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,

LINDA LINGLE
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:

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

"§386-31 Total disability. (a) Permanent total disability. Where 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.

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

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

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

In all other cases the permanency and totality of the disability shall be determined on the facts. No adjudication of permanent total disability shall be made until after two weeks from the date of the injury.

(b) Temporary total disability. Where a work injury causes total disability not determined to be permanent in character, the employer, for the duration of the disability, but not including the first three calendar days thereof, shall pay the injured employee a weekly benefit at the rate of sixty-six and two-thirds per cent of the employee's average weekly wages, subject to the limitations 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.
If an employee is unable to complete a regular daily work shift due to a work injury, the employee shall be deemed totally disabled for work for that day.

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

The payment of these benefits shall [only] be terminated only upon order of the director or if the employee's treating physician determines that the employee is able to resume work and the employer has made a bona fide offer of suitable work within the employee's medical restrictions. The order shall only be issued after the director has reviewed the case file and position papers submitted by the employee and the employer. When the employer is of the opinion that temporary total 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
work, if offered, temporary total disability benefits shall not be discontinued based solely on the inability to perform or continue to perform light work.

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

(1) If the director determines, based upon a review of medical records and reports and other relevant documentary evidence, that an injured employee's medical condition may be stabilized and the employee is unable to return to the employee's regular job, the director shall issue a preliminary decision regarding the claimant's entitlement and limitation to benefits and rights under Hawaii's workers' compensation laws. The preliminary decision shall be sent to the affected employee and the employee's designated representative and the employer and the employer's designated representative and shall state that any party disagreeing with the director's preliminary findings of medical stabilization and work limitations may
request a hearing within twenty days of the date of
the decision. The director shall be available to
answer any questions during the twenty-day period from
the injured employee and affected employer. If
neither party requests a hearing challenging the
director's finding, the determination shall be deemed
accepted and binding upon the parties. In any case
where a hearing is held on the preliminary findings,
any person aggrieved by the director's decision and
order may appeal under section 386-87.

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

(A) That the injured employee may invoke the
employee's rights under section 378-2, 378-32, or
386-142, or all of them, in the event of unlawful
discrimination or other unlawful employment
practice by the employer; and
(B) That after termination of temporary total
disability benefits, an injured employee who
resumes work may be entitled to permanent partial
disability benefits, which, if awarded, shall be
paid regardless of the earnings or employment
status of the disabled employee at the time.

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

(c) Subsection (b) notwithstanding, where a work injury
causes temporary total disability and payment of compensation
due under this chapter does not begin within thirty days of the
date of injury, the injured employee shall be entitled to
receive a weekly benefit equal to seventy per cent of the
injured employee's average weekly wages, subject to the
limitations on weekly benefit rates prescribed in subsection (a), or if the employee's average weekly wages are less than the maximum weekly benefit rate prescribed in subsection (a), at the rate of one hundred percent of the employee's average weekly wages."

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

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

The working group shall submit findings and recommendations, including proposed legislation, to the legislature no later than twenty days prior to the convening of the regular session of 2009.
SECTION 3. This Act shall apply to any employee receiving temporary total disability benefits on or after its effective date.

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

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