JOSH GREEN, M.D.
GOVERNOR

SYLVIA LUKE
LIEUTENANT GOVERNOR

JADE T. BUTAY
DIRECTOR

WILLIAM G. KUNSTMAN
DEPUTY DIRECTOR

STATE OF HAWAIʻI
KA MOKUʻĀINA O HAWAIʻI
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
KA ʻOIHANA PONO LIMAHANA

February 8, 2023

To: The Honorable Sharon Y. Moriwaki, Chair,
The Honorable Chris Lee, Vice Chair, and
Members of the Senate Committee on Labor and Technology

Date: Wednesday, February 8, 2023
Time: 3:00 p.m.
Place: Conference Room 224, State Capitol and Videoconference

From: Jade T. Butay, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. 919 RELATING TO WORKERS' COMPENSATION

I. OVERVIEW OF PROPOSED LEGISLATION

The **DLIR strongly opposes** SB919 and has serious concerns about potential effects and unintended consequences. SB919 proposes to repeal Section 386-79, Hawaii Revised Statutes (HRS), relating to medical examinations by employer's physician, and to replace it with a new title, "Medical examination under mutual agreement between employer and employee" with language that proposes:

- Independent Medical Examinations (IMEs) or permanent impairment rating examinations be performed by qualified chiropractors or physicians selected and mutually agreed upon by the employer and employee.
- The selected chiropractor or physician shall be willing to undertake the examination, be currently licensed in the State pursuant to chapters 442 Chiropractic and 453 Medicine or Surgery, and shall conduct the examination within 45 days of receiving notice of the selection or appointment, or as soon as possible.
- The employer shall pay for the IME or permanent impairment rating examination.
- The use of an out-of-state chiropractor or physician is allowed under certain circumstances.
- If a mutual agreement as to the selection of the chiropractor or physician cannot be reached between the parties, the Director shall appoint a duly qualified impartial chiropractor or physician to examine the injured

employee and submit a report. The fees for such examination shall be paid by the employer.

- Fees for all IMEs or permanent rating examinations shall be limited to charges listed in the medical fee schedule established pursuant to 386-21(c).
- This section would now apply to all IMEs regardless if ordered by the Director.

II. CURRENT LAW

§386-79 specifies that the employee, whenever ordered by the Director, shall submit to the examination by a qualified physician or surgeon designated and paid by the employer. If a claimant refuses to attend the examination, or obstructs in any way the examination, the claimant's rights to benefits are suspended for the period during which the refusal or obstruction continues. §386-79 also provides that the employee has the right to have a physician, surgeon, or chaperone designated and paid by the employee present at the examination.

§386-21(c) limits the costs of conducting the ordered IME to the complex consultation charges governed by the medical fee schedule.

§386-27 "Qualifications and duties of health care providers." provides that 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.

III. COMMENTS ON THE SENATE BILL

The Department strongly opposes this measure and offers the following comments:

Mutual agreement. DLIR is concerned with the requirement "mutually agreed upon chiropractor or physician by the parties" as this could result in delays while the parties try to agree on a physician to perform the IME or rating examination. If a party objects, then a hearing may need to be requested and the dispute will have to go through the adjudicatory process.

Qualified chiropractors or physician. The Department is concerned that the measure only allows for physicians currently licensed pursuant to chapters 442 Chiropractic and 453 Medicine or Osteopathy to perform the IMEs or rating examinations. It does not allow for the IMEs or rating examinations to be performed by other licensed physicians pursuant to chapters 448 Dentistry, 455 Naturopathic medicine, 459 Optometry, 463E Podiatry, 465 Psychology, and 457

Advanced Practice Registered Nurses, all of which are considered "physicians" under the workers' compensation law (§386-1 Definitions.).

Written notice to the injured employee. The measure proposes that written notice to the employee be given no later than five working days before the appointment. The Department is concerned this may be too short of notice. Depending on the injured employee's medical condition, five working days may not be sufficient time for the injured employee to make necessary arrangements such as transportation to attend the IME or rating examination.

Cost of conducting the IME or permanent impairment rating examination. The measure removes "ordered medical examination" and "complex consultation charges" from 386-79 which means the cost limitations would apply to all IMEs, appointed or not appointed, and makes it unclear as to the fees that can be charged for such examinations. The medical fee schedule does not currently list any fees for an IME or rating examination.

Difficulty with establishing the list of physicians. Under this measure, in cases where the director must appoint a physician, a list of qualified physicians willing to conduct the IMEs for the purposes of compensability or permanent disability becomes the responsibility of the Director. Issues such as willingness of physicians to be on the list of different medical specialties and allowable fees for the evaluations will have to be addressed, especially since the bill is unclear on the fees to conduct the IME or permanent impairment rating examination. Additional funding may be needed for staff resources to compile and maintain the list of qualified physicians.

Out-of-State claimants. The measure provides for IMEs for claimants living out-of-state. The measure allows for physicians who are licensed and who reside in the state of the claimants' residence to be selected, provided that state's physician licensing requirements are equivalent to a physician's license under chapters 442 Chiropractic or 453 Physicians and surgeons. Currently, the employer is responsible for locating these out-of-state physicians and for scheduling the examinations in the state where the claimant resides.

The Department has serious concerns in cases where the Director must appoint a qualified physician as the Department may need to seek qualified physicians and then compile and maintain a list of these physicians in different specialties who are willing to perform the IMEs or rating examinations. Issues of willingness of the out-of-state physicians and allowable fees to conduct the IME or permanent impairment rating examination may need to be addressed, especially since the bill is unclear as to the cost of conducting such examinations. Due to the limited number of out-of-state claimants, it is not reasonable and practical for the Department to compile and maintain such a list. Again, additional funding may be needed for staff resources if the Department will be responsible to review the

qualifications of the out-of-state physicians and to compile and maintain a list of these physicians.

Additional funding. When the parties cannot agree on a chiropractor or physician to perform the IME or rating examination, the measure proposes that the Director appoint one. The measure does not provide specifics regarding this. Will the Director simply have to appoint a chiropractor or physician, or will the Director also have to schedule the appointment, send written notice to the claimant and physician, copy and send medical reports to the IME or rating physician, and if applicable, set up travel, transportation, room and board? If so, then additional funding may be required for staff resources to complete these tasks.

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

Section 386-85, HRS, "Presumptions" provides a strong presumption of compensability for work injury claims. The employer has the right of discovery to fully investigate the work injury. To do so, the employer will rely on the IME report (paid by the employer) to provide evidence to overcome the presumption. With the limited pool of IME physicians, the employers will find it difficult to conduct timely discovery.

Physicians, surgeons, chaperones. This measure eliminates the employee's right to designate a physician, surgeon, or chaperone to be present at the examination. DLIR believes that this should not be eliminated as it helps to ensure impartiality of the IME or rating examination.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023

ON THE FOLLOWING MEASURE:
S.B. NO. 919, RELATING TO WORKERS' COMPENSATION.

BEFORE THE:
SENATE COMMITTEE ON LABOR AND TECHNOLOGY

DATE: Wednesday, February 8, 2023 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Carissa A. Goto or Li-Ann Yamashiro, Deputy Attorneys General

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Chair Moriwaki and Members of the Committee:

The Department of the Attorney General provides the following comments.

This bill seeks to amend section 386-79, Hawaii Revised Statutes (HRS), which sets forth procedures when the Director of Labor and Industrial Relations (Director) orders an injured employee to undergo a medical examination by a physician or surgeon. We recommend some clarifications to the bill, as follows.

First, the bill removes the wording in section 386-79(a) and (h), HRS, at page 1, line 6, and page 6, line 5, which specified that this section applies only to examinations that are ordered by the Director. Most medical examinations are not ordered by the Director. As written, the bill imposes new requirements for <u>all</u> medical examinations of the injured employee, whether they are ordered by the Director or not. If this was not the intent, we recommend reinserting wording to clarify that section 386-79, HRS, applies only to examinations which are ordered by the Director.

Second, as written, the bill contemplates that only physicians licensed under chapter 453, HRS, and chiropractors licensed under chapter 442, HRS, may perform independent medical examinations or permanent impairment ratings. This conflicts with the definition of "physician" in section 386-1, HRS, which includes "a doctor of medicine, a dentist, a chiropractor, a naturopathic physician, a psychologist, an optometrist, an advanced practice registered nurse, and a podiatrist." Thus, we recommend that all

references to “chiropractor or physician” throughout the bill be amended to read “physician,” and all references to chapters 442 and 453, HRS, be deleted.

Third, section 386-79(c), at page 3, line 15, through page 4, line 13, provides that an out-of-state examiner of the appropriate specialty may be selected if no Hawai‘i-licensed examiners are available or the employee resides out-of-state. The selected out-of-state examiner must be licensed in another state with requirements equivalent to the licensure requirements under Hawai‘i law. Because the bill states that the selection of the out-of-state examiner is "upon approval by the director," it appears that the Director would be required to interpret the laws of other states, which falls outside of chapter 386, HRS. We recommend that the language requiring the out-of-state examiner to be licensed in a state with equivalent licensing requirements be deleted.

Fourth, section 386-79(d), at page 4, lines 14-20, requires the Director to appoint an examiner if the parties are unable to reach a mutual agreement but does not state who is responsible for scheduling the examination, notifying the parties, or other tasks to facilitate the examination. We recommend that the bill specify who will be responsible for completing these tasks.

Fifth, section 386-79(i), at page 6, line 10, through page 7, line 2, provides two separate definitions of “medical stability” in two separate paragraphs (page 6, line 15-18, and page 6, line 19, though page 7, line 2). We recommend that the definitions be consolidated into one paragraph, similar to how the definition of “medical stabilization” appears in section 12-10-1, Hawai‘i Administrative Rules, as follows:

> "Medical stabilization" means that no further improvement in the injured employee's work-related condition can reasonably be expected from curative health care or the passage of time. Medical stabilization is also deemed to have occurred when the injured employee refuses to undergo further diagnostic tests or treatment which the health care provider believes will greatly aid in the employee's recovery.

Lastly, a Ramseyer typographical error occurs on page 1, line 3, in the title of section 386-79, HRS. We recommend that the title be amended to read as follows:

“**§386-79 Medical examination [~~by employer’s physician.~~] under mutual agreement between employer and employee.**”

Thank you for the opportunity to provide testimony on this bill.

DEPARTMENT OF HUMAN RESOURCES

CITY AND COUNTY OF HONOLULU

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RICK BLANGIARDI
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February 6, 2023

The Honorable Sharon Moriwaki, Chair
The Honorable Chris Lee, Vice Chair
and Members of the Committee on Labor and Technology
State Senate
Hawaii State Capitol, Room 224
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Moriwaki, Vice Chair Lee, and Members of the Committee:

Subject: Senate Bill No. 919, Relating to Workers' Compensation

Senate Bill No. 919 requires the independent medical examination and permanent impairment rating examination of an injured employee under the Workers' Compensation Law to be conducted by a qualified chiropractor or physician selected by the mutual agreement of the parties and paid for by the employer; and in absence of a mutual agreement, requires the Director of Labor and Industrial Relations to appoint a duly qualified impartial chiropractor or physician to be paid by the employer.

The City and County of Honolulu respectfully opposes this bill.

First, 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 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 is certain to have the unintended consequence of potentially lengthening certain claims because: 1) it is silent as to what would happen if there is no qualified physician available to perform the evaluation within the forty-five days or "as soon as possible" requirement; and 2) with the claimant's attending physician being the sole arbiter as to when an injured worker attains medical stability, employers would lose the ability to challenge ongoing disability and medical treatment when the medical evidence indicates the claimant has reached medical stability and could possibly return to work. These situations would undoubtedly lead to additional hearings and litigation at the Department of Labor.

We respectfully urge your committee to file S.B. No. 919.

Sincerely,

Nola N. Miyasaki
Director

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

Pauahi Tower, Suite 2010
1003 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 525-5877

Alison H. Ueoka
President

TESTIMONY OF MILIA LEONG

COMMITTEE ON LABOR AND TECHNOLOGY
Senator Sharon Y. Moriwaki, Chair
Senator Chris Lee, Vice Chair

Wednesday, February 8, 2023
3:00 p.m.

SB 919

Chair Moriwaki, Vice Chair Lee, and members of the Committee on Labor and Technology, my name is Milia Leong, Vice President of Claims and Medical Management Services for HEMIC. I am testifying today on behalf of Hawaii Insurers Council. The 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** SB 919.

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

The current system regarding Independent Medical Examinations (IMEs) has been in place for some time and although imperfect, this bill would take away benefits, add delays, burden the Department, and mandate timelines that cannot be met. This would not benefit the injured worker, the employer, the Department, or the providers. The vast majority of IMEs are conducted without incident, dispute, or need for an Order by the Director. In fact, in many cases, the IME provides direction of which an attending physician will often "concur," and proceed with recommendations that result in necessary medical treatment

that facilitate recovery of a work accident. It appears that this legislation is prompted by claims that IME physicians are biased toward the employer. We do not believe this is true. Employers seek access to clinical expertise to help return the injured worker to the job. Currently, there are numerous safeguards in place to ensure the IME is objective and unbiased. Injured workers are able to obtain opinions or comments from their treating physician or other doctors regarding the IME opinion if they disagree. Injured workers are also able to obtain their own permanent impairment rating and if the Director relies on it, the employer has to pay for it. Finally, there is an appeals process that provides further due process to both sides if an agreement cannot be reached.

According to DLIR, less than 10% of all workers' compensation claims are ordered by the Director. This means that the vast majority of workers' compensation claims are moved through the system without the need for an IME. The current system provides an approach for the employer and injured worker to resolve medical treatment disputes in an efficient manner. The proposal to mandate mutual agreement in lieu of an ordered IME will increase workers' compensation costs and delay the delivery of medical treatment in certain cases. This is detrimental to the injured worker and does not benefit the employer.

This bill requires mutual agreement between the employer and employee of an IME physician. If there is no agreement, the IME physician is chosen by DLIR. An IME is used as a second opinion when compensability is in question or when medical progress is stagnant. If an injured worker has been treated for some time, there is a point where additional medical treatment will not be curative. The injured worker is either ready to return to work in full capacity, is partially disabled, or is permanently disabled. If the IME process is restricted, it may greatly prolong the period of treatment that is not medically curative and delay the injured worker's return to gainful employment.

The amount of cases where parties cannot agree on a mutually agreed upon examiner are the minority. However, if the law is changed to *require mutual agreement*, we believe many cases, *will not have mutual agreement* because there is no incentive to do so by either party. For this reason, selection of a mutually agreed upon physician will almost

undoubtedly always be selected by the Director. SB 919 is silent on the "process" of a mutually agreed upon examiner. Specifically, what defines "inability to reach a mutual agreement," how the Director will select an examiner, and the timeframe in which selection will take place. This leaves the injured worker in limbo and the employer must keep paying for benefits that may be unrelated to a work injury. This can go on for an indefinite period.

The provision to require permanent impairment ratings to be separate from treatment IMEs presents an inconvenience to the injured worker and does not correspond to better outcomes. A comprehensive examination often takes several hours and this requirement will add costs to the system by requiring two separate examinations that could be addressed in one visit. IMEs are performed to address various aspects of an injured worker's injury and recovery such as primary and secondary diagnosis, appropriate treatment, ability to return to work, medical stability, utilization and measurement of the degree of physical impairment. *In many cases, it is important to obtain a baseline impairment rating to later determine the effectiveness of treatment.* It is beneficial for the injured worker to have one physician review the medical records and conduct the physical examination in a comprehensive manner when appropriate. It is also more cost effective if treatment and impairment are addressed by a single examination instead of requiring two. The suggestion that two separate evaluations benefit~~s~~ the injured worker is not substantiated by evidence and will only add costs and delay the delivery of benefits. Requiring prior written consent from the injured worker to allow for an impairment rating during the IME exam will delay the process and add cost. This can also go on for an indefinite period.

SB 919 takes away benefits from the injured worker that were fought for by the coalition of injured workers for years, namely having the right to a physician or chaperone attend the exam and having the right to record the exam.

The bill limits the reimbursement to an IME physician to that in the Medical Fee Schedule which will only further limit the pool of physicians willing to perform these types of exams

which can contain voluminous records. This delays resolution for the injured worker and unnecessarily adds costs to the system. Finally, the bill requires medical stability be determined by the Department if it cannot be determined by the primary care provider. This burdens the Department with a task that they are not equipped to provide.

We ask that this bill be held.

Thank you for the opportunity to testify.

American Property Casualty Insurance Association℠
INSURING AMERICA apci.org

To: Senator Sharon Y. Moriwaki, Chair
Senator Chris Lee, Vice Chair
Committee on Labor and Technology

From: Mark Sektnan, Vice President

Re: **SB 919 – Relating to Workers' Compensation**
APCIA Position: Oppose

Date: Wednesday, February 8, 2023
3:00 p.m., Room 224 & Videoconference

Aloha Chair Moriwaki, Vice Chair Lee and Members of the Committee:

The American Property Casualty Insurance Association of America (APCIA) is opposed to **SB 919** which upends the existing system of independent medical examinations. The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

SB 919 requires the independent medical examination and permanent impairment rating examination of an injured employee to be conducted by a qualified chiropractor or physician ***selected by the mutual agreement*** of the parties and paid for by the employer. In absence of a mutual agreement, it requires the Director of Labor and Industrial Relations to appoint a duly qualified impartial chiropractor or physician to be paid by the employer.

SB 919 will upend an existing system which while not perfect works well and creates unnecessary administrative costs and burdens for insurance companies and requires the Director to needlessly intervene in the IME process. The proposed legislation will lead to routine disputes over the employer's or workers' compensation insurer's selection of an IME physician, because trial lawyers will use this as a litigation strategy to get the Director to intervene in the IME process. The bill will also create unnecessary additional work for the Director, delay the selection of an IME physician, and increase claims administrative costs.

The proposed requirement that, "the selection of the examining doctor shall be by mutual agreement" will needlessly delay the IME process to the detriment of the injured workers, increase the IME costs for insurers and employers, and make the IME process unnecessarily contentious.

Policyholders already possess the legal right to have the IME reviewed by a doctor of their selection, if they want to contest the insurer's IME doctor's medical assessment. If a party wants to contest the selection of a particular IME physician by the Director, a resolution of that dispute would need to be resolved *before* any IME may be conducted. Therefore, the insurer could be hindered in its ability to comply with its regulatory duty to promptly investigate and settle claims, and will be prevented from securing timely information about the injured worker's medical diagnosis. Additionally, this new IME selection process, especially in situations where a party is contesting the Director's IME physician selection, could end up delaying the injured worker's ability to secure timely medical treatment.

SB 919 is unnecessary, and likely to create unintended adverse consequences for injured workers, impose needless requirements on employers and insurers that will be insurance rate cost-driver for the workers' compensation system, and turn a standard medical evaluation claims process (IME) into a costly, complicated, and contentious procedure.

For these reasons, APCIA asks the committee to hold this bill in committee.