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February 21, 2018

To: To:The Honorable Sylvia Luke, Chair,
The Honorable Ty J.K. Cullen, Vice Chair, and
Members of the House Committee on Finance

Date: Wednesday, February 21, 2018
Time: 2:00 p.m.
Place: Conference Room 308, 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

HB 2202HD2 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 supports the intent of this measure to further define physician and surgeon and offers comments.

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 employee to have a duly qualified physician or surgeon designated and paid by the employee conduct the examination and the employee and the employee's right to have a physician, surgeon or chaperone present at the examination.

III. COMMENTS ON THE HOUSE BILL

DLIR supports the intent of this measure to further define physician and surgeon, but offers comments as the measure may lead to unintentional consequences. The Department also notes that although §386-27 gives the Director the authority to qualify medical providers, the Director relies on the Hawaii Medical Board, which regulates licensure under the Department of Commerce and Consumer Affairs' Professional & Vocational Licensing Division. The Hawaii Medical Board would also regulate matters pertaining to the duty of care provision (c)(3) in the proposal.

- 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).

- 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.

- 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.

DEPARTMENT OF HUMAN RESOURCES
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KIRK CALDWELL
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CAROLEE C. KUBO
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ASSISTANT DIRECTOR

February 21, 2018

The Honorable Sylvia Luke, Chair
The Honorable Ty J.K. Cullen, Vice Chair
and Members of the Committee
on Finance
The House of Representatives
State Capitol, Room 308
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Luke, Vice Chair Cullen, 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.

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

The Twenty-Ninth Legislature
Regular Session of 2018

HOUSE OF REPRESENTATIVES
Committee on Finance
Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair
State Capitol, Conference Room 308
Wednesday, February 21, 2019; 2:00 p.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.

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.

HB-2202-HD-2
Submitted on: 2/20/2018 1:58:57 PM
Testimony for FIN on 2/21/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Douglas Moore	Hawaii Injured Workers Association	Support	No

Comments:

Aloha committee members: our Injured Workers Association frequently hears from injured workers that they were mistreated and some hurt by defense medical examiners. We believe this misconduct will continue until defense or independent medical examiners are held to the same standard of care as treating physicians. Therefore, defense or independent medical examiners should also be held accountable for malpractice committed on injured workers. This bill will help make the examiners more accountable. Please pass this bill. mahalo

Francis G. Brewer, DC
1150 S. King Street, Suite 604
Honolulu, Hawaii 96814
(808) 593-0313

Chair Sylvia Luke
Vice-Chair Ty J.K. Cullen
House Committee on Finance

Re: House Bill No. 2202, H.D. 2, Relating to Workers' Compensation
Hearing Date: February 21, 2018
Hearing Time: 2:00 p.m.

Dear Chair Luke, Vice-Chair Cullen, and members of the Committee,

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

House Bill No. 2202, HD 2 amends Hawaii Revised Statutes, § 386-79 to, among other things, provide that the examining 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."

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 and the AMA Guides to the Evaluation of Permanent Impairment, 5th edition. All of this will result in a smaller pool of qualified IME/ICE physicians, and less effective direction of care of the employees.

My role as an independent chiropractic examiner is to impartially evaluate the employee's condition and treatment received, to determine if treatment provided was reasonable and appropriate, to determine whether additional diagnostic testing or treatment may be required and, upon request, to rate the employee's injury. Some people may feel that the IME/ICE process is designed only to cut employees off from care. To the contrary, it is meant to ensure that the employee is getting care that is effective for the workplace injury at issue. In many cases, additional treatment recommendations are made over and above that which have already been prescribed by the treating physician. The independent medical examination process more fully and further evaluates injured employees, which can result in additional appropriate diagnostic testing, specialist referrals, and treatment, benefitting both

the employee and the employer. It is in this context that I have the following concern with H.B. No. 2202, H.D. 2.

The IME/ICE physician is meant to be independent and objective. Holding examining physicians to the "same duty of care to the injured employee while performing such a medical examination as would be owed to a traditional patient" 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.

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. Imposing a treatment standard on the independent medical examiner would distort the results of the examination and impose 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.

Francis G. Brewer, D.C.

LATE

WIMAH
Work Injury Medical Association of Hawaii

To: **Rep. Sylvia Luke, Chair**
Rep. Ty J.K. Cullen, Vice-Chair
Members of the Committee on Finance

Date: Wednesday, February 21, 2018
Time: 2:00 p.m.
Place: Conference Room 308
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 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.
- The workers' compensation system was designed to be more informal and outside the normal legal process, but unfortunately it has developed into a formal, adversarial legal process. These bills attempt to reduce the adversarial nature of the increasingly contentious workers' compensation system and reduce the bias of either party's physician through a mutual selection of a physician to perform the IME. This is an attempt to return the workers' compensation system to its original design.

Sincerely,

Scott J Miscovich MD

President

Work Injury Medical Association of Hawaii