

# SB 859

## RELATING TO WORKERS' COMPENSATION

Allows an employee to have a chaperone present and use a recording device during the medical examination relating to a work injury under workers' compensation. Clarifies that the employee's right to have a physician or surgeon present at the medical examination applies to the right to have a duly qualified physician or duly qualified surgeon present and defines "duly qualified physician" and "duly qualified surgeon".

DAVID Y. IGE  
GOVERNOR



JAMES K. NISHIMOTO  
DIRECTOR

RYKER WADA  
DEPUTY DIRECTOR

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

February 21, 2017

**TESTIMONY TO THE  
SENATE COMMITTEE ON JUDICIARY AND LABOR**

For Hearing on Friday, February 24, 2017  
9:00 a.m., Conference Room 016

BY

JAMES K. NISHIMOTO  
DIRECTOR

**Senate Bill No. 859**  
**Relating to Workers' Compensation**

**(WRITTEN TESTIMONY ONLY)**

TO CHAIRPERSON KEITH-AGARAN, VICE CHAIR RHOADS, AND MEMBERS OF  
THE COMMITTEE:

Thank you for the opportunity to provide **comments** on S.B. 859.

The purposes of S.B. 859, are to allow an employee to have a chaperone present and use a recording device during the medical examination relating to a work injury under workers' compensation; clarify that the employee's right to have a physician or surgeon present at the medical examination applies to the right to have a duly qualified physician or duly qualified surgeon present; and define "duly qualified physician" and "duly qualified surgeon."

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.

First, many, many bills and much testimony has been submitted to this committee in sessions past to change the current law pertaining to independent medical examinations ("IMEs") due to its alleged failings. The matter has also been debated at

length in the Workers' Compensation Working Group convened by House Concurrent Resolution 168 (2015) for the purpose of streamlining the WC process including the employer-requested medical examination, under chapter 386. From the employer's perspective, the IME remains one of the few ways it can defend against a claim that did not arise out of the course and scope of employment or against medical treatment that is not related to the work injury. This is particularly true in light of the statutory presumption in Section 386-78, HRS, that a claim is for a covered work injury, and recent Hawaii Supreme Court decisions such as Pulawa v. Oahu Construction Co., Ltd., and Seabright Insurance Company, SCWC-11-0001019 (Hawai'i November 4, 2015) which liberalized the standard for medical treatment from "reasonable and necessary" to "reasonably needed" and allows claimants to "receive[ ] the opportunity for the greatest possible medical rehabilitation."

Second, the bill's specific definition for a "duly qualified physician" and "duly qualified surgeon" is certain to have the unintended consequence of potentially lengthening certain claims as both employees and/or their attorneys and employers debate whether the physician at issue is "qualified" to treat the injury being examined. This would be especially true in those claims where there are multiple injuries being examined which led to the necessity of the IME.

Finally, in lieu of passing this bill with all of its unresolved issues, we respectfully request consideration be given to deferring this measure pending completion of the working group report and the workers' compensation closed claims study mandated by Act 188 (SLH 2016), wherein the legislature found that "a closed claims study is warranted to objectively review whether specific statutory changes are necessary" to the workers' compensation law. Upon delivery of the respective reports to the legislature, the empirical findings and specific recommendations of the working group and closed claims study can inform any legislative initiatives on workers' compensation.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE  
GOVERNOR

SHAN S. TSUTSUI  
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA  
DIRECTOR

LEONARD HOSHIJO  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
830 PUNCHBOWL STREET, ROOM 321  
HONOLULU, HAWAII 96813  
[www.labor.hawaii.gov](http://www.labor.hawaii.gov)  
Phone: (808) 586-8844 / Fax: (808) 586-9099  
Email: [dllr.director@hawaii.gov](mailto:dllr.director@hawaii.gov)

February 24, 2017

To: The Honorable Gilbert S.C. Keith-Agaran, Chair,  
The Honorable Karl Rhoads, Vice Chair, and  
Members of the Senate Committee on Judiciary & Labor

Date: Friday, February 24, 2017  
Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

From: Linda Chu Takayama, Director  
Department of Labor and Industrial Relations (DLIR)

**Re: S.B. No. 859 Relating to Workers' Compensation**

**I. OVERVIEW OF PROPOSED LEGISLATION**

This proposal amends section 386-79, Hawaii Revised Statutes (HRS), which relates to physician examinations ordered by the DLIR Director, by proposing that the employee has the right to have a chaperone designated and paid by the employee present at the examination. The employee shall also have the right to use a recording device during the medical examination and the proposal provides a definition of "duly qualified" physician and "duly qualified" surgeon.

DLIR supports the intent of the measure to permit recording and the attendance of chaperones in an Independent Medical Examination (IME), which has the potential to increase the overall fairness of the IME process.

**II. CURRENT LAW**

Section 386-79, HRS, allows the employee to have a physician or surgeon designated and paid by the employee present during the examination. It does not state that a chaperone may be present and does not specify the employee's right to record the examination.

**III. COMMENTS ON THE SENATE BILL**

The Department offers the following comments on this measure:

Requiring that the physician or surgeon who the claimant asks to be present at the examination to be “duly qualified” aligns with existing law that requires physicians and surgeons to be “duly qualified” when an employee is ordered by the director to submit to an examination.

Section 1(c) of the measure, which lists requirements for “duly qualified physician” and “duly qualified surgeon,” is not necessary as section 386-27, HRS, lists qualifications and duties of health care providers for them to be qualified by the DLIR Director.

There may be some hesitation on the part of a physician or surgeon conducting the examination to have a “chaperone” present or to have the entire examination recorded. With the exception of an interpreter or chaperones for other specific reasons, some physicians may already have a policy of restricting the examination to just the injured employee. This may reduce the number of physicians or surgeons willing to do these types of examinations.

The Department also does not understand the intent or meaning of the proposed subsection (c)(3).

DEPARTMENT OF HUMAN RESOURCES  
**CITY AND COUNTY OF HONOLULU**  
650 SOUTH KING STREET, 10<sup>TH</sup> FLOOR • HONOLULU, HAWAII 96813  
TELEPHONE: (808) 768-8500 • FAX: (808) 768-5563 • INTERNET: www.honolulu.gov/hr

KIRK CALDWELL  
MAYOR



CAROLEE C. KUBO  
DIRECTOR

NOEL T. ONO  
ASSISTANT DIRECTOR

February 24, 2017

The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice Chair  
and Members of the Committee  
on Judiciary and Labor  
The Senate  
State Capitol, Room 016  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

**SUBJECT: Senate Bill No. 859  
Relating to Workers' Compensation**

S.B. 859 seeks to amend Hawaii Revised Statutes (HRS) Section 386-79 to allow a chaperone to be present during an ordered medical examination, provide the employee with the right to record the examination and add qualifications before a physician can conduct an ordered examination under the section. The City and County of Honolulu opposes the measure insofar as it mandates additional criteria for independent medical examiners which have no valid basis in law or medicine.

Under the measure, a physician performing an ordered medical examination would be required to (1) be qualified to treat the injury being examined, (2) possess medical malpractice insurance, and (3) owe the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient. These requirements are at odds with the purpose and nature of ordered medical examinations.

An examination conducted under HRS Section 386-79 is strictly to assess diagnosis, causation, prognosis, maximum medical improvement, work capacity and/or appropriateness of care. As a result, no physician-patient relationship is created between the employee and the physician conducting the examination. This independent nature of the examination and the concomitant nonexistence of any physician-patient relationship are the cornerstones of medical examinations provided under this section. Consequently, there is no legal or medical basis to support the requirement that examiners possess medical malpractice insurance in order to conduct such an examination.

Mandating that medical examiners provide the same duty of care to employees examined under the section that a traditional patient would receive is also legally and medically

February 24, 2017  
Page 2

unfounded. To the contrary, imposing such a requirement would potentially establish a physician-patient relationship between the parties or at the very least create the appearance of one, thereby destroying one of the foundational tenets of independent medical examinations.

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 is reasonable and related to the work injury. Amending the statute would greatly reduce the number of physicians and surgeons that would be willing to perform an independent medical examination and serve to limit the employer's fundamental right to evaluate whether the employer is liable for the claim or medical treatment. The City therefore opposes S.B. 859 and asks that the bill be held in committee.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolee C. Kubo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Carolee C. Kubo  
Director

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB859 on Feb 24, 2017 09:00AM\*  
**Date:** Thursday, February 23, 2017 1:19:11 PM

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**SB859**

Submitted on: 2/23/2017

Testimony for JDL on Feb 24, 2017 09:00AM in Conference Room 016

| <b>Submitted By</b> | <b>Organization</b>                | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|------------------------------------|---------------------------|---------------------------|
| Douglas Moore       | Hawaii Injured Workers Association | Support                   | No                        |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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The Twenty-Ninth Legislature  
Regular Session of 2017

THE SENATE

Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

State Capitol, Conference Room 016

Friday, February 24, 2017; 9:00 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 859  
RELATING TO WORKERS COMPENSATION**

The ILWU Local 142 supports S.B. 859, which allows an employee to have a chaperone present and use a recording device during the medical examination relating to a work injury under the workers' compensation.

This measure provides greater fairness and more integrity to the independent medical examination process. Providing the opportunity for the injured worker to be accompanied by a "chaperone" while being examined by a physician or surgeon designated and paid for by the employer, allows the worker to feel better supported, in what would otherwise be an unfamiliar and in many cases intimidating experience.

Although current law allows the injured worker the right to a physician or surgeon of his or her designation to be present at the independent medical examination, that physician or surgeon would have to be paid by the injured worker. In most instances an injured worker would not have the financial means to be able to pay for that kind of representation.

S.B. 859 also provides a right for the injured worker to record an independent medical examination, through the use of a recording device provided by the worker. This could result in the employer's physician or surgeon feeling uncomfortable or even intimidated. Therefore, we would suggest that the right to record the examination be permitted when the employer's physician agrees to such a recording.

The ILWU urges passage of S.B. 859, with additional language to cover the suggestion made in the testimony. Thank you for the opportunity to share our views on this measure.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
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**SB859**

Submitted on: 2/23/2017

Testimony for JDL on Feb 24, 2017 09:00AM in Conference Room 016

| <b>Submitted By</b> | <b>Organization</b>                | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|------------------------------------|---------------------------|---------------------------|
| Douglas Moore       | Hawaii Injured Workers Association | Support                   | No                        |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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**Francis G. Brewer, D.C.**  
**1150 S. King Street, Suite 604**  
**Honolulu, Hawaii 96814**

February 22, 2017

Sen. Gilbert S.C. Keith-Agaran, Chair  
Sen. Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

via e-mail:  
[JDLtestimony@capitol.hawaii.gov](mailto:JDLtestimony@capitol.hawaii.gov)

Re: Senate Bill No. 859 Relating to Workers' Compensation  
Hearing Date: Friday, February 24, 2017  
Hearing Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

Dear Chair Keith-Agaran, Vice-Chair Rhoads, and members of the Committee:

My name is Francis Brewer, D.C., and I am the President of Brewer Consulting Services, Inc. I have personally performed independent chiropractic evaluations for over twenty years. Thank you for the opportunity to testify on this measure.

Senate Bill No. 859 amends Hawaii Revised Statutes, § 386-79, to allow an employee to have a chaperone present at, and to have the right to record, the independent medical examination related to the employee's worker's compensation injury. This measure also provides that the examining physician "owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

I respectfully oppose this measure because I believe that the amendments to HRS § 386-79 will taint the independent nature of the independent medical examination (IME) and independent chiropractic examination (ICE), and impose an inappropriate, unnecessary, and unduly burdensome standard upon examining physicians that is inconsistent with the purpose of IMEs/ICEs. All of this will result in a smaller pool of qualified IME/ICE physicians, and less effective direction of care of the employees.

First, requiring a chaperone will impede honest dialogue between the employee and the examining physician. It is important that the employee's explanation of the incident, treatment received, and symptoms be the employee's alone, and not subject to outside influence. The presence of third-parties who may intentionally -- or unintentionally -- influence the examination compromises the integrity of the IME/ICE process, which is to determine objectively the injured worker's status. This opinion is based on practical experience where, in the past, chaperones have been allowed to attend evaluations. On many occasions the chaperone takes an advocate role and has disrupted the evaluation, requiring either

termination of the evaluation or ejection of the chaperone. In one instance we had to have the police summoned to the office to "escort" a disruptive physician chaperone who had attended an evaluation being performed by a physician at our offices. A chaperone is not necessary for the effective performance of the examination, and can be a serious distraction.

Second, allowing recording of the examination will have the same effect of impeding full and candid communication between the injured worker and the examining physician that is needed in order for the examination to be effective. Moreover, there is no provision for ensuring the integrity of the recording itself, which itself may be subject to alteration.

Because of the adverse impact that third-parties and recording devices can have when present during the IME/ICE, it is my policy that third-parties not be allowed to attend the examination, and that recording devices not be used. Please note that this policy ***does not in any way interfere with an employee's right to have an interpreter present***, or to have other assistance necessary for the evaluation to be conducted in a complete and impartial manner.

Third, and finally, I strongly object to holding examining physicians to the "same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient." The IME/ICE physician is meant to be independent and objective. The treatment standard as applied to IME/ICE physicians would necessarily transform the IME/ICE physician from an independent voice to an advocate, in circumstances where the examining physician does not have the requisite relationship and information to fully inform and advise the injured worker on all of his or her medical issues.

I strongly believe that the integrity of the IME/ICE process must be preserved in order for the results to be reliable and useful, both for the employer and the employee. This requires, as much as possible, an environment of trust between the employee and the examining physician. The proposed amendments do not foster trust, but instead have the potential to inflame an already adversarial system, further hindering the process. Imposing a treatment standard on the independent medical examination process also imposes an unreasonable degree of risk to the examining physicians that will discourage qualified physicians from participating as independent medical examiners.

For the foregoing reasons, I respectfully request that this measure be held.

Sincerely,



Francis G. Brewer, D.C.

## TESTIMONY OF LINDA O'REILLY

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SENATE COMMITTEE ON JUDICIARY AND LABOR

Friday, February 24, 2017

9:00 a.m., room 016

### **SB 859**

Chair Keith-Agaran, Vice Chair Rhoads, and members of the Committee on Judiciary and Labor, my name is Linda O'Reilly, Assistant Vice President at First Insurance Company of Hawaii and representing Hawaii Insurers Council today. 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 forty percent of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** this bill. The bill defines a "duly qualified physician" and a "duly qualified surgeon" to mean one that is qualified to treat the injury being examined, possess medical malpractice insurance, and owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient. The definitions, "duly qualified physician" and "duly qualified surgeon" would apply to both the IME physician and if one accompanies the employee in an IME. The bill also allows a chaperone to accompany an employee in an exam and allows recordation of the exam.

We believe this bill will further restrict the small pool of physicians willing to perform IMEs in the state. Having the exam recorded and allowing a physician, surgeon or chaperone in the exam room will change the tone of the interaction between IME physician and patient to one that may be of an unnatural flow, self-conscious, and stilted. The provision that requires the IME physician to have medical malpractice insurance may also reduce the number of available physicians because not all of them may carry this coverage. Finally, the duty of care requirement could expose IME

physicians to some liability as although we believe they would give the patient the same level of care as if they were their own patient, the IME physician is not the treating physician and has not had a history of treating the patient over time.

If the pool of IME physicians is reduced, it will not serve the injured worker. The delays to obtain an IME will be longer, mutual agreement of IME physicians may be hampered, and cases will remain open longer with no resolution pending an IME. This could prevent medical treatment, prolong a settlement, or delay an impairment rating, all of which are harmful to the injured worker. For the employer, the longer delays add to the medical and indemnity costs which are ultimately passed on to the business and then to the consumer. We ask that this bill be held.

Thank you for the opportunity to testify.

Hawaii State Legislature

February 22, 2017

COMMITTEE ON JUDICIARY AND LABOR

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

*Filed via electronic testimony submission system*

**RE: SB 859, WC Medical Examination, Chaperone - NAMIC's Written Testimony in Opposition**

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the February 24, 2017, public hearing. Unfortunately, I will not be able to attend the public hearing, because of a previously scheduled professional obligation.

Although NAMIC appreciates the bill sponsor's laudable desire to make sure that injured workers' feel comfortable and secure during their medical examinations, via having the right to have a chaperone or a "duly qualified" surgeon or "duly qualified" physician present at the medical examination, NAMIC is concerned that the proposed legislation will actually harm injured workers more than it will help them.

Specifically, NAMIC is concerned that the overly restrictive definition of a "duly qualified" physician or surgeon is likely to have an adverse impact on the availability of medical providers authorized and qualified to participate in medical examinations, especially in light of the limited size of the medical provider marketplace in the State of Hawaii.

NAMIC is concerned that this proposed legislation could create three very significant problems for injured workers and employers/workers' compensation insurers: 1) The overly restrictive definition of a "duly qualified" surgeon or physician could end up excluding a lot of talented and otherwise qualified medical providers from the process thereby leading to unnecessary delays in conducting medical examinations to the detriment of injured workers, who need timely diagnoses and treatment; 2) By reducing the number of medical professionals authorized to participate in the medical examinations, "supply and demand" market pricing will likely lead to more expensive medical examinations for everyone; and 3) When the pool of medical professionals qualified to participate in medical examinations is reduced there is a greater likelihood that some of the qualified physicians and surgeons will have legal conflict of interest concerns that could adversely impact their ability to participate in the workers' compensation system, which could lead to diminished access to quality medical care for injured workers.

Additionally, NAMIC is concerned that the proposed legislation does not define who may be a qualified “chaperone”. For the sake of clarity and so as to avoid needless conflict between the parties, NAMIC believes that it makes sense to define this important term.

Finally, NAMIC is concerned that the proposed legislation authorizes a party to mechanically record the medical examination. NAMIC is concerned that this could discourage many medical providers from wanting to participate in medical examinations out of concern that their candid comments to the injured worker could lead to medical malpractice legal liability exposure. Moreover, NAMIC believes that it is in the best interest of injured workers to have medical examinations be “medical in nature” not “quasi-legal proceedings”. If medical examinations are mechanically recorder, injured workers may censure their comments about their ailments to the medical provider out of fear that their statements could be used as legal “admissions against interest” in a workers’ compensation hearing. If a medical provider only receives limited information from the injured workers about his/her injury, the medical provider’s ability to thoroughly and accurately evaluate the injured worker’s medical condition is seriously hindered.

For the aforementioned reasons, NAMIC respectfully asks this committee to **VOTE NO on SB 859, because the proposed legislation is rife with untended medical and legal consequences that could limit the medical care received by injured workers.**

Thank you for your time and consideration. Please feel free to contact me at \_\_\_\_\_ or at \_\_\_\_\_ if you would like to discuss NAMIC’s written testimony.

Respectfully,



Christian John Rataj, Esq.  
NAMIC Senior Director – State Affairs, Western Region



**Randolph Soo Hoo, M.D.**  
**1150 S. King Street, Suite 604**  
**Honolulu, Hawaii 96814**

February 22, 2017

Sen. Gilbert S.C. Keith-Agaran, Chair  
Sen. Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

via e-mail:  
[JDLtestimony@capitol.hawaii.gov](mailto:JDLtestimony@capitol.hawaii.gov)

Re: Senate Bill No. 859 Relating to Workers' Compensation  
Hearing Date: Friday, February 24, 2017  
Hearing Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

Dear Chair Keith-Agaran, Vice-Chair Rhoads, and members of the Committee:

My name is Randolph Soo Hoo, and I have personally performed independent medical evaluations (IMEs) for over twenty-five years.

Senate Bill No. 859 amends Hawaii Revised Statutes, § 386-79, to allow an employee to have a chaperone present at, and to have the right to record, the independent medical examination related to the employee's worker's compensation injury. This measure also provides that the examining physician "owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

I respectfully oppose this measure because I believe that the amendments to HRS § 386-79 will taint the independent nature of the IME and impose an inappropriate, unnecessary, and unduly burdensome standard upon examining physicians that is inconsistent with the purpose of IMEs. All of this will result in a smaller pool of qualified IME physicians, and less effective direction of care of the employees.

Requiring a chaperone impedes honest dialogue between the examinee and the examining physician. It is important that the examinee's explanation of the incident, treatment received, and symptoms be the examinee's alone, and not subject to outside influence. The presence of third-parties who may intentionally -- or unintentionally -- influence the examination compromises the integrity of the IME process, which is to determine objectively the injured worker's status. This opinion is based on practical experience where, in the past, chaperones have been allowed to attend evaluations. On many occasions the chaperone takes an advocate role and has disrupted the evaluation, requiring either termination of the evaluation or ejection of the chaperone. I am aware of an instance where the police had to be

summoned to "escort" a disruptive physician chaperone who had attended an evaluation. A chaperone is not necessary for the effective performance of the examination, and can be a serious distraction.

Second, recording of the examination has the same effect of impeding full and candid communication between the injured worker and the examining physician that is needed in order for the examination to be effective. Moreover, there is no provision for ensuring the integrity of the recording itself, which may be subject to alteration.

Because of the adverse impact that third-parties and recording devices can have when present during the IME, it is my policy that third-parties not be allowed to attend the examination, and that recording devices not be used. Please note that this policy **does not in any way interfere with an employee's right to have an interpreter present**, or to have other assistance necessary for the evaluation to be conducted in a complete and impartial manner.

Finally, I strongly object to holding examining IME physicians to the "same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient." The IME physician is meant to be independent and objective. Imposing a treatment standard on the independent medical examination process imposes an unreasonable degree of risk to the examining physicians that will discourage qualified physicians from participating as independent medical examiners. The treatment standard, as applied to IME physicians, transforms the IME physician from that of an independent voice to that of a treating physician. In these circumstances, the IME physician does not have the requisite physician-patient relationship and information to fully inform and advise the injured worker on all of his or her medical issues.

I strongly believe that the integrity of the independent medical evaluation process must be preserved to provide reliable, objective, and useful results for the employer and the examinee. This requires, as much as possible, an environment of trust between the employee and the examining physician. The proposed amendments do not foster trust and has the potential to inflame an already adversarial system.

For the foregoing reasons, I respectfully request that this measure be held.

Sincerely,

A handwritten signature in black ink that reads "Randolph Soo Hoo, M.D." The signature is written in a cursive, flowing style.

Randolph Soo Hoo, M.D.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB859 on Feb 24, 2017 09:00AM  
**Date:** Wednesday, February 22, 2017 11:27:29 PM  
**Attachments:** [Comments responding to Bill 978.docx](#)

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**SB859**

Submitted on: 2/22/2017

Testimony for JDL on Feb 24, 2017 09:00AM in Conference Room 016

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Robert S. Harvey    | Individual          | Oppose                    | No                        |

Comments:

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Comments responding to Bill 978:

I, Robert Harvey, have been a practicing orthopedic physician/surgeon in Hawaii since starting the first ER group at Queens Medical Center in 1969. Over the years, I have done Independent Medical Evaluations – more lately. I oppose H Bill 978 for the following reasons. The IME Evaluation increasingly may be the injured workers' only chance of receiving a medical specialist evaluation and opinion.

1. Regarding the right to have a “duly qualified” physician present, I am a medical doctor (MD), whose specialty is orthopedics, as such I am qualified to evaluate and render opinions on musculoskeletal conditions. It would be inappropriate for an physician who does not specialize in musculoskeletal conditions to be considered “duly qualified” in these issues. I am certainly not qualified to render an opinion on hernia surgery. A general practitioner is not qualified to render on an opinion on my shoulder recommendations.

Another qualified orthopedist must be present to evaluate my exam and recommendations. My examination is minimally 2 hours, what orthopedist is going to take this time out of his practice to attend? Who pays for this, and where is his allegiance? The patient's or attorney's designated orthopedist may be biased in his opinion for many reasons.

These considerations are true of other specialties.

The patient would be coached what to say and what not to say. This is not a trial and would distort the examiner's ability to make an impartial accurate diagnosis.

It is the patient's history that is important and pertinent, and not that which is constructed by the accompanying physician, or the “chaperone”.

2. Regarding the use of a recording device, this stifles the free flow of conversation. People speak differently if they know they are being recorded. Any word, phrase, or understanding of response may be called to question. This will require further investigation and inevitable questions by the patient's or employer's attorney. Response time with attorney's consequent questions can be 1-2 months. Either party must be on guard and cannot speak spontaneously. It's hard to divert conversation into casual expression of

activities (and revealed capabilities). Attorneys would now coach patients on this mini-deposition preventing an unbiased assessment of the patient's medical condition.

The injured worker is most helped by an accurate diagnosis and appropriate treatment.

3. Regarding the duty of care requirement, the role of the examiner is to provide an independent, unbiased assessment of the patient's medical condition, abilities, and treatment. The purpose of the evaluation is not medical treatment. The evaluator is not the patient's treating physician – it is not his duty to interrupt or provide care.

If new diagnoses are discovered, the evaluator has an obligation to inform the requesting party and the individual, and recommend further assessment.

Recently, many patients have had neither diagnosis (joint pain is not a diagnosis) nor treatment for their workers' injuries. Making a diagnostic opinion and recommending treatment does not obligate the evaluator to treat these conditions. The exam is designed to either help clarify and direct further evaluation and treatment, or substantiate the need for ongoing care.

4. Regarding one employer requested exam per case, in the current medical climate, many workers have not had their injuries evaluated or treated at the time of the employer requested examination. The worker should be allowed to have all conditions diagnosed and receive appropriate treatment before his condition is to be considered at maximum medical improvement.

These workers should see appropriate providers, receive treatment, and be reevaluated after their condition has been treated. They should not be denied future impairment evaluations due to inadequacies of previous treatment.

The worker may require the expertise of several different specialty areas, and several different IMEs by physicians qualified in these different specialties.

**Steven A. Kaneshiro, M.D.**  
**1150 S. King Street, Suite 604**  
**Honolulu, Hawaii 96814**

February 22, 2017

Sen. Gilbert S.C. Keith-Agaran, Chair  
Sen. Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

via e-mail:  
[JDLtestimony@capitol.hawaii.gov](mailto:JDLtestimony@capitol.hawaii.gov)

Re: Senate Bill No. 859 Relating to Workers' Compensation  
Hearing Date: Friday, February 24, 2017  
Hearing Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

Dear Chair Keith-Agaran, Vice-Chair Rhoads, and members of the Committee:

My name is Steven A. Kaneshiro, M.D., and I have personally performed independent medical evaluations for over ten years. Thank you for the opportunity to testify on this measure.

For the purposes of defining and clarifying the role of an independent medical evaluation (IME), the *American Medical Association Guides to the Evaluation of Permanent Impairment*, Fifth Edition, the recognized standard for the determination of permanent impairment in the state of Hawaii, is cited.

The *Guides* state:

“An **impairment evaluation** is a medical evaluation performed by a physician, using a standard method as outlined in the *Guides* to determine permanent impairment associated with a medical condition. ... An impairment evaluation is not the same as an **independent medical evaluation (IME)**, which is performed by an independent medical examiner who evaluates but does not provide care for the individual.”

In outlining the “Examiner’s Roles and Responsibilities,” the *Guides* note:

“The physician’s role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual’s medical condition ...”

The *Guides* conclude by stating:

“As an impairment evaluator, the physician has the responsibility to understand the regulations that pertain to medical practice in his or her specific area, as in workers’

compensation or personal injury evaluations. It is also the responsibility of the physician to provide the necessary medical assessment to the party requesting the evaluation, with the examinee's consent. The physician needs to ensure that the examinee understands that the evaluation's purpose is medical assessment, not medical treatment."

Senate Bill No. 859 amends Hawaii Revised Statutes (HRS), § 386-79, to allow an employee to have a chaperone present at, and to have the right to record, the independent medical examination related to the employee's worker's compensation injury. This measure also provides that the examining physician "owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

I respectfully oppose this measure because I believe that the amendments to HRS § 386-79 will taint the independent and unbiased nature of the IME, and impose an inappropriate, unnecessary, and unduly burdensome standard upon examining physicians that is inconsistent with the purpose of IMEs as set forth by the *Guides*. All of this will result in a smaller pool of qualified IME physicians, and less effective direction of care of the employees.

First, requiring a chaperone will impede honest dialogue between the employee and the examining physician. It is important that the employee's explanation of the incident, treatment received, and symptoms be the employee's alone, and not subject to outside influence. The presence of third-parties who may intentionally -- or unintentionally -- influence the examination compromises the integrity of the IME process, which is to determine objectively the injured worker's status. This opinion is based on practical experience where, in the past, chaperones have been allowed to attend evaluations. On many occasions the chaperone takes an advocate role and has disrupted the evaluation, requiring either termination of the evaluation or ejection of the chaperone. I am aware of an instance where the police had to be summoned to "escort" a disruptive physician chaperone who had attended an evaluation. Since the role of an examiner is to be independent and unbiased as prescribed by the *Guides*, a chaperone is not necessary for the effective performance of the examination, and can be a serious distraction.

Second, allowing recording of the examination will have the same effect of impeding full and candid communication between the injured worker and the examining physician that is needed in order for the examination to be effective. Moreover, there is no provision for ensuring the integrity of the recording itself, which may be subject to alteration.

Because of the adverse impact that third-parties and recording devices can have when present during the IME, it is my policy that third-parties not be allowed to attend the examination, and that recording devices not be used. Please note that this policy **does not in any way interfere with an employee's right to have an interpreter present**, or to have other assistance necessary for the evaluation to be conducted in a complete and impartial manner.

Third, and finally, I strongly object to holding examining physicians to the "same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient." Again, this is contrary to the examiners' role as set forth in the *Guides*. With the examinee's knowledge and consent, the IME physician is meant to be independent, unbiased and objective. The treatment standard as applied to IME physicians would necessarily transform the IME physician from an independent voice to an advocate, in circumstances where the examining physician does not have the requisite relationship and information to fully inform and advise the injured worker on all of his or her medical issues.

In accordance with the *AMA Guides*, Fifth Edition, the recognized standard in the state of Hawaii, I strongly believe that the integrity of the IME process must be preserved in order for the results to be reliable and useful, both for the employer and the employee. This requires, as much as possible, an environment of trust between the employee and the examining physician. The proposed amendments do not foster trust, but instead have the potential to inflame an already adversarial system, further hindering the process. Imposing a treatment standard on the independent medical examination process also imposes an unreasonable degree of risk to the examining physicians that will discourage qualified physicians from participating as independent medical examiners.

For the foregoing reasons, I respectfully request that this measure be held.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Kaneshiro, M.D.", with a stylized flourish at the end.

Steven A. Kaneshiro, M.D.



**Tetsuto Numata, MD**  
**1150 S. King Street, Suite 604**  
**Honolulu, Hawaii 96814**

February 23, 2017

Sen. Gilbert S.C. Keith-Agaran, Chair  
Sen. Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

via e-mail:  
[JDLtestimony@capitol.hawaii.gov](mailto:JDLtestimony@capitol.hawaii.gov)

Re: Senate Bill No. 859 Relating to Workers' Compensation  
Hearing Date: Friday, February 24, 2017  
Hearing Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

Dear Chair Keith-Agaran, Vice-Chair Rhoads, and members of the Committee:

My name is Tetsuto Numata, MD, and I am an orthopedic surgeon. I have personally performed independent medical evaluations for over thirty years. Thank you for the opportunity to testify on this measure.

Senate Bill No. 859 amends Hawaii Revised Statutes, § 386-79, to allow an employee to have a chaperone present at, and to have the right to record, the independent medical examination related to the employee's worker's compensation injury. This measure also provides that the examining physician "owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

I respectfully oppose this measure because I believe that the amendments to HRS § 386-79 will taint the independent nature of the independent medical examination (IME)/independent chiropractic examination (ICE) and impose an inappropriate, unnecessary, and unduly burdensome standard upon examining physicians that is inconsistent with the purpose of IMEs/ICEs. All of this will result in a smaller pool of qualified IME/ICE physicians, and less effective direction of care of the employees.

First, requiring a chaperone will impede honest dialogue between the employee and the examining physician. It is important that the employee's explanation of the incident, treatment received, and symptoms be the employee's alone, and not subject to outside influence. The employee is the best person to describe what happened to him/her, what treatments have worked and what the symptoms are that he/she is suffering from at the time of the evaluation.

The presence of third-parties who may intentionally -- or unintentionally -- influence the examination compromises the integrity of the IME/ICE process, which is to determine objectively the injured workers' status. Otherwise, a chaperone is not necessary for the effective performance of the examination, and can be a serious distraction.

Second, allowing recording of the examination will have the same effect of impeding full and candid communication between the injured worker and the examining physician that is needed in order for the examination to be effective. Moreover, there is no provision for ensuring the integrity of the recording itself, which may be subject to alteration.

Because of the adverse impact that third-parties and recording devices can have when present during the IME/ICE, it is my policy that third-parties not be allowed to attend the examination, and that recording devices not be used. Please note that this policy ***does not in any way interfere with an employee's right to have an interpreter present***, or to have other assistance necessary for the evaluation to be conducted in a complete and impartial manner.

Third, and finally, I strongly object to holding examining physicians to the "same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient." It is not clear nor spelled out in detail what "same duty of care" means. The **main job** of an IME/ICE physician is to be **independent** and **objective**. The main purpose is not to be or become the examinee's physician. The main purpose is not to treat a patient or to provide medical advice to a patient or to advise a patient what he/she should do for their medical problems. The main purpose is to provide an impartial medical opinion based on thorough review of medical facts and to render an opinion based on a "reasonable degree of medical certainty" standard. The purpose is not to be the advocate for the injured worker, nor for the employer. Holding the IME/ICE physicians to the "same duty of care" standard as applied to a normal physician-patient relationship would transform the IME/ICE physician from an independent voice to an advocate, in circumstances where the examining physician does not have the requisite relationship and information to fully inform and advise the injured worker on all of his or her medical issues. It would also defeat the main purpose of an IME/ICE physician, which is to provide an **impartial, independent** and **objective** opinion based on medical facts regarding the injured worker's medical condition.

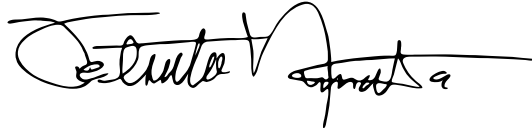
I strongly believe that the integrity of the IME/ICE process must be preserved in order for the results to be reliable and useful, both for the employer and the employee. This requires, as much as possible, an environment of trust between the employee and the examining physician. The proposed amendments do not foster trust, but instead have the potential to inflame an already adversarial system, further hindering the process. Imposing a treatment standard on the independent medical examination process also imposes an

Testimony of Tetsuto Numata, M.D.  
Senate Bill No. 859 Regarding Workers' Compensation  
Hearing before Senate Committee on Judiciary & Labor (JDL)  
Hearing: Friday, February 24, 2017; 9:00 am  
Page 3

unreasonable degree of risk to the examining physicians that will discourage qualified physicians from participating as independent medical examiners.

For the foregoing reasons, I respectfully request that this measure be held.

Sincerely,

A handwritten signature in black ink, appearing to read "Tetsuto Numata", with a long horizontal flourish extending to the right.

Tetsuto Numata, M.D.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:** \*Submitted testimony for SB859 on Feb 24, 2017 09:00AM\*  
**Date:** Sunday, February 19, 2017 6:40:36 AM

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**SB859**

Submitted on: 2/19/2017

Testimony for JDL on Feb 24, 2017 09:00AM in Conference Room 016

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Timothy McNulty     | Individual          | Support                   | No                        |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB859 on Feb 24, 2017 09:00AM\*  
**Date:** Thursday, February 23, 2017 3:57:34 PM

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**SB859**

Submitted on: 2/23/2017

Testimony for JDL on Feb 24, 2017 09:00AM in Conference Room 016

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Una Greenaway       | Individual          | Support                   | No                        |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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**William H. Fagan, D.C.**  
**1150 S. King Street, Suite 604**  
**Honolulu, Hawaii 96814**

February 22, 2017

Sen. Gilbert S.C. Keith-Agaran, Chair  
Sen. Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

via e-mail:  
[JDLtestimony@capitol.hawaii.gov](mailto:JDLtestimony@capitol.hawaii.gov)

Re: Senate Bill No. 859 Relating to Workers' Compensation  
Hearing Date: Friday, February 24, 2017  
Hearing Time: 9:00 a.m.  
Place: Conference Room 016, State Capitol

Dear Chair Keith-Agaran, Vice-Chair Rhoads, and members of the Committee:

My name is William H. Fagan, D.C. I have practiced chiropractic for 38 years and personally performed independent chiropractic evaluations for over five years. Thank you for the opportunity to testify on this measure.

Senate Bill No. 859 amends Hawaii Revised Statutes, § 386-79, to allow an employee to have a chaperone present at, and to have the right to record, the independent medical examination related to the employee's worker's compensation injury. This measure also provides that the examining physician "owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

I respectfully oppose this measure because I believe that the amendments to HRS § 386-79 will taint the independent nature of the independent medical examination (IME) and independent chiropractic examination (ICE), and impose an inappropriate, unnecessary, and unduly burdensome standard upon examining physicians that is inconsistent with the purpose of IMEs/ICEs. All of this will result in a smaller pool of qualified IME/ICE physicians, and less effective direction of care of the employees.

First, requiring a chaperone will impede honest dialogue between the employee and the examining physician. It is important that the employee's explanation of the incident, treatment received, and symptoms be the employee's alone, and not subject to outside influence. The presence of third-parties who may intentionally -- or unintentionally -- influence the examination compromises the integrity of the IME/ICE process, which is to determine objectively the injured worker's status. This opinion is based on practical experience where, in the past, chaperones have been allowed to attend evaluations. On many occasions the chaperone takes an advocate role and has disrupted the evaluation, requiring either

termination of the evaluation or ejection of the chaperone. I am aware of an instance where the police had to be summoned to "escort" a disruptive physician chaperone who had attended an evaluation. A chaperone is not necessary for the effective performance of the examination, and can be a serious distraction.

Second, allowing recording of the examination will have the same effect of impeding full and candid communication between the injured worker and the examining physician that is needed in order for the examination to be effective. Moreover, there is no provision for ensuring the integrity of the recording itself, which may be subject to alteration.

Because of the adverse impact that third-parties and recording devices can have when present during the IME/ICE, it is my policy that third-parties not be allowed to attend the examination, and that recording devices not be used. Please note that this policy **does not in any way interfere with an employee's right to have an interpreter present**, or to have other assistance necessary for the evaluation to be conducted in a complete and impartial manner.

Third, and finally, I strongly object to holding examining physicians to the "same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient." The IME/ICE physician is meant to be independent and objective. The treatment standard as applied to IME/ICE physicians would necessarily transform the IME/ICE physician from an independent voice to an advocate, in circumstances where the examining physician does not have the requisite relationship and information to fully inform and advise the injured worker on all of his or her medical issues.

I strongly believe that the integrity of the IME/ICE process must be preserved in order for the results to be reliable and useful, both for the employer and the employee. This requires, as much as possible, an environment of trust between the employee and the examining physician. The proposed amendments do not foster trust, but instead have the potential to inflame an already adversarial system, further hindering the process. Imposing a treatment standard on the independent medical examination process also imposes an unreasonable degree of risk to the examining physicians that will discourage qualified physicians from participating as independent medical examiners.

For the foregoing reasons, I respectfully request that this measure be held.

Sincerely,

A handwritten signature in black ink, appearing to read "W. H. Fagan, D.C.", written in a cursive style.

William H. Fagan, D.C.