LATE TESTIMONY

March 1, 2015

To: COMMITTEE ON JUDICIARY AND LABOR
The Honorable Gilbert Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Honorable Senator of Committee

Date: Tuesday, March 3, 2015
Time: 9:15 am
Place: Conference Room 016
State Capitol
415 Beretania Street

From: Dennis W.S. Chang, Labor and Workers' Compensation Attorney
Dillingham Transportation Building
735 Bishop Street Suite 320
Honolulu, Hawaii 96813

Re: Strong Support for Passage of SB 1174, SD 1, Relating to Workers' Compensation

I. Current Statutory Provision and Abusive Practices.

Section 386-79, HRS, currently provides that after a work injury and during the period of disability, an injured worker, when ordered by the Director of Labor and Industrial Relations, "shall submit" to an examination at a reasonable time and place before a qualified physician (or surgeon) for extremely limited purposes: "where the employer [inclusive of self insured employers and insurance carriers] is dissatisfied with the progress of the case or where major and elective surgery, or either, is contemplated, . . .[or] good and valid reasons exist with regard to the medical progress of the employee's treatment." This is the process more commonly referred to as an "independent medical examination" ("IME"). If the employee refuses to attend the examination, or obstructs in any way the examination as ordered by the Director, the employee's rights to benefits under the workers' compensation statute are suspended for the period during which the refusal or obstruction continues.

However, as repeatedly disclosed session after session for more than a decade, in the actual practice in claims handling use of the IME process has been increasing abusive, in particular, for the unrepresented injured workers. As stressed over the years, the designated physician (or surgeon), who is paid handsomely, is beholden to the employer. Inevitably, the

result is bias reports, which are detrimental to injured workers. Trickery is used when the employer (inclusive of its representatives, whether attorney, insurance carrier or third party administrator), bypass the mandatory statutory requirements of section 386-79 by merely sending a letter directing them to appear for an examination before a designated physician. Fear tactics are often added. Injured workers are warned that if they fail to appear as directed, they will be responsible for an outrageous no-show fee. Recently, a potential client informed me that she was informed that all of her benefits would be terminated if she failed to appear at an examination as directed by the employer's representative.

Claims are denied and wholesale benefits are terminated based on the bias physician designated reports. Aside from the economic incentive, the designated physician is unaccountable to the injured workers and immune from medical malpractice and other lawsuits. The result is obvious economic ruin and undue emotional distress for injured workers and their families because of bias rather than independent expert reports. These are real life regular occurrences.

The employer also fails to send cover letters, which it transmits to its designated physician, to injured workers and their representatives who have no idea what is asked in the IME process. Oftentimes, injured workers or their representatives are left to blindly guess as to what the designated physician is asked to address. Similarly, the employer may likely sneak in a question in the IME process to the designated physician and ask for a determination of what is the extent of the injured workers' permanent impairment rating for the work injuries. That is not allowed under section 386-79, but a vital portion of the workers' compensation process because the rating is used to ultimately determine the monetary amount to be awarded to injured workers. Or, the cover letter may contain assumptions or medical summaries, which may be erroneous. A review of the cover letter is essential by injured workers or their representatives before any employer designated examination. The employer designated physician also will summarily dismiss any input from injured workers or their representatives by claiming that he was retained by the employer.

Reason and fairness dictate a joint selection of a fair physician to conduct an IME/ rating. Injured workers or their representatives have presented countless abusive practices, which warrant amending section 386-79, and no reason to document them. There is no reason to repeat all of the abusive practices of the employer because the Legislature has been presented with cogent arguments for approximately two decades on the compelling need to amend section 386-79. It is long overdue to insert a sense of reason and fairness into the statute and rebuke the lie that the "IME" is sacrosanct for the employer. The litany that Section 386-79 is absolutely required because an employee has the benefit that a claim is presumed to be work related is utter nonsense because a jointly selected physician, who is not beholden to the employer, can make an sincere independent determination on any disputed issue in the workers' compensation process.

II. SB 1174, SD 1 Should be Fully Embraced as Consistent With the Humanitarian Purpose of the Workers' Compensation Law, Chapter 386, HRS.

SB 1174, SD 1 will curb a substantial abusive practices by adopting an orderly process of having more true independent medical examinations. We will be much closer to having "independent physicians," a misnomer as now applied by an employer. There will be substantial cost savings by the avoidance of unnecessary protracted litigation. In turn, there should be expedited claims processing as intended by the Grand Bargain, which stripped injured workers of the right to file lawsuits for their personal injuries to make them whole for their damages following work injuries, and in exchange, they were provided with highly limited statutory benefits under the Workers' Compensation Law pursuant to Chapter 386, HRS. This is akin to the no-fault law with less monetary benefits, which should be unquestionably promptly paid.

Under the rules of statutory construction, the operative word "independent" is required to be given its plain, simple meaning. As defined in the Webster's Dictionary, the most common definition of "independent" is "not subject to control by others." Another common meaning is "not looking to others for one's opinion or for guidance in conduct." At least during nearly the last decade of legislative sessions, a substantial number of bills have been proposed with the hopes of securing that "independent" medical examination pursuant to section 386–79. Under the rules of statutory construction, unambiguous words contained in statutes like "independent" must be given its plain, simple meaning, consistent with the underlying purpose of the enabling statutes. *Bailey's Bakery, Ltd. v. William Borthwick*, 38 Haw. 16; 1948 Haw. LEXIS 34 (1948).

Consistent with the foregoing discussion, SB 1174, SD 1 should be passed without hesitation. The mantra of opposition speaks volumes of the disingenuous antics, which an employer views as a means to avoid the Grand Bargain and rob injured workers of their meager statutory entitlements under Chapter 386. This proposed bill requires the mutual selection of physicians to conduct "IMEs" pursuant to section 386-79, like the objective process of selecting arbitrators to resolve labor disputes between unions and employers contained in collective bargaining agreements, which have worked ideally for decades in both the public and private sectors. We know that this process will work, and work well by ending abusive practices, trickery and other undue advantage for an employer or its representatives.

III. Conclusion.

This year is the 100th anniversary of the Grand Bargain. I do have a suggestion. The Chair should consider adding another subsection which requires that "the list of physicians also be practicing physicians with patients, unless agreed to by the parties." It is shameful that certain designated "independent" physicians have depended their entire livelihood or nearly all of their livelihood on income from conducting so-called "IMEs." I also applaud the individuals drafting and introducing the proposed bill, which should be passed without any reservations.

Perhaps, one undeniable elementary consideration is to view the critical need to amend section 386-79 because injured workers can never secure experts like the employers or their representative who have nearly infinite resources to engage in prolonged litigation by hiring

their designated physicians to conduct examinations and circumvent section 386-79 by having their other highly paid physicians to conduct records review and generate bias reports as well to overwhelm injured workers.

LATE TESTIMONY

DENNIS W. S. CHANG

Attorney at Law, A Limited Liability Law Corporation

WORKER'S RIGHTS - LABOR LAW
WORKER'S COMPENSATION
SOCIAL SECURITY DISABILITY
LABOR UNION REPRESENTATION
EMPLOYEES RETIREMENT SYSTEM
BODILY INJURIES

March 2, 2015

THE TWENTY-EIGHTH LEGISLATURE
REGULAR SESSION OF 2015

To: COMMITTEE ON JUDICIARY AND LABOR
Senator Gilbert Keith-Agaran, Chair
Senator Maile S.L Shimabukuro, Vice Chair

Date: Tuesday, March 3, 2015
Time: 9:15 a.m.
Place: State Capitol
Conference Room 016

From: Dennis W.S. Chang
Labor and Workers' Compensation Attorney

Re: Strong Support for Passage of S.B. 1174 Relating to Workers' Compensation

(Supplemental Testimony)

Suggestions to Facilitate Choosing Physician

This serves as my supplemental testimony. In addition to the suggestion made in the conclusion, I ask that you further request that the Department ask the following questions for each physician:

Indicate your experience serving as an expert in the last ten years by percentage for the employers or its representatives as opposed to serving as an expert for injured workers or their representatives.

Indicate the number of patients, who are injured workers, you have been currently treating under the workers' compensation process for the past year.

Indicate whether you are willing to share your previous expert reports, if any, for review upon request of the general public after a redaction of confidential information, including protected information under HIIPA.

LATE TESTIMONY

March 1st 2015 Via E-mail: HTH!estimony@capitol.hawaii.gov

To: The Honorable Josh Green, Chair The Honorable Glenn Wakai, Vice Chair Senate Committee on Health

From: Elaine Harris – injured worker

Re: SB 1174 – Relating to Workers' Compensation PCI
Position: STRONGLY SUPPORT
Date: Tuesday 3rd March 2015 at 9.15am

Aloha Chair Green, Vice Chair Wake and Members of the Committee

I am an injured worker who has actual experience with the workers compensation system and I strongly support the bill **SB 1174** that would require first that the employer and employee reach a mutual agreement on the physician who conducts the Independent Medical Examination.

I have read other testimony opposing this bill, much of which repeats the same verbiage and is provided by employers, insurance companies or other stake holders, who speak much of the opportunities available to injured workers who disagree with IME reports. About their right to obtain their own independent medical opinions and pursue their grievance through hearings, appeals and continued litigation. They speak to their own burdens, but not to the existing costly burdens to the injured worker under the current system. It is disappointing to see no testimony from injured workers, with personal experience of Insurer Independent Medical Examiners and their reports.

I suspect this is because most injured workers are unaware of the existence of **SB 1174**, because there is no powerful lobby supporting their best interests. I myself learned about it, quite by chance and almost too late. The case for opposing the bill cites checks and balances for care providers, who for some reason they think can't get it right.

In my own case, my care provider is the Chief of Staff for occupational health, for one of the larger providers of injured worker care. He is not incompetent, he is very experienced and capable. The employer/adjuster accepted compensability from the outset, but they ultimately ordered an IME. When I asked for the IME doctor's credentials and information about what percentage of his practice was for IME reports versus medical care and asked for a choice of three doctors, I was ignored by the adjuster, advised Workers Compensation is not "no fault" and ordered to attend.

Accompanied by my husband, I underwent a lengthy, exhausting, over-taxing and embarrassing IME, the doctor pushed and pulled my legs to force the range of motion, which led to a great deal of pain later. He made me wait for over an hour, although there were no other people there. I found his use of profanity and the fact that he absented himself after two hours to attend to his eight-year old child unprofessional. Despite a humiliating physical exam, it was worth it, because this IME doctor did determine that I had a problem with balance and falling to the side.

He agreed with my care provider that I needed further treatment, but quibbled about the type of Physiotherapy, which the insurer used to totally deny treatment. Although I was not safe to return to work and could be a hazard to other employees and customers, he stated I could return to work, but this was moot, because I had been" resigned from leave" by my employer two months before. I received no treatment and no income for over a year.

During this IME the doctor had a six-pack of beer on his exam room table and while explaining the law to me, advised that the insurance companies presume all injured workers are frauds. I subsequently attended a rating exam, but the IME refused to enter the exam room because my husband was with me. He later filed a rating report completed about a permanent limited range of motion issue, in absentia, without ever speaking with me, measuring or examining me. He did not provide any prior notice of personal policies that would truncate the IME rating exam.

A year later, after repeated requests for copies of reports and releases pertaining to my claim, I finally received a copy of yet another rating report compiled in by another IME doctor in absentia. This doctor inaccurately documented my medical records, clearly did not read them and spoke to the "excellence" of the initial IME report compiled by his unprofessional colleague. He spoke to psychological issues, yet I could not find evidence of any credentials for this doctor in the fields of Psychology or Psychiatry. Not one of these three IME doctors reviewed the MRI films themselves.

The battle to obtain copies of these reports was exhausting and counterproductive to my healing and efforts to return to gainful employment. This had already been impeded by frequent delays in treatment plan approvals and a denial of the treatment plan prescribed by my own care provider, a specialist and recommended by two of the insurers IME doctors.

I am aware that some insurance programs are run as "no fault" and according to research, the workers compensation program is also run as a "no fault" system. I understand that any fault of either the employer or the employee are usually immaterial. With the exception of workers compensation cases, it is customary practice to offer a selection of three IME doctors to the injured party. Many have testified that it would add to costs and burdens to afford injured workers the same rights, but they overlook the existing burdens on the injured worker and the Dpt. of Labor.

It is unfair to disenfranchise injured workers and place even further financial and other burdens on those who are disabled and financially distressed. It is difficult to believe IME doctors with a practice based primarily on Insurance examinations and reports, could be impartial, when their livelihood is dependent on such work. The current system needs to be amended, because if IME doctors were truly fair, **SB 1174** would not have been presented. I challenge claims that any delay or additional costs would be involved in setting IME appointments or completing the examinations if the doctors had to be mutually agreed on.

The current law does not build trust, or reduce confrontation and the current strategy of the employers/insures, is counter productive to this end. It would be more equitable if the experiences of injured workers and historical IME reporting patterns and insurance adjuster distribution of IME case work was considered, before any decision is made on **SB 1174**.

Very truly yours,

Elaine Harris

Elaine Harris
Honolulu, Hi

LATE TESTIMONY

Heartwood
PACIFIC, LLC

P.O. Box 1719 , Kea'au, HI 96749-1719
P. (808) 327-6700 F. (808) 982-5283

General Contractor ABC 23231

www.heartwoodpacific.com

Via E-mail: JDLTestimony@capitol.hawaii.gov
Via Fax (808) 586-7348

March 3, 2015

TO: HONORABLE GIL KEITH AGARAN, CHAIR, HONORABLE MAILE SHIMABUKURO, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY AND LABOR

SUBJECT: **STRONG OPPOSITION TO S.B. 1174, SD1, RELATING TO WORKERS' COMPENSATION.** Provides that an independent medical examination and permanent impairment rating examination shall be conducted by a qualified physician selected by the mutual agreement of the parties. Provides a process for appointment in the event that there is no mutual agreement. (SD1)

HEARING
DATE: Tuesday, March 3, 2015
TIME: 9:15 a.m.
PLACE: Conference Room 016

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

Heartwood Pacific, LLC is a locally owned and operated general contractor doing business on Hawai'i Island since 2001.

First and foremost, to avoid any confusion, what has been commonly referred to as an Independent Medical Examination or an IME should be correctly referred to as an Employer's Medical Examination (EME) as referenced in law pursuant to Section 386-79, Hawaii Revised Statutes. It is really the employer's requested examination of an injured worker who the employer may feel is not receiving appropriate treatment and also to determine permanent impairment rating. It is not an "independent" medical exam.

Heartwood Pacific, LLC is in **strong opposition to S.B. 1174, S.D. 1 Relating to Workers' Compensation,** which would require the commonly referred to "independent medical examinations" (IME) and permanent impairment rating examinations for workers compensation claims to be performed by physicians mutually agreed upon by the employers and employees. We believe this is unnecessary as the current procedure in place works.

Under the current system, employees select their treating physician who treats and provides its medical opinion. The employer then has its chance to disagree (if it so chooses), at its own cost, by opting to do an EME. There is also an appeal process if the parties cannot agree. The existing law provides employers a chance to get a medical opinion of its own choosing while the new law would not. The current process is fair and it works. If this bill passes, the employer's only tool to evaluate the treating physician's plan of action would be taken away. It is our opinion that worker's compensation claims that misuse the system would increase significantly, resulting in more costs to construction employers and ultimately to taxpayers that hire them. We respectfully feel the current law strikes a good balance between the need to take care of injured employees and the employers desire to curb costly abuses of the system. No changes are needed.

Let's not make it harder to do business in Hawaii, please do not pass this bill.

For these reasons, we request that that the proposed bill be held by this Committee.