SB2123

NEIL ABERCROMBIE
GOVERNOR

DWIGHT TAKAMINE
DIRECTOR

JADE T. BUTAY
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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January 31, 2014

To: The Honorable Clayton Hee, Chair,
The Honorable Maile S.L. Shimabukuro, Vice Chair, and
Members of the Senate Committee on Judiciary & Labor

Date: Friday, January 31, 2014
Time: 10:30 a.m.
Place: Conference Room 016, State Capitol

From: Dwight Y. Takamine, Director
Department of Labor and Industrial Relations

Re: S.B. No. 2123 Relating to Workers' Compensation

I. OVERVIEW OF PROPOSED LEGISLATION

DLIR supports this measure and suggests two amendments as outlined below. S.B. 2123 proposes to repeal Section 386-79, Hawaii Revised Statutes (HRS), relating to medical examinations by employer's physician, and to replace it with new language that proposes:

- Independent Medical Examinations (IMEs) and permanent impairment rating examinations be performed by physicians selected and mutually agreed upon by the employer and employee;
- If no agreement as to physician can be reached, the parties shall jointly prepare a list of 5 physicians and by elimination, choose one physician to perform the IME;
- The selected physician shall be currently licensed pursuant to chapter 453 or 442 and shall conduct the examination within 45 calendar days or as soon as practicably possible after the selection;
- The employer shall pay for the IME;
- The use of an out-of-state physician is allowed under certain

circumstances and;

- The measure shall be repealed on June 30, 2018 and Section 386-79, HRS, shall be reenacted in the form in which it read on the day before the effective date of this measure.

The Department supports this measure that will bring a greater assurance of impartiality in the IME and permanent impairment rating processes and, importantly, has the potential to reduce the number of Workers' Compensation medical disputes.

II. CURRENT LAW

Currently, Section 386-79, HRS, specifies that the employee, when ordered by the director, shall submit to the examination by a qualified physician designated and paid by the employer. If an employee refuses to attend the examination, or obstructs in any way the examination, the claimant's rights to benefits are suspended for the period during which the refusal or obstruction continues.

III. COMMENTS ON THE SENATE BILL

1. Reduction in number of disputes. Decisions on issues of compensability and permanent disability rely primarily on the doctors' reports that are submitted by the parties. In contested cases, the parties' primary concern is to have doctors' reports that support their position and they would therefore seek IME doctors who will likely support their positions.

   Employers or Insurance Companies, however, have an economic advantage over claimants, so creating a mechanism that would limit this dynamic of "shopping for medical experts" could possibly reduce the number of disputes, especially for cases related to the issues of compensability and permanent disability.

   Reducing the number of disputes will assist the Disability Compensation Division that is currently backlogged in scheduling cases for hearings where disputes between the parties occur. Cases involving compensability could take about 6 months to schedule a hearing from the time the request is made, while cases with less compelling issues such as permanent disability could take 4 to 5 months for a hearing to be scheduled.

2. Fair and Impartial. Where there are disagreements about medical stability, the Department believes the mechanism set forth in the measure will provide a fairer and more impartial method of dispute resolution as well as reduce the number of disputes.

3. Out-of-State claimants. The measure also provides for IMEs, where medical treatment is disputed, for claimants living out-of-state. The measure allows for physicians who reside outside the State of Hawaii and who are licensed in another state as a physician equivalent to a license under chapter 453 or 442 to perform IMEs and rating examinations for out-of-state claimants. Currently, the employer is responsible for locating these out-of-state physicians and for scheduling the examinations in the state where the claimants currently reside. The employer will continue to be responsible for arranging and paying for travel arrangements for claimants who must return to Hawaii for an IME.

4. Medical records to IME physician. The Department recommends the measure stipulate that the employer shall send the claimant's medical records to the IME physician as is the current practice.

5. Medical stability. The Department has concerns about the language in Section 1, Subsection (f) which relies on medical stability to be determined solely by the injured employee's attending physician. Employers would lose the ability to challenge ongoing disability and medical treatment when the medical evidence indicates the claimant has reached medical stability. This may result in lengthening of certain claims.

6. The Department recommends that the words "relevant medical" specialty be added in Section 1, subsection (c), first paragraph, 9th line, to read: "….a physician equivalent to a license under chapter 453 or 442, may be selected if there is no State of Hawaii-licensed physician available in a relevant medical specialty to conduct the examination.

7. The Department has concerns that this bill will not be advantageous to "Pro se" Claimants who have no legal representation. "Pro se" Claimants may not have the knowledge to appoint physicians to be on the list of five physicians and they may have to seek legal counsel to represent them, which will increase costs to them.

8. The Department recommends the following language be included to address the concern about pro se claimants:
(g) Any time an employee is requested or ordered to undergo an independent medical examination or permanent impairment rating, the employer shall provide a notice approved by the director that informs the employee of their rights and obligations pertaining to independent medical examinations or permanent impairment ratings and instructions on how to participate in the process for independent medical examinations or permanent

impairment rating as provided for in this section.

9. The department has some concerns that the prescribed process will always ensure the employer prevails inasmuch as the employer has the final say on the list of five physicians.

NEIL ABERCROMBIE
GOVERNOR

BARBARA A. KRIEG
DIRECTOR

LEILA A. KAGAWA
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

January 28, 2014

TESTIMONY TO THE
SENATE COMMITTEE ON JUDICIARY AND LABOR

For Hearing on Friday, January 31, 2014
10:30 a.m., Conference Room 016

BY

BARBARA A. KRIEG
DIRECTOR

Senate Bill No. 2123
Relating to Workers' Compensation

TO CHAIRPERSON CLAYTON HEE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on S.B. 2123.

The purposes of S.B. 2123 are to require independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees; and allow for the use of an out-of-state physician under certain conditions.

The Department of Human Resources Development (DHRD) has a fiduciary duty to administer the State's self-insured workers' compensation program and its expenditure of public funds. In that regard, DHRD respectfully <u>opposes</u> this bill.

First, an independent medical examination conducted by a physician of the employer's choice is the primary tool that is available to the employer to help overcome the statutory presumption that a claim is for a covered work injury, to show that ongoing medical treatment may be unreasonable or unnecessary, and to determine whether a requested medical treatment, e.g., surgery, is reasonable and related to the work injury. Amending the statute in this fashion would deprive the employer of a very fundamental

right to conduct its discovery, using physicians of its choice, to evaluate whether the employer is liable for the claim or medical treatment. We note that the workers' compensation law allows an employee to select any physician of his or her choice as the attending physician—and make a first change of physician—without having to seek mutual agreement from the employer. An IME physician, as selected by the employer which is paying for the examination, provides an alternative medical opinion and serves as a check and balance to the attending physician when objective evidence indicates that a claim may not be compensable or a contemplated treatment regimen may be unnecessary, unreasonable, or even harmful to the employee.

Second, if the parties are unable to agree on a physician to perform an examination, this bill requires that the parties alternately strike names of physicians from a list whereby the last remaining physician would conduct the examination. We believe this would add another layer of delay to an already complex claims process when compensability of a claim or further medical treatment are at issue.

Third, this bill would require that any mutually agreed upon physician examine the employee within forty-five calendar days of selection or appointment, or as soon as practicably possible. In our experience, the employer often has to wait ninety days or more for an available appointment. The bill is silent as to what would happen if there is no qualified physician available to perform the evaluation within the forty-five days or "as soon as practicable" requirement. These unresolved issues may lengthen the process and make it more burdensome.

Finally, the bill would apparently make the claimant's attending physician the sole arbiter as to when an injured worker attains medical stability. This would have the unintended consequence of potentially lengthening certain claims because employers would lose the ability to challenge ongoing disability and medical treatment when the medical evidence indicates the claimant has reached medical stability and could possibly return to work.

Based on the foregoing, we respectfully request that this measure be held.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Seventh Legislature, State of Hawaii
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association
January 31, 2014

S.B. 2123 – RELATING TO WORKERS' COMPENSATION

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of S.B. 2123, which requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by mutually agreed upon physicians. We believe that employees who are injured on the job deserve to be evaluated by an impartial physician selected with their input and agreement. As drafted, the bill provides a reasonable alternative to selection of an impartial physician in the event no mutual agreement is reached.

Thank you for the opportunity to testify in support of S.B. 2123.

Respectfully submitted,

Randy Perreira
Executive Director

HAWAII STATE AFL-CIO

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Randy Perreira
President

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The Twenty-Seventh Legislature, State of Hawaii
Hawaii State Senate
Committee on Judiciary and Labor

Testimony by
Hawaii State AFL-CIO
January 31, 2014

S.B. 2123 – RELATING TO WORKERS' COMPENSATION

The Hawaii State AFL-CIO supports S.B. 2123 which requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees and allows for the use of an out-of-state physician under certain conditions.

The purpose of this bill is to reduce workers' compensation costs and speed up an employee's ability to return to work by selecting physicians who are mutually agreed upon.

Presently, injured employees are required to go to non-treating doctors who are selected by the employers or insurance carriers. Employees have absolutely no say as to who the doctors will be, resulting in a lack of trust when the medical reports are generated. In fact, some physicians are paid handsomely each year by insurance carriers to perform medical examinations. This should raise a red flag and lead us to question the validity of the medical reports. As a result, unnecessary hearings are conducted, resulting in various delays causing higher costs for both the employers and insurance carriers.

Most notably, S.B. 2123 would reduce workers' compensation costs by eliminating the unnecessary struggles that exist between the employers and employees. It would require mutual cooperation when selecting a doctor to perform a medical examination.

Respectfully submitted,

Randy Perreira
President

The Twenty-Seventh Legislature
Regular Session of 2014

THE SENATE
Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Friday, January 31, 2014; 10:30 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 2123
RELATING TO WORKERS' COMPENSATION

The ILWU Local 142 supports S.B. 2123, which requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees and allows for the use of an out-of-state physician under certain conditions. The measure sunsets on 6/30/2018.

When the workers' compensation law was enacted in Hawaii decades ago, the premise was simple. If a worker became injured in the course of his or her employment, the injury was presumed compensable and the employer was obligated to arrange, with payment by the employer or through an insurer, to provide the worker with medical treatment for the injury and compensation (at least in part) for the worker's lost income. In exchange for this consideration, the injured worker was prohibited from suing his employer for the injuries. Other laws were also enacted to provide for safe and healthful work environments, presumably to prevent work injuries from occurring.

In the ensuing years, this "grand bargain" began to unravel. What was intended to be "no-fault" system, workers' compensation became more adversarial as employers sought to deny workers injured on the job their rightful entitlement to compensation by delaying payment of benefits and challenging presumption.

One of the ways in which the adversarial nature of the system manifested itself is in the so-called "independent"medical examination. This examination is requested by the employer and its insurer to determine compensability, to assess medical treatment and progress, and to otherwise determine what benefits, if any, the injured worker should receive under the law. However, because the physician is requested by the employer and paid by the employer, physicians chosen by the employer/insurer to conduct the "independent medical examination are often viewed as suspect.

To counter this perceived bias, S.B. 2123 proposes that the physician who is to perform an independent medical examination be selected by mutual agreement of the employer/insurer and the injured worker. If both parties agree to a physician, questions of bias are likely to be reduced and the adversarial nature of the process will be diminished. Independent medical examiners themselves need not rely on employers/insurers alone for continuing referrals but rather on the examiner's reputation for neutrality and objectivity. Furthermore, there should be no adverse cost factor as the fees for a physician chosen by mutual agreement of the parties should be no different than if he was chosen by the employer/insurer.

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION
THE VOICE OF THE CONSTRUCTION INDUSTRY

Testimony to the House Committee on Judiciary & Labor
Friday, January 31, 2014
10:30 a.m.
State Capitol - Room .16

SUBJECT: S.B. 2123, Relating to Workers' Compensation

Dear Chair Hee, Vice-Chair Shimabukuro, and members of the Committee:

My name is Gladys Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii). BIA-Hawaii is the voice of the construction industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit, professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii is strongly opposed to S.B. 2123.

S.B. 2123 would require independent medical examinations (IME) and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees. The bill allows for the use of an out-of-state physician under certain conditions and repeals on 06/30/2018.

The current statutes have numerous safeguards in place to allow injured employees full disclosure of an employer/insurance carrier's IME report, the right to seek their own medical opinion if they disagree, and an appeal process if the parties cannot agree. A majority of IME's are conducted today under the current statutes without incident or dispute. Permanent impairment rating examinations are currently performed by mutual agreement between parties, without any need for mandate by legislation.

Both changes to the system may be at the expense of finding the best available care for injured claimants in a timely manner. Simply finding qualified physicians to conduct these reviews is time consuming and results in delays due to a shortage of such professionals. Pushing the selection of IME physician on to the DLIR will create more delays if claimants choose to gamble that they will receive a more favorable review by the government-appointed physician.

The ability for an employer to select an IME ensures there is a check and balance system for overall medical care for the injured worker because injured workers select their own treating physician. Without it, the system would be one-sided and costs for any employer, whether private or government, could quickly escalate, resulting in an inequitable, unaffordable, and unsustainable program.

If the intent of this bill is to build trust and reduce confrontation in the workers' compensation system, it will fail at both objectives. Instead, this bill will compel claimants to rely more heavily on plaintiffs' attorneys to navigate increasingly complex procedures.

BIA-Hawaii is **opposed** to S.B. 2123 and respectfully requests that it be **held**.

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HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

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Alison Powers
Executive Director

TESTIMONY OF JANICE FUKUDA

SENATE COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

Friday, January 31, 2014
10:30 a.m.

SB 2123

Chair Hee, Vice Chair Shimabukuro, and members of the Committee, my name is Janice Fukuda, Assistant Vice President, Workers' Compensation Claims at First Insurance, testifying on behalf of Hawaii Insurers Council. 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 one third of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** SB 2123, which amends Section 386-79, Medical Examination by Employer's Physician.

Our members believe this bill will substantially increase workers' compensation costs, which will translate into a higher cost of doing business, limiting business' ability to compete, adversely affect employees by limiting job availability, pay, and benefits and ultimately find its way into the costs of goods and services in Hawaii.

The current system regarding Independent Medical Examinations (IMEs) has been in place for some time and we believe it is working. It appears that this legislation is prompted by claims that IME physicians are biased toward the employer. We do not believe this is true. Employers seek access to clinical expertise to help return the injured worker to the job. Currently, there are numerous safeguards in place to ensure the IME is objective and unbiased. Injured workers are able to obtain opinions or

comments from their treating physician or other doctors regarding the IME opinion if they disagree. Injured workers are also able to obtain their own rating and if the hearings officer relies on it, the employer has to pay for it. Finally, there is an appeals process that provides further due process to both sides if an agreement cannot be reached.

The current system provides an approach for the employer and injured worker to resolve medical treatment disputes in an efficient manner. The proposal to mandate mutual agreement will increase workers' compensation costs and delay the delivery of medical treatment in certain cases. This is detrimental to the injured worker and does not benefit the employer.

This bill requires mutual agreement between the employer and employee of an IME physician. If there is no agreement, the IME physician is chosen from a joint list of five physicians with the employer choosing the first and alternating with the employee. Then each may strike a physician until only one remains who shall be the IME physician. The proposed process will delay the ability to secure an examination in a timely manner and may hinder the ability to expeditiously resolve conflicts. Furthermore, only one IME is allowed unless another is approved by the Director.

An IME is used as a second opinion when compensability is in question or when medical progress is stagnant. If an injured worker has been treated for some time, there is a point where additional medical treatment will not be curative. The injured worker is either ready to return to work in full capacity, is partially disabled, or is permanently disabled. If the IME process is restricted, it may greatly prolong the period the injured worker continues to get treatment that is not medically curative.

There are very few cases where mutual agreement cannot be reached. However, if the law is changed to *require mutual agreement*, we believe many cases *will not have mutual agreement* because there is no incentive to do so. If there is no mutual

agreement, the physicians who are licensed under Chapter 453 are a very broad pool, however, we believe the result of having inexperienced physicians perform IMEs will not serve the injured worker or the employer and ultimately increase appeals and costs. Subsequently, if an IME is not performed at a high standard, the employer may not be able to get another one if the Director does not approve it. This leaves the injured worker in limbo and the employer must keep paying for medical treatment that may be unnecessary.

The bill also allows *only* the treating physician to say the injured worker has reached medical stability. This definition differs than that of "medical stabilization" in the administrative rules. The difference is the rules definition has an additional part that says if an injured worker refuses to get recommended treatment by the treating physician, he or she has reached medical stabilization. There is no need for a new truncated definition. By allowing only the treating physician to say when the injured worker has reached medical stability or stabilization, the injured worker will continue to be in limbo as long as the treating physician says so. This disallows the IME physician from saying the injured worker has reached medical stability or stabilization. Again, this will leave the injured worker in limbo with continued treatment which may be unnecessary and the employer will have to pay for it.

The provision to require impairment IMEs to be separate from treatment IMEs presents an inconvenience to the injured worker and does not correspond to better outcomes. A comprehensive examination often takes several hours and this requirement will add costs to the system by requiring two separate examinations that could be addressed in one visit. IMEs are performed to address various aspects of an injured worker's injury and recovery such as primary and secondary diagnosis, appropriate treatment, utilization and measurement of the degree of physical impairment. *In many cases, it is important to obtain a baseline impairment rating to later determine the effectiveness of treatment.* It is beneficial for the injured worker to have one physician review the medical records and conduct the physical examination in a comprehensive manner. It

is also more cost effective if treatment and impairment are addressed by a single IME instead of requiring two. The suggestion that two separate examinations benefits the injured worker is not substantiated by evidence and will only add costs and delay the delivery of benefits. Requiring prior written consent from the injured worker to allow for an Impairment rating during the IME exam will delay the process and add cost.
The bill also limits IMEs to one per case, unless approved by the Director. There is no measurable benefit to the injured worker by limiting IMEs to one per case. In fact, such a restriction may harm the injured worker. Several IMEs may be necessary in some cases to clarify the diagnosis, establish a baseline, determine whether there has been improvement or deterioration, explain a change in the condition, or impairment. A subsequent IME may be necessary if the injured worker develops new symptoms or conditions secondary to the work injury. The bill does not allow for any exceptions for an ordered IME for impairment ratings. In the event that an injured worker is ordered to attend an impairment examination and the physician determines that the injured worker is not at maximum medical improvement, or is a no-show for the appointment, the injured worker is precluded from obtaining a subsequent impairment rating. Neither an employer nor an injured worker should be restricted in securing an IME.

For these reasons, we respectfully request that SB 2123 be held.

Thank you for the opportunity to provide comments.

Another aspect of S.B.2123 is to prohibit combining the independent medical examination and the permanent impairment rating into a single examination. The two have different purposes—one to assess compensability, medical treatment and progress, and the other to measure the extent of permanent disability. In the latter case, permanent disability should only be determined when the injured worker has reached maximum medical improvement.

The ILWU urges passage of S.B. 2123. We thank you for the opportunity to share our views on this important matter.

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GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Uploaded via Capitol Website

January 31, 2014

TO: HONORABLE CLAYTON HEE, CHAIR, HONORABLE MAILE SHIMABUKURO, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY AND LABOR

SUBJECT: **STRONG OPPOSITION TO S.B. 2123, RELATING TO WORKERS' COMPENSATION.** Requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees. Allows for the use of an out-of-state physician under certain conditions. Repeals on 06/30/2018.

HEARING
DATE: Friday, January 31, 2014
TIME: 10:30 a.m.
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Committee Members,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA is **strongly opposed** to S.B. 2123, Relating to Workers' Compensation. S.B. 2123 would require that a mutually agreed upon physician be chosen by the employer and employee for the independent medical examination and permanent impairment rating examination for worker's compensation claims. GCA is opposed to this bill because it requires the selection of an Independent Medical Examiner (IME) physician by mutual agreement. This will add to compensation costs and delay the delivery of medical treatments in certain cases. The added costs and delays do not benefit either the employer or the injured worker. The IME process is the employer's only safeguard against abusive practices by an employee that may be taking advantage of his or her worker's compensation benefits. The passage of this bill may likely lead to more contested workers' compensation claims because of the added burden placed on the employer to further defend against potentially fraudulent cases.

S.B. 2123 remains at odds with the interests of GCA members and other business organizations and for those reasons GCA opposes S.B. 2123 and respectfully requests that this Committee defer the measure.

The GCA believes the current system that is in place works. We believe this legislation is unnecessary. Thank you for the opportunity to express our concerns on this measure.

WIMAH

WORK INJURY MEDICAL ASSOCIATION OF HAWAII
91-2135 FORT WEAVER ROAD SUITE #170
EWA BEACH, HAWAII 96706

MAULI OLA
THE POWER OF HEALING

JANUARY 31, 2014

COMMITTEE ON JUDICIARY AND LABOR

SENATE BILL 2123 RELATING TO WORKERS' COMPENSATION

REQUIRES INDEPENDENT MEDICAL EXAMINATIONS AND PERMANENT IMPAIRMENT RATING EXAMINATION FOR WORKERS' COMPENSATION CLAIMS TO BE PERFORMED BY PHYSICIANS MUTUALLY AGREED UPON BY EMPLOYERS AND EMPLOYEES. ALLOWS FOR THE USE OF AN OUT-OF-STATE PHYSICIAN UNDER CERTAIN CONDITIONS. REPEALS ON 06/30/2018.

WORK INJURY MEDICAL ASSOCIATION OF HAWAII STRONGLY SUPPORTS SENATE BILL 2123.

WORK INJURY MEDICAL ASSOCIATION OF HAWAII BELIEVE SENATE BILL 2123 WILL SPEED UP THE PROCESS OF INDEPENDENT MEDICAL EXAMS AND ALSO INSURE THE EXAMINATION IS DONE BY A PHYSICIAN WHO IS QUALIFIED.

PASSAGE OF SENATE BILL 2123 WILL BE GREATLY APPRECIATED.

GEORGE M. WAIALEALE
EXECUTIVE DIRECTOR
WORK INJURY MEDICAL ASSOCIATION OF HAWAII

EMAIL: WIMAHEXDIR@AOL.COM PHONE: (808)-383-0436

Property Casualty Insurers
Association of America
Advocacy. Leadership. Results.

To: The Honorable Senator Clayton Hee, Chair
Senate Committee on Judiciary and Labor

From: Mark Sektnan, Vice President

Re: **SB 2123 – Relating to Workers' Compensation**
PCI Position: OPPOSE

Date: January 31, 2014
10:30 a.m., Conference Room 016

Aloha Chair Hee and Members of the Committee:

The Property Casualty Insurers Association of America (PCI) is in opposition to SB 2123, which is unnecessary and unfair, and would result in significant administrative delays. PCI is a national trade association that represents over 1,000 property and casualty insurance companies. In Hawaii, PCI member companies write approximately 34.6 percent of all property casualty insurance written in Hawaii. PCI member companies write 42.2 percent of all personal automobile insurance, 43.5 percent of all commercial automobile insurance and 58.9 percent of the workers' compensation insurance in Hawaii.

SB 2123 would replace the existing employer requested examinations in workers compensation claims with a new, complicated system for obtaining "independent medical examinations". Instead of the existing system that allows an employer to obtain an examination of a claimant to evaluate the merits of a claim, SB 2123 would require first that the employer and employee reach a mutual agreement on the physician who conducts the examination.

The term "independent medical examination" is typically used to describe the examinations contemplated by Hawaii Revised Statutes § 386-79, but its use in this bill ignores the important function of the employer requested examination and strips out the employer's right to discovery of facts in workers compensation proceedings. This is neither fair nor prudent.

The employer requested examination is intended to establish a procedure for the employer to access his right to discovery of a claimant's physical condition and course of treatment. The effect of this bill is to do away with the employer's right altogether at the option of the injured employee.

Under the existing law there are many protections for the employee built in. The employer is limited to only one employer requested examination unless good and valid reasons exist with regard to the progress of the employee's treatment. Therefore, the employer has an incentive to obtain a credible examination - on the first try - that will withstand scrutiny on appeal before the DLIR's Disability Compensation Division. Also the report of the employer requested examination must be given to the employee, who has a right to challenge the report and to offer evidence that disputes the report's findings, so there is a check against employer abuse.

Finally, the selection process set forth in SB 2123 would be stalled by built-in delays. The employer would have to first try to reach a mutual agreement. If the parties are unable to reach an agreement, the bill requires the employer and employee to develop a list of five physicians and then cross off names much as a jury is selected. This could be a very cumbersome and time consuming process. Once a physician is appointed to take the case, the examination is supposed to take place within 45 days. No doubt, that is an optimistic estimate as currently, delays in finding willing and able physicians are already widespread. All this means that examinations would be additionally burdened by these new administrative delays.

PCI respectfully requests that the Committee hold SB 2123.

TESTIMONY BEFORE THE SENATE COMMITTEE ON

JUDICIARY AND LABOR

Friday, January 31, 2014
10:30 a.m.

SB 2123
RELATING TO WORKERS' COMPENSATION

By Marleen Silva
Director, Workers' Compensation
Hawaiian Electric Company, Inc.

Chair Hee, Vice Chair Shimabukuro and Members of the Committee:

Hawaiian Electric Co. Inc., its subsidiaries, Maui Electric Company, LTD., and Hawaii Electric Light Company, Inc**. strongly oppose S.B. 2123.** Our companies represent over 2,000 employees throughout the State.

This bill mandates that independent medical examinations (IME's) and permanent impairment rating examinations for workers' compensation claims be performed by physicians mutually agreed upon by employers and employees, and removes the role of the director of the DLIR to appoint a physician if the parties are unable to come to an agreement.

Under the current statutes, employees select their own treating physician. Independent medical examinations are a tool which gives employers the ability to seek an expert medical opinion, at their expense, when the compensability of a claim (statutory presumption), excessive treatment, or reasonableness of a proposed surgical procedure is in question. A majority of IME's are conducted under the current statutes without incident or dispute today. Safeguards are also already in place to allow injured employees full disclosure of an employer's IME report, and the right to seek their own medical opinion if they disagree.

While we appreciate the intent, we cannot support a bill that takes away an employer's fundamental right in the discovery process to select their own expert medical opinion when a claim or treatment plan is in question and requires further investigation or clarification.

Medical stability is already defined in the statutes and the new definition proposed is not consistent with the *Guides* used to evaluate permanent impairment. Given the limited number of qualified physicians, permanent impairment ratings are currently selected by mutual agreement between parties, without the need for mandate by legislation.

For these reasons, we strongly oppose S.B. 2123 and respectfully request this measure be held.

Thank you for this opportunity to submit testimony.

The Senate
Twenty-Seventh Legislature, 2014
State of Hawai'i

TO: Honorable Clayton Hee, Chair
Honorable Maile Shimabukuro, Vice Chair
Members of the Committee on Judiciary & Labor

DATE: Friday, January 31, 2014
TIME: 10:30 A.M.
PLACE: Conference Room 016
Hawai'i State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

FROM: National Federation of Independent Business (NFIB) Hawai'i

RE: SENATE BILL 2123, RELATING TO WORKERS' COMPENSATION

Chair Hee, Vice Chair Shimabukuro and members of the Committees,

Thank you for the opportunity to testify on Senate Bill 2123. NFIB Hawai'i respectfully **opposes** this measure.

SB 2123 requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees. The bill also allows for use of an out-of-state physician under certain conditions.

The National Federation of Independent Business is the largest advocacy organization representing small and independent businesses in Washington, D.C., and all 50 state capitals. In Hawaii, NFIB represents more than 1,000 members. NFIB's purpose is to impact public policy at the state and federal level and be a key business resource for small and independent business in America. NFIB also provides timely information designed to help small businesses succeed.

Thank you for the opportunity to testify on this measure.

Senate Committee on Judiciary and Labor
Friday, January 31, 2014 / 10:30 AM
Hawai'i State Capitol, Room 016

Senate Bill 2123: Relating to Workers' Compensation

Aloha Chair Hee, Vice Chair Shimabukuro and members of the committee. On behalf of the Society for Human Resource Management – Hawai'i Chapter (SHRM Hawai'i) I am writing in adamant opposition to Senate Bill 2123.

SB 2123 requires independent medical examinations and permanent impairment rating examinations for workers' compensation claims to be performed by physicians mutually agreed upon by employers and employees. The bill also allows for use of an out-of-state physician under certain conditions.

Human resource professionals are responsible for businesses' most valuable asset: people. As such, we are keenly aware of the needs of both employers and employees; we truly have everyone's best interest at heart. We adamantly oppose this measure for its significant alteration of the manner in which workers' compensation claims are handled and resolved. In addition, we believe there will be a host of unintended consequences and costs associated with this bill.

Our most significant concerns are:

1. If the employer and employee must agree on a physician to perform a medical examination or permanent impairment rating, the employer loses the ability to meaningfully participate in the selection of an appropriate physician based on education, experience and specialty.

2. If the medical examination must be conducted within 45 calendar days of the selection or appointment process or as soon as practically possible, the physicians will have insufficient time to schedule and conduct the examination, review medical records – which are often substantial – and prepare a detailed and professional report.

3. If the employer cannot combine the medical examination and rating without the employee's consent – even where the physician deems the employee stable and ratable – the employer will be required to unnecessarily schedule additional examinations and report. Additional examinations and reports will increase the cost to the employer in the form of physician fees as well as extended workers' compensation benefits associated with an extended examination period.

We respectfully request this bill not be advanced. However, should the bill continue, we would like to ask for the opportunity to discuss these issues with you further. Thank you for the opportunity to testify.

DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

WORKER'S RIGHTS - LABOR LAW
WORKER'S COMPENSATION
SOCIAL SECURITY DISABILITY
LABOR UNION REPRESENTATION
EMPLOYEES RETIREMENT SYSTEM
BODILY INJURIES

January 29, 2014

To: COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L Shimabukuro, Vice Chair

Date: Friday, January 31, 2014
Time: 10:30 AM
Place: Conference Room 016, State Capitol

From: Dennis W.S. Chang, Labor and Workers' Compensation Attorney

Re: Strong Support for Passage of S.B. 2123 Relating to Workers' Compensation

I. Introduction.

The purpose of S.B. 2123 is to improve the fairness of the workers' compensation process and to provide better quality services to injured workers by requiring truly independent medical examinations and permanent partial disability ratings to be performed by mutual agreement of employers and insurance carriers, and employees. This bill requires the mutual selection of physicians to conduct "independent medical examinations" pursuant to section 386-79, Hawaii Revised Statutes (HRS) like the objective process of selecting arbitrators to resolve labor disputes between unions and employers contained in collective bargaining agreements.

II. Existing Law.

Chapter 386, HRS contains what should be an orderly process under the workers' compensation statute by using "independent medical examinations." Claims are deemed compensable when injured workers sustain injuries arising out of and in the course of their employment. If the claims are disputed or deemed specious, they may be subjected to an exacting scrutiny when employers and insurance carriers appoint "independent physicians," a misnomer, to investigate the claims. If employers and insurance carriers are able to prove by credible substantial evidence that the claims are not work related, they prevail on the issue whether the claims are covered under Chapter 386. They exercise their discretion to designate "independent physicians" at their costs to conduct the examinations to challenge the alleged compensable claims.

The opposition routinely argues that the independent medical examinations are critical because when the Grand Bargain was struck, injured workers were given an edge, the presumption that their claims would be covered under Chapter 386 in the absence of substantial proof to the contrary. This is totally disingenuous. First, the presumption was exchanged for the insulation of employers from getting sued by injured workers, who are negligently or deliberately exposed to abject hazardous working conditions. Second, the examinations are **oftentimes never** used for the rebuttal of claims which should be presumed to be covered under Chapter 386. Instead, they are used to mislead injured workers into the hands of physicians, who are beholden to employers and insurance carriers. Then, the physicians issue reports containing opinions for highly reduced monetary ratings or opinions to justify the termination of the injured workers'

ongoing statutory entitlements.

Under the rules of statutory construction, the operative word "independent" is required to be given its plain, simple meaning. As defined in the Webster's Dictionary, the most common definition of "independent" is "not subject to control by others." Another common meaning is "not looking to others for one's opinion or for guidance in conduct." At least during nearly the last decade of legislative sessions, a substantial number of bills have been proposed with the hopes of securing truly "independent" medical examinations pursuant to section 386–79, HRS. Under the rules of statutory construction, unambiguous words contained in statutes like "independent" must be given its plain, simple meaning, consistent with the underlying purpose of the enabling statutes. *Bailey's Bakery, Ltd. v. William Borthwick*, 38 Haw. 16; 1948 Haw. LEXIS 34 (1948). Yet, employers and insurance carriers continue to divert the Legislature's attention from the real issue by maintaining that "independent medical examinations" are necessary in their arsenal to rebut the presumption as intended by the Grand Bargain. They intentionally disregard the fact that injured workers received the presumption so that their claims are covered for reduced monies and benefits under the workers' compensation statute, and forever forfeited their right to sue their employers in tort for much more monies.

III. S.B. 2123 Is A Fair Independent Option To The Current Abusive "Independent" Examinations.

The publicity relating to the misused words "independent medical examinations" should have persuaded some legislators by now to recognize that the process is abusive, and the unwavering truth that injured workers are not routinely sent to physicians who are clearly "independent." Factually, the testimony with undeniable evidence adduced during the previous legislative sessions has outright revealed the hidden secret that these examinations and the attendant reports are outright bias, unreliable, and engineered to deliberately harm injured workers with legitimate work injuries. Experienced practitioners, including lay persons who have represented injured workers for decades, have unequivocally demonstrated that physicians appointed by employers and insurance carriers are only aligned with the defense industry. Indisputable evidence have been introduced showing illustrations of biased physicians, who are appointed by employers and insurance carriers alike. They are handsomely paid to issue lopsided reports. Then, the reports are used to rob injured workers of substantial sums of monies and denied critical medical treatment under the workers' compensation statute.

Getting on the list of physicians, who are appointed by employers and insurance carriers, is so lucrative that some have devoted their entire medical practices to conducting only so-called "independent examinations." Aside from the rewarding payments, highlights for such physicians include having no patient load, the absence of having to own or lease elaborate medical equipment, incurring insignificant costs for office space, and avoiding the payment of costly premiums for malpractice insurance because <u>they are immune from medical malpractice. The latter is true even when their flawed opinions are forced upon treating physicians and injured workers to their detriment</u>. As revealed during one of the more recent legislative sessions, undeniable evidence showed that at least one physician routinely relied upon by employers and carriers earned more than one million dollars by conducting so-called "independent medical examinations" pursuant to section 386-79, HRS.

Legislators should be asking what perpetuates the irony of the employers and insurance carriers fighting so passionately to retain the exclusive right to protect section 386-79, which allows them compelled "independent examinations" with a physician of their choosing. Are they misleading the Legislature because they believe that qualified physicians who are not appointed and paid by them cannot be independent, conduct fair examinations and issue objective reports?

Or, if not designated by them, are they maintaining that physicians cannot be "independent" and issue sincere neutral qualified opinions? Employers and insurance carriers have yet to provide their justification to influence "independent physicians."

It is for this reason that S.B. 2123 has been presented as yet another "independent" option for consideration to remove the current select group of abusive physicians, who purport that they are fair and neutral, but hired, appointed, and paid handsomely by the employers and insurance carriers. This bill should be embraced and passed by the Legislature because it is patterned after the closely examined method in a fair universally accepted process of resolving labor disputes. Strong supporting testimony has been presented for this precise reason - consideration of yet another option in lieu of the current method in conducting "independent medical examinations."

IV. Concern For The Unrepresented Injured Workers.

Everyone should be concerned that unrepresented injured workers will experience difficulty with S.B. 2123 , if passed. This is a legitimate concern. However, any alternative option (there are many) to the current "independent medical examinations" would grossly improve the workers' compensation process. Injured workers can gather names of physicians from family, friends and co-workers because everyone knows of someone who has sustained a work injury.

A nominal sum could be allocated as an amendment to this bill. It would be a small price to pay by funding a position, which will be housed in the Director's office. The incumbent will be responsible for the maintenance of a listing of physicians, who must meet the qualifications contained in Chapter 386, HRS, and any related administrative rules. Additionally, the listing will include a physician's specialty and *curriculum vitae*. Other criteria should be included under the name of each physician.

*number of years conducting medical examinations and impairment ratings pursuant to the AMA Guides to the Evaluation of Permanent Impairment

*number of medical examinations and impairment ratings conducted before the effective date of this bill

*number of medical examinations conducted for employers or carriers in the last ten years

*number of impairment ratings conducted for employers or carriers in the last ten years

*number of medical examinations conducted for injured workers in the last ten years

*number of impairment ratings conducted for injured workers in the last ten years

*gross income earned in conducting medical examinations in each of the last ten years

*gross income earned in conducting rating in each of the last ten years

*hourly rate for conducting medical examinations and/or impairment rating each of the last ten years

*number of reports with opinions that a claim should be deemed compensable/covered in each of the last ten years

*the precise body parts which the physician claims a specialty

*the percentage of active patients treated in each of the last ten years

*the states in which physician has been licensed to practice medicine

*the states in which physician has been barred from practicing medicine

*the number of times physician has been discredited in the last ten years in diagnosing a condition in litigation

I would recommend that the Chair of this committe request additional similar criteria to be considered for the mutual selection of a physician before decision making is completed. The criteria can be culled from a good oral deposition of a physician, who has served as an expert in a workers compensation or personal injury lawsuit.

Injured workers in need of selecting physicians for a mutual listing of qualified physicians will be allowed to examine the list in selecting and striking physicians as set forth in S.B. 2123.