HB 2202

RELATING TO WORKERS' COMPENSATION

HOUSE OF REPRESENTATIVES
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

H.B. NO. 2202

A BILL FOR AN ACT

RELATING TO WORKERS' COMPENSATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 386-79, Hawaii Revised Statutes, is amended to read as follows:

"**§386-79 Medical examination by employer's duly qualified physician[~~,~~] or duly qualified surgeon.** (a) After an injury and during the period of disability, the employee, whenever ordered by the director of labor and industrial relations, shall submit to examination, at reasonable times and places, by a duly qualified physician or duly qualified surgeon designated and paid by the employer. The employee shall have the right to have a duly qualified physician, duly qualified surgeon, or chaperone designated and paid by the employee present at the examination, which right, however, shall not be construed to deny to the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability. The employee shall also have the right to record such examination by a recording device designated and paid for by the employee; provided that the examining duly

qualified physician or duly qualified surgeon approves of the recording.

If an employee refuses to submit to, or the employee or the employee's designated chaperone in any way obstructs such examination, the employee's right to claim compensation for the work injury shall be suspended until the refusal or obstruction ceases and no compensation shall be payable for the period during which the refusal or obstruction continues.

(b) In cases where the employer is dissatisfied with the progress of the case or where major and elective surgery, or either, is contemplated, the employer may appoint a duly qualified physician or duly qualified surgeon of the employer's choice who shall examine the injured employee and make a report to the employer. If the employer remains dissatisfied, this report may be forwarded to the director.

Employer requested examinations under this section shall not exceed more than one per case unless good and valid reasons exist with regard to the medical progress of the employee's treatment. The cost of conducting the ordered medical examination shall be limited to the complex consultation charges

governed by the medical fee schedule established pursuant to section 386-21(c).

(c) A duly qualified physician or duly qualified surgeon who is selected and paid for by the employer to perform a medical examination on an employee pursuant to this section shall:

(1) Be duly 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 such a medical examination as would be owed to a traditional patient."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. This Act shall take effect on July 1, 2018.

INTRODUCED BY: _____

JAN 2 2 2018

H.B. NO. 2202

Report Title:
Workers' Compensation; Medical Examination; Duly Qualified Physician; Duly Qualified Surgeon

Description:
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 summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

HB 2202

TESTIMONY

HB 2202

LATE TESTIMONY

DAVID Y. IGE
GOVERNOR

LEONARD HOSHIJO
ACTING DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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February 1, 2018

To: The Honorable Aaron Ling Johanson, Chair,
The Honorable Daniel Holt, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Thursday, February 1, 2018
Time: 9:00 a.m.
Place: Conference Room 309, State Capitol

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

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

I. OVERVIEW OF PROPOSED LEGISLATION

HB 2202 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. This bill also proposes "duly qualified" physician or "duly qualified" surgeon be listed in the title of Section 386-79, HRS.

The Department provides comments.

II. CURRENT LAW

Section 386-27, Qualification and duties of health care providers, HRS, provides qualifications and duties of health care providers. The director shall qualify any person initially who has a license to practice under HRS 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

The department offers the following comments on this measure.

- The addition of "duly qualified" before physician and surgeon is redundant and not necessary.

- 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
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KIRK CALDWELL
MAYOR

CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

February 1, 2018

The Honorable Aaron Ling Johanson, Chair
The Honorable Daniel Holt, Vice Chair
and Members of the Committee
on Labor & Public Employment
The House of Representatives
State Capitol, Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Johanson, Vice Chair Holt, and Members of the Committee:

SUBJECT: House Bill No. 2202
Relating to Workers' Compensation

H.B. 2202 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, the bill's failure to define "duly qualified physician" or "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 or surgeon at issue is "duly qualified" to perform the examination. This is particularly true for those claims where there are multiple injuries being examined which led to the necessity for 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

WIMAH
Work Injury Medical Association of Hawaii

LATE

To: **Rep Aaron Ling Johanson, Chair**
Rep Daniel Holt, Vice-Chair
Members of the Committee on Labor and Public Employment

Date: Thursday, February 1, 2018
Time: 9:00 a.m.
Place: Conference Room 309
State Capitol
415 South Beretania Street

Support for House Bill 2202

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 which 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 are apparently 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 3 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 physician to give employer's 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 which often have devastating consequences to injured workers.
- There are physicians who conduct employer's examinations who properly consider the facts and who provide opinions which 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 WIMAH

Work Injury Medical Association of Hawaii

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

January 31, 2018

Chair Aaron Ling Johanson
Vice-Chair Daniel Holt
House Committee on Labor & Public Employment

Re: House Bill No. 2202 Relating to Workers' Compensation
Hearing Date: February 1, 2018
Hearing Time: 9:00 am

Dear Chair Johanson, Vice-Chair Holt, 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 amends Hawaii Revised Statutes, § 386-79 to, among other things, provide that the examining physician "owes 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.

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,

FBD

Francis G. Brewer, D.C.

Testimony HB 2202

I am testifying in opposition to HB 2202.

I am a neurologist who performs IME and impairment rating examinations. I was the founder of the first multidisciplinary occupational health center on Maui.

I am a contributing author to the 6th Edition of the Guides to the Evaluation of Permanent Impairment published by the American Medical Association.

I strive to provide objective, thorough, medically supportable assessments. My opinions are independent of the party requesting the evaluation.

One of the issues raised in this bill pertains to owing the same duty of care owed to a traditional patient.

There is no question that best medical practices should be followed in diagnosing an injured worker's condition and making recommendations regarding the need for additional investigations or treatment.

However, HB 2202 is vague and attempts to impose something that is not possible in the context of an independent medical exam.

Reasons for this include the fact that the patient is being seen for a primarily administrative evaluation performed at the request of a third party (typically the insurer).

The examination is not performed at the request of the injured worker, there is no provision for follow up or subsequent contact and patient management issues are outside of the control of the evaluating physician.

There are also issues unrelated to diagnosis or treatment such as causation which are not typical of the usual clinical context.

Because this Bill is vague and the attempts to impose a doctor-patient relationship cannot be fulfilled, this Bill should not be passed.

Sincerely, Lorne Direnfeld MD.