality, the proposed changes would result in claimants being unable to secure attorneys in disputed compensability cases;

(6) The Legislature provided presumptions in the law to minimize challenges to benefits while providing provisions elsewhere in the statute to minimize the employer’s exposure to liability. (Compare section 386-85 with sections 386-5 and 386-8, HRS.) The Legislature did not intend for any other presumptions or burdens of proof to be arbitrarily assigned to one party or the other. The party or parties who must bear the burden of proof is to be determined by law consistent with the purpose of the statute. The Administration proposes to arbitrarily assign the burden to the party requesting the hearing. (See proposed change to section 12-10-72.1, HAR.) Because the employer can withhold or deny benefits, the claimant will always be the party requesting a hearing and therefore will always hold the burden of proof at a hearing. This shifts the balance created by the Legislature between the presumptions and the limits to the employers’ liability;

(7) The Legislature provided for vocational rehabilitation services to "restore an injured worker’s earning capacity as nearly as possible to that level which the worker was earning at the time of injury" and to "return the injured worker to suitable work in the active labor force as quickly as possible in a

cost-effective manner." (Section 386-25, HRS.) Vocation is defined as a person's business, profession, or occupation. (*Roberts' Dictionary of Industrial Relations 759 (3rd Ed.)*). Occupation is a person's trade or vocation that provides the principal way an individual makes a living. (*Id. at 493*.) The legislative intent was not to arbitrarily exclude any option that might restore the worker's earnings in suitable work achieved in a time and cost efficient manner. The rules for years have recognized that intent. (See section 12-14-1, HAR.) The Administration proposes to arbitrarily exclude self-employment as a form of suitable work for rehabilitation, which might actually prove to be the most time and cost efficient manner of returning an injured worker to suitable work. (See proposed change to section 12-14-1, HAR.) An arbitrary exclusion of self-employment as suitable work in rehabilitation is in direct conflict with the current law that weighs all factors in considering the appropriate rehabilitation for the injured worker;

(8) Related to vocational rehabilitation benefits, the Administration also proposes to arbitrarily limit services to 104 weeks. (See proposed change section 12-14-5(c)(7), HAR.) The legislative intent was to reduce the hardship generally on society by keeping an employee in gainful employment balanced against time and cost efficiency concerns. (Section 386-25(a), HRS.) If an employee sustains a substantial loss in earning capacity and has significant financial obligations as a result of an industrial injury, it was the legislative intent that the employee receive the services necessary to allow that employee to continue to meet those financial obligations and remain productive in society. To arbitrarily terminate services at 104 weeks even if to do so precludes achieving the legislative objective is directly in conflict with the intent of the law. Similarly, it is contrary to the legislative intent for the Administration to propose a rule to restrict any vocational rehabilitation services to looking for work that is similar in nature to work performed by the injured worker in the past since some injuries might preclude return to any form of work similar to past experiences. (See proposed change to section 12-14-4(b)(2)(F)(iii), HAR);

(9) Given the inherent tension between the injured worker and the employer in the appropriateness of any vocational rehabilitation plan, it was the intent of the Legislature that the Director determine the appropriateness of the plan. Section 386-25(b),(h), HRS. Directly contrary to this intent is the Administration's proposal to give the employer the authority to deny a plan, which is then only subject to review by the Director for having "unreasonably withheld its

approval." (See proposed change section 12-14-5(d), HAR);

(10) The Legislature provided authority to the Director to issue guidelines on health care and services. (Section 386-26, HRS.) That authority was not without restrictions. The Director was limited to guidelines related to the frequency of treatment and for reasonable use of medical care and services that are considered necessary and appropriate under the statute. (Section 386-26, HRS.) As defined by the Merriam-Webster dictionary, a guideline is an indication or outline of policy or conduct . It is something that serves as a guide or an example. (*American Heritage Dictionary of the English Language*.) The Administration proposes to turn the guidelines from suggestive and informative to a presumptive guide in determining reasonableness of care. (See proposed change to section 12-15-32, HAR.) The scope of treatment would be prescribed by a commercial organization's publication and only allow rebuttal by other evidence-based national guidelines. (See proposed changes to sections 12-15-30(d) and 12-15-32, HAR.) In 1996, the Legislature deleted the requirement that the Director approve treatments (up to ten additional treatments) after the initial five treatments. (Act 260, section 3, Session Laws of Hawaii 1996.) The effect of the 1996 legislative change was more flexibility in treating the claimant. The Administration's proposal to convert to mandatory, presumptively valid commercial guidelines is contrary to the legislative intent on guidelines and the general intent to require the employer to provide all medical care, service, and supplies "as the nature of the injury requires." (Section 386-21, HRS);

(11) Related to section 386-21, HRS, the Administration also proposed to arbitrarily limit any emergency care to the first 72 hours following the injury. (See proposed changes to sections 12-15-1 and 12-15-50, HAR.) Under the statute, the appropriateness of emergency medical treatment should be submitted to the statutory test of whether it was "reasonably related to the nature of the injury." (Section 386-21, HRS.) Arbitrarily limiting the service to the first three days following an injury is arbitrary and contrary to the legislative intent in section 386-21, HRS; and

(12) The Legislature provided for employers to become self-insured if they satisfied certain safeguards under the law. (See section 386-121, HRS.) The Legislature finds the changes proposed by the Director (see proposed changes to section 12-10-94, HAR,) are overly restrictive and will deter otherwise solvent, adequately financed employers from qualifying for self-insurance. It is the intent of the Legislature to give employers options in how they secure compensation to their

employees for workers' compensation injuries. The proposed changes restrictively limit those options.

Your Committee finds that this bill, by incorporating into chapter 386, HRS, the substantive definitions, standards, criteria, and policies in effect on January 1, 2005, under currently existing rules, policies, and case law in the relevant substantive areas, will preserve and protect the prerogative of the Legislative Branch of government and prevent the abuse of power.

While seeking to maintain the balance intended by the Legislature, the House subject committee considered the concerns raised at the public hearing with regard to the investigation of fraud. Therefore, the fraud provision was omitted in S.B. No. 1808, S.D. 1, H.D. 1, and your Committee on Finance will address this issue in another vehicle. Your Committee also agrees with the H.D. 1, which reinstates the rulemaking authority of the Director on July 1, 2007.

As affirmed by the record of votes of the members of your Committee on Finance that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 1808, S.D. 1, H.D. 1, and recommends that it pass Third Reading.

Respectfully submitted on behalf of the members of the Committee on Finance,

	_____ DWIGHT TAKAMINE, Chair