

HB2202 HD2

Measure Title: RELATING TO WORKERS' COMPENSATION.

Report Title: Workers' Compensation; Medical Examination; Duly Qualified Physician; Duly Qualified Surgeon
Provides that a duly qualified physician or duly qualified surgeon selected and paid for by an employer to perform a medical examination on an employee relating to a work injury under workers' compensation shall be duly qualified to treat the injury being examined, possess medical malpractice insurance, and owe the same duty of care to the injured employee as to a traditional patient. (HB2202 HD2)

Companion:

Package: None

Current Referral: LBR, CPH

Introducer(s): JOHANSON



**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

830 PUNCHBOWL STREET, ROOM 321

HONOLULU, HAWAII 96813

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April 3, 2018

To: To: The Honorable Rosalyn H. Baker, Chair,
The Honorable Jill N. Tokuda, Vice Chair, and
Members of the Senate Committee on Commerce, Consumer Protection and
Health

Date: Tuesday, April 3, 2018

Time: 10:00 a.m.

Place: Conference Room 229, State Capitol

From: Leonard Hoshijo, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 2202 HD2 RELATING TO WORKERS' COMPENSATION

I. OVERVIEW OF PROPOSED LEGISLATION

HB2202HD2 proposes to amend section 386-79, Hawaii Revised Statutes (HRS), to specify that a “duly qualified” physician or “duly qualified” surgeon selected and paid for by the employer are “duly qualified” to treat the injury being examined. “Duly qualified” is defined as used in this section. The bill also proposes “duly qualified” physician or “duly qualified” surgeon be listed in the title of Section 386-79, HRS.

DLIR provides comments with concerns about the possible unintended consequences of the measure.

II. CURRENT LAW

Section 386-27, HRS, provides qualifications and duties of health care providers. The director shall qualify any person initially who has a license to practice under Chapters 453 Medicine or Osteopathy, 448 Dentistry, 442 Chiropractic, 455 Naturopathic medicine, 459 Optometry, 463E Podiatry, 465 Psychology and 457 Advanced Practice Registered Nurses.

Section 386-79, HRS, allows the employer to have a duly qualified physician or surgeon designated and paid by the employer to conduct the examination and the employee shall have the right to have a physician, surgeon or chaperone present at the examination.

III. **COMMENTS ON THE HOUSE BILL**

DLIR is concerned that the proposal would lead to further delays in the claims process and potential litigious and unintentional consequences.

- Proposed subsection (c)(1) requires that a duly qualified physician or surgeon "be duly qualified to treat the injury being examined." This provision could lead to further delays in the process as the parties challenge a physician's qualifications, especially in cases with multiple body parts or added issues (stress or psychological). Would an injury involving multiple body parts require "duly qualified" physicians for each body part?
- Proposed subsection (c)(2) requires the examiner to "possess medical malpractice insurance". The Department is concerned because certain IME doctors do not procure medical malpractice insurance because they do not treat patients. Alternatively, these IME doctors would see a significant increase in their costs if they were able to procure malpractice insurance. This may reduce the availability of IME doctors or willingness to participate causing further delays. With the current shortage of WC physicians in Hawaii, especially in rural areas, this requirement would further contribute to the shortage of IME doctors.
- Proposed subsection (c)(3) requires that a duly qualified physician "owe the same duty of care to the injured employee while performing such a medical examination as would be owed to a traditional patient." The Examiner does not have the usual doctor-patient relationship. The Examiner is a medical professional, who is not involved in the claimant's care. The Examiner does not provide treatment nor diagnose the patient. Rather, the Examiner provides an opinion of the diagnosis and causation of the injury. It is DLIR's understanding that the Hawaii Medical Board definition of a physician requires a physician to treat and therefore certain IME doctors could not possibly be "duly qualified."
- Proposed subsection (d) defines duly qualified as a "doctor whose specialty is appropriate for the injury to be examined." This may also lead to more challenges and delays, especially where multiple body parts or issues are involved.

HB-2202-HD-2

Submitted on: 4/2/2018 7:50:59 AM

Testimony for CPH on 4/3/2018 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for Oahu County Committee on Legislative Priorities of the Democratic Party of Hawai'i	Support	No

Comments:

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 10TH FLOOR • HONOLULU, HAWAII 96813
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KIRK CALDWELL
MAYOR



CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

April 3, 2018

The Honorable Rosalyn H. Baker, Chair
The Honorable Jill N. Tokuda, Vice Chair
and Members of the Committee on Commerce,
Consumer Protection, and Health
The Senate
State Capitol, Room 229
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Baker, Vice Chair Tokuda, and Members of the Committee:

**SUBJECT: House Bill No. 2202, H.D. 2
Relating to Workers' Compensation**

H.B. 2202, H.D. 2, provides that a duly qualified physician or duly qualified surgeon selected and paid for by an employer to perform a medical examination on an employee relating to a work injury under workers' compensation shall be duly qualified to treat the injury being examined, possess medical malpractice insurance, and owe the same duty of care to the injured employee as to a traditional patient.

The City and County of Honolulu, Department of Human Resources, offers the following comments on the bill.

First, the requirements imposed by this measure on an IME physician are at odds with the purpose and nature of ordered examinations. An examination conducted under Section 386-79, HRS, is intended 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 examining physician. This independent nature of the examination and the concomitant non-existence 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.

The Honorable Rosalyn H. Baker, Chair
The Honorable Jill N. Tokuda, Vice Chair
and Members of the Committee on Commerce,
Consumer Protection, and Health
The Senate
April 3, 2018
Page 2

Second, mandating that medical examiners provide the same duty of care to employees examined as a traditional patient is also legally and medically unfounded. 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.

Third, while the bill defines “duly qualified” as “a doctor whose specialty is appropriate for the injury to be examined,” this definition lends itself to multiple competing interpretations of what is an appropriate specialty, particularly when a claim involves examination of multiple injuries. This bill is certain to have the unintended consequence of potentially lengthening certain claims as both employees and/or their attorneys and employers debate—and litigate at a hearing—the issue of whether the physician or surgeon at issue has the appropriate specialty and is therefore “duly qualified” to perform the examination.

Finally, from the City’s perspective as a self-insured employer which pays benefits from public funds, the IME is one of the few tools the City can use to ensure that a questionable claim arose out of the course and scope of employment or that a requested medical treatment is related to the work injury. Without the benefit of an independent medical opinion, the City could be held liable for every claim that is filed and every medical treatment that is sought—even those injuries and treatments that would otherwise be covered by the employee’s private medical insurance or a no-fault policy if the injury or treatment is necessitated by a non-work incident or a motor vehicle accident, respectively. 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.”

Thank you for the opportunity to testify.

Sincerely,



Carolee C. Kubo
Director



HAWAII MEDICAL ASSOCIATION

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www.hawaiimedicalassociation.org

TO:

COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

Senator Rosalyn H. Baker, Chair

Senator Jill N. Tokuda, Vice Chair

DATE: Tuesday, April 3, 2018

TIME: 10:00AM

PLACE: Conference Room 229

FROM:

Hawaii Medical Association

Dr. Christopher Flanders, DO, Executive Director

Lauren Zirbel, Government and Community Relations

Re: HB 2202, HD2 RELATING TO WORKERS COMPENSATION

Position: SUPPORT

In order to perform as an Independent Medical Examiner a "duly qualified physician" and "duly qualified surgeon" should: (1) Be appropriately licensed in the state of Hawaii under HRS Section 453; (2) Possesses medical malpractice insurance; and (3) Owe the same duty and standard of care to the injured employee as would be owed a traditional patient.

Thank you for the opportunity to provide testimony.

HMA OFFICERS

President – William Wong, Jr., MD President-Elect – Jerry Van Meter, MD Secretary – Thomas Kosasa, MD
Immediate Past President – Bernard Robinson, MD Treasurer – Elizabeth A. Ignacio, MD
Executive Director – Christopher Flanders, DO

TESTIMONY BEFORE THE SENATE COMMITTEE
ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

Tuesday, April 3, 2018
10:00 A.M.

H.B. 2202, HD2
RELATING TO WORKERS' COMPENSATION

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

Chair Baker, Vice Chair Tokuda and Members of the Committee:

Hawaiian Electric Co. Inc., its subsidiaries, Maui Electric Company, Ltd., and Hawaii Electric Light Company, Inc. **strongly oppose H.B. 2202, HD2.** Our companies represent over 2,500 employees throughout the State.

This bill proposes changes to the existing statute to mandate that a “duly qualified physician” or “duly qualified surgeon” selected and paid for by an employer, must also be “duly qualified” to perform an independent medical examination (IME) to treat the injury being examined. The examiner must also possess medical malpractice insurance, and owe the same duty of care to the injured employee as to a traditional patient.

We respectfully cannot support this measure because it imposes an unnecessary standard on physicians/examiners that is inconsistent with the purpose and intent of an administrative and “independent” medical evaluation, typically requested by an employer or insurer, or ordered by the Director under Section 386-79, HRS. The role of the examining physician is to provide an “independent” and objective opinion of the diagnosis, causation, treatment of the injury. Therefore the examining physician could not have a traditional doctor-patient relationship because they have not been involved in the direct care and treatment of the patient. Requiring that they “owe the same duty of care to the injured employee while performing such a medical examination as would be owed to a traditional patient” could not be possible, could distort the results, and would be an unreasonable expectation given their role as an “independent examiner” in the process under the statute.

Imposing these standards on the examining physician will discourage the already limited pool of qualified physicians to perform these examinations and may lead to unintended consequences and delays in the process as the parties challenge a physician’s qualifications to perform the examination, especially when there are multiple body parts and/or psychological issues.

For these reasons, we strongly oppose H.B. 2202, HD2 and respectfully request this measure be held.

Thank you for this opportunity to submit testimony.



**To: Senator Rosalyn H. Baker, Chair
Senator Jill N. Tokuda, Vice Chair
Members of the Committee on Commerce, Consumer Protection, and Health**

Date: Tuesday, April 3, 2018

Time: 10:00 a.m.

Place: Conference Room 229

State Capitol

415 South Beretania Street

Support for House Bill 2202 HD2

As President of Work Injury Medical Association of Hawaii representing the providers treating injured workers in our state, we strongly support HB 2202.

The key provisions of this bill provide for the following:

- (a) Requires a workers' compensation impartial exam to be conducted by a "duly qualified physician" or "duly qualified surgeon"
- (b) Defines "duly qualified physician" and "duly qualified surgeon" as follows: (1) Is duly qualified to treat the injury being examined; (2) Possesses medical malpractice insurance; and (3) Owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

Justification:

- Unfortunately, some employer/carriers are abusing the system by choosing their "favored" physicians who produce reports that predictably favor the employer/carrier. Too often, the goal of an employer directed medical examination is not altruistic. The goal is often to enable an employer to escape liability or to delay benefits. An employer can attempt to escape liability if the employer can obtain a physician's opinion in its favor.
- The financial rewards to an employer's physician who consistently provides opinions in favor of an employer can be substantial. Employer's physicians apparently are paid more than \$2,000.00 per examination. Three examinations per week yields \$6,000.00. 50 weeks a year yields an income of \$300,000.00. Employer's physicians can do more than three examinations per week.

There is at least one employer physician who has earned more than \$1 million from one workers' compensation insurer.

- Employer's physicians do not have any duty of care to the injured worker and often escape responsibility for a misdiagnosis. It is the freedom from liability that allows the employer's physicians to give the employer the opinions they want without responsibility to the injured worker.
- For many workers with severe injuries, however, the workers' compensation system is the only thing that stands between them and a downward spiral of unemployment, debt and even homelessness. The use of "employer medical examinations" results in delays that often have devastating consequences to injured workers.
- There are physicians who conduct employer's examinations who properly consider the facts and provide opinions that are medically sound. Attorneys representing injured workers will readily agree to have their clients examined by such physicians. Responsible insurance carriers will utilize the services of such physicians because those carriers know that proper medical treatment with a correct diagnosis will result in getting the injured worker back to work sooner, which is the correct and fair result.
- The problem with employers' examinations lies with certain physicians and insurance carriers who are willing to use improper opinions to unfairly deny benefits to injured workers. The inherent disparity of the financial resources of insurance carriers versus an injured worker, who is frequently without income, makes the playing field inherently uneven in favor of the carrier.
- This bill attempts to bring greater fairness to the IME process by holding the employer physician accountable for his/her diagnosis. Opponents of this measure argue that an IME exam is intended to assess diagnosis, causation, prognosis, maximum medical improvement, work capacity, and/or appropriateness of care for the insurance company, and therefore an IME physician should not owe a duty of care to the injured worker. As Sen. Karl Rhoads eloquently stated, "How can you be a doctor, and you're looking at a patient, but you're saying your duty is to someone else?" Rhoads asks. "I don't see how that makes any legal, moral or ethical sense at all."
- I would encourage you to read, if you haven't already, the Civil Beat series "Waiting In Pain" at <http://www.civilbeat.org/projects/waiting-in-pain/>.

Sincerely,

Scott J Miscovich MD

President

Work Injury Medical Association of Hawaii

HB-2202-HD-2

Submitted on: 4/2/2018 10:07:33 PM

Testimony for CPH on 4/3/2018 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
cathy wilson	Individual	Support	No

Comments:

Support for House Bill 2202 HD2

Dear Chair Senator Roz Baker and Committee Members,

The key provisions of this bill provide for the following:

(a) Requires a workers' compensation impartial exam to be conducted by a "duly qualified physician" or "duly qualified surgeon"

(b) Defines "duly qualified physician" and "duly qualified surgeon" as follows: (1) Is duly qualified to treat the injury being examined; (2) Possesses medical malpractice insurance; and (3) Owes the same duty of care to the injured employee while performing the medical examination as would be owed to a traditional patient."

Reasons this measure is needed:

- Unfortunately, some employer/carriers are abusing the system by choosing their "favored" physicians who produce reports that predictably favor the employer/carrier. Too often, the goal of an employer directed medical examination is not altruistic. The goal is often to enable an employer to escape liability or to delay benefits. An employer can attempt to escape liability if the employer can obtain a physician's opinion in its favor.
- Employer's physicians do not have any duty of care to the injured worker and often escape responsibility for a misdiagnosis. It is the freedom from liability that allows the employer's physicians to give the employer the opinions they want without responsibility to the injured worker.
- This bill attempts to bring greater fairness to the IME process by holding the employer physician accountable for his/her diagnosis. Opponents of this measure argue that an IME exam is intended to assess diagnosis, causation, prognosis, maximum medical improvement, work capacity, and/or appropriateness of care for the insurance company, and therefore an IME physician should not owe a duty of care to the injured worker. As Sen. Karl Rhoads eloquently stated, "How can you be a doctor, and you're looking at a patient, but you're saying your duty is to someone else?" Rhoads asks. "I don't see how that makes any legal, moral or ethical sense at all."

- I would encourage you to read, if you haven't already, the Civil Beat series "Waiting In Pain" at <http://www.civilbeat.org/projects/waiting-in-pain/> .

Thank you,

Cathy Wilson

Injured Worker Advocate

THE SENATE
The Twenty-Ninth Legislature
Regular Session of 2018

Committee on Consumer Protection

Sen. Rosalyn H. Baker, Chair
Sen. Jill N. Tokuda, Vice Chair
State Capitol, Conference Room 229
Tuesday, April 3, 2018; 10:00 a.m.

**STATEMENT OF ILWU LOCAL 142 ON H.B. 2202, H.D. 2
RELATING TO WORKERS' COMPENSATION**

Thank you for the opportunity to present testimony regarding H.B. 2202, HD 2. ILWU supports this bill.

Independent medical evaluations are a central element to the workers' compensation process and the fairness and integrity of these examinations is of paramount importance to this system of adjudication.

H.B. 2202, HD 2 establishes essential criteria for examining physicians under Section 386-79 HRS that will uphold the fairness and integrity of the independent medical examination process by requiring that all examiners be "duly qualified physicians."

These fundamental qualifications include being qualified to treat the injury examined, possessing medical malpractice insurance and owing the same duty of care as they would to traditional patients. Requiring malpractice insurance need not transform the independent examining relationship into a physician-patient relationship—it will simply mean that the examiner is held to the appropriate standard of care that exists for medical evaluation of this nature in our community. Where the examiner is guilty of intentionally perpetuating false information or fails to make a proper diagnosis in a fashion is grossly negligent, there should be legal recourse if the patient can prove actual damages.

However, the mere commission of an error will not necessarily result in actual damages, because a false diagnosis may be identified in the subsequent litigation of the claim and result in no harm to the patient, if she overcome it during the later course of her case. Only when there is actual, provable harm and a departure from the standard of care in our community owed by an examiner will a claim for malpractice arise. If H.B. 2202, HD 2 is passed in its current form, there will less likelihood of malpractice claims because only "duly qualified physicians" will conduct the exams. Employers and insurers will be encouraged to evaluate the qualifications of their examiners scrupulously and assign them only to claims where they have the necessary expertise to render an objective evaluation. In the long run, such care promotes sound and accurate medical evaluation and neutral, objective fact finding, and ultimately, a more expeditious resolution to all claims.

Psychological or psychiatric evaluation is an area of concern. At present, there are instances when physicians who are not mental health experts render opinions on psychiatric or psychological issues which are far beyond the areas of their professional expertise. Such unqualified physicians may incorrectly diagnose Somatoform Pain Disorder; Narcissistic, Paranoid, Avoidant, Dependent, or Histrionic Personality Disorder; and/or Hypochondriasis without the requisite specialization or knowledge to make such assertions. These false diagnoses then become a permanent part of patient's medical records and may form the basis of lifelong stigmatization. It also detracts from the accurate diagnosis and treatment because the patients are incorrectly branded as "malingerers" who are guilty of "symptom magnification." This can result in open neglect and the failure to treat authentic injury and illness and can be profoundly frustrating to the injured worker.

To be sure, these diagnoses can validly be made and are recognized in the Diagnostic and Statistical Manual of the American Psychiatric Association. However, enormous care and precision must be utilized in rendering these diagnoses for the reasons outlined above.

In purely physical medicine, it should be evident that a physician must have the appropriate qualifications to render an accurate assessment of the patient's injury and to answer questions regarding medical causation. In some instances, internists or occupational medicine specialists with little or no understanding of post-concussion syndrome or the subtle distinctions made by neuropsychologists regarding organic brain syndrome and cognitive deficits are allowed free reign to dismiss authentic impairments of the brain merely because they lack the expertise and understanding to render objective evaluations.

More fundamentally, because the consequences of gross error and evaluation that departs from the standards of practice in this community can be so devastating to the injured worker, examining physicians should be required to possess medical malpractice insurance and ought to be subject to suit in that small number of cases where their errors are tantamount to medical malpractice. Without effective restraints such as the threat of suit, a small number of unscrupulous physicians have created a cottage industry of rendering non-objective opinions in favor of whoever retains them. Typically these false opinions lead to a disproportionate denial of claims, leading to spurious defenses and denials that artificially increases needless litigation and unnecessary cost and expense.

H.B. 2202, HD 2 provides a concise remedy for these excesses and will help restore objective medical evaluation and practice and accountability to this practice. For this reason, ILWU Local 142 supports the bill's passage.