CONCURRING OPINION OF ACOBA, J.

I concur in the result reached by the majority,[1] but on the grounds that (1) the interpretation of a statute such as HRS § 431:10C-308.5(b)[2] is a question of law, and, hence, this court is competent to perform that task without reference to an agency's interpretation of the subject statute, (2) if the term IME in HRS § 431:10C-308.5(b) is ambiguous with respect to "record reviews," as the majority holds, (3) resort must be had to legislative history to define that term, (4) because the legislative history categorizes record reviews as an "ancillary procedure incident to the conducting of an IME," Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794, a record review is part of an IME involving a physical examination and not independent of it, (5) however, other bases for the same result announced by the United States district court (district court) in

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[1] The majority holds that (1) "the term 'independent medical examination' [(IME),] as it appears in [Hawai'i Revised Statutes (HRS)] § 431:10C-308.5(b) [(2005)], is ambiguous with respect to whether an actual examination of the claimant . . . is an essential aspect of the 'examination[,]'" majority opinion at 12 (capitalization altered), therefore, (2) it "defers to the insurance commissioner's interpretation[]" of the statute, "unless his interpretation is palpably erroneous[,]" id. at 20 (capitalization altered), (3) "the insurance commissioner's interpretation that an actual examination is a necessary component of an [IME] . . . is not palpably erroneous[,]" id. at 22 (capitalization altered), hence (4) "Dr. [Bruce] Hector's record review did not constitute an [IME]," id. at 33 (capitalization altered) and therefore, (5) Respondent/Defendant-Appellant Government Employees Insurance Company (Respondent) "did not violate the statute[,]" id. (capitalization altered).

[2] HRS chapter 431:10C pertaining to Motor Vehicle Insurance, section 308.5 (b), titled "Limitation on Charges," states that "[c]harges for [IMEs], including record reviews, physical examinations, history taking, and reports[,]" (emphasis added), are subject to various requirements as described infra.

Engle v. Liberty Mutual Fire Insurance Co., 402 F. Supp. 2d 1157 (D.Haw. 2005), on which the majority relies, would contravene the language of HRS § 431:10C-308.5(b) and the legislative history therefor, and may adversely affect application of that statute in the future.

I.

It has been stated that "it is the function of the courts to interpret the law, and courts are in no way bound by an [administrative] agency's legal interpretation." Chavez v. Mountain States Constructors, 929 P.2d 971, 976 (N.M. 1996) (internal quotation marks and citation omitted); see also Baerst v. State Bd. of Educ., 642 A.2d 76, 78 (Conn. App. 1994) (where interpretation of statute is issue of first impression, courts do not defer to agency interpretation but, rather, "expound and apply governing principles of law" (internal quotation marks and citations omitted)); Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("[T]his court [is] free to reverse the agency's decision if affected by an error of law" (citing HRS 91-14(g)(4)); Newark Valley Cent. School Dist. v. Pub. Employment Relations Bd., 632 N.E.2d 443, 445 (N.Y. 1994) (holding that "[d]eference to [the agency] is not required . . . if the issue is one of statutory interpretation, dependent on discerning legislative intent, as statutory construction is the function of the courts" (citation omitted)).

When reviewing an agency determination, this court applies standards codified at HRS § 91-14(g) (1993) to the agency decision. Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2000). But the interpretation of HRS § 431:10C-308.5(b) is not before us on appeal from an agency decision pursuant to HRS § 91-14(g). Cf. Camara, 67 Haw. at 216, 685 P.2d at 797 (holding that appeal from agency decision entitled to deference only if "consistent with legislative purpose").

Rather, the issue raised on certiorari is whether the first circuit court (the court) or the Intermediate Court of Appeals (ICA) erred in its interpretation of a statute. It is well established that this is a question of law, to be reviewed de novo under the right/wrong standard. See, e.g., Kimura v. Kamalo, 106 Hawai'i 501, 507, 107 P.3d 430, 436 (2005) (stating, on appeal from partition action in trial court, that "[t]he interpretation of a statute is a question of law[]" and that "[r]eview is de novo, and the standard of review is right/wrong[]"); see also State v. Hicks, 113 Hawai'i 60, 70, 148 P.3d 493, 503 (2006) (stating, on appeal from trial court, that "[t]he interpretation of a statute is a question of law reviewable de novo" (quoting State v. Kalani, 108 Hawai'i 279, 283, 118 P.3d 1222, 1226 (2005))); State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (same (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996))).

Thus, "[w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995) (quoting Crosby v. State Dep't of Budget & Fin., 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994)). However, when a statute is ambiguous, we consider the context of the ambiguous language or legislative history.

> In construing an ambiguous statute, "the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) (1985). Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool.

Id. at 19, 904 P.2d at 904 (internal quotation marks, citations, and brackets omitted). See, e.g., In re Cunha, 104 Hawai'i 267, 271, 88 P.3d 202, 206 (2004) (noting that "courts may take legislative history into consideration in construing a statute" on appeal involving application of Uniform Probate Code (quoting Franks v. City & County of Honolulu, 74 Haw. 328, 335, 843 P.2d 668, 672 (1993))); State v. Sullivan, 97 Hawai'i 259, 262, 36 P.3d 803, 806 (2001) (examining legislative history to determine whether statute provided a right to jury trial); State v. Edwards, 96 Hawai'i 224, 233, 30 P.3d 238, 247 (2001) (reviewing legislative history to determine whether police satisfied statutory requirement to contact attorney).

In this case, as discussed infra, there is legislative history readily at hand to clarify any perceived ambiguity in HRS § 431:10C-308.5. Therefore, it is neither appropriate nor necessary to defer to the insurance commissioner's interpretation of the definition of an IME. See In re Water Use Permit Applications, 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000). "If we determine, based on [legislative history], that the legislature has unambiguously spoken on the matter in question, then our inquiry ends." Id.

Despite our established rules for construing ambiguous statutes, the majority maintains that the insurance commissioner's interpretation of the definition of an IME in Weigel v. Liberty Mutual Fire Insurance Co., ATX-2002-134-P (Hawai'i Insurance Commissioner's Final Order Mar. 31, 2005) is "worthy of deference." Majority opinion at 32. In Weigel, the insurance commissioner, without citing to case law, applicable Hawai'i Administrative Rules (HARs), or any other authority, defined an IME solely by looking at the "context of the entire statutory provision[.]" ATX-2002-134-P, RO at 8.[3] The majority cites Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 653 P.2d 420 (1982), Vail v. Employees' Retirement System, 75 Haw. 42, 856 P.2d 1227 (1993), Holi v. AIG Hawaii Insurance Co., 113 Hawai'i 196, 150 P.3d 845 (App. 2007), Nelson v. University of Hawaii, 97

[3] The commissioner's ruling in Weigel is not before us on appeal today, and in that sense is "unrelated" to the present proceedings.

Hawai'i 376, 38 P.3d 95 (2001), and State v. McCully, 64 Haw. 407, 642 P.2d 933 (1982), in support of its contention. See majority opinion at 22-23, 32. Respectfully, the majority's reliance on these cases is misplaced.

First, Treloar and Vail involved direct appeals from agency decisions, which, as has already been noted, is not the situation here. See Treloar, 65 Haw. at 421-22, 653 P.2d at 416-18 (appeal from decision of Labor and Industrial Relations Board); Vail, 75 Haw. at 67, 856 P.2d at 1230 (appeal from decision of Employee's Retirement System). Accordingly, neither Treloar nor Vail supports the contention that we should defer to an agency in the case at bar.

Second, unlike the situation at bar, both Nelson and Holi involved the application of HAR. Arguably, where an agency promulgates a rule, we will accord consideration to its interpretation of its own rules. See, e.g., Holi, 113 Hawai'i at 205, 150 P.3d at 854 (deferring to agency's definition of disputed term in HAR). But our case is not concerned with the application of an administrative rule by an agency; therefore, the question of deference to any agency in Nelson is obviously inapposite. Accordingly, Nelson is not authority for deferring to the insurance commissioner's construction of a statute, rather than a rule.

Furthermore, the majority misconstrues the issue of deference to the Hawai'i Civil Rights Commission in Nelson. In

that case, this court was concerned with modification of the test for establishing a hostile environment sexual harassment claim [HESH] set forth in this court's earlier decision in Steinberg v. Hoshijo, 88 Hawai'i 10, 18, 960 P.2d 1218, 1226 (1998). Steinberg's test, however, was based entirely on the applicable HAR. Id. To reiterate, this case does not involve an agency's interpretation of its own promulgated rules. Hence, on the facts themselves, Nelson does not apply.

Third, in McCully, this court said that the dispositive regulation was not in effect, and there were no interpretations of the statute by federal courts. 64 Haw. at 412, 642 P.2d at 937. This court relied on the practice of the postal service in reaching its determination. It is unclear why McCully did not consider the legislative history of the statute in that particular case. The unquestioned established principle as we have reaffirmed is that "[w]hen the language of a provision [in a federal statute] is ambiguous, we look to the legislative history of the statute in question to ascertain its confines." Keauhou Master Homeowners Ass'n, Inc. v. County of Hawai'i, 104 Hawai'i 214, 219, 87 P.3d 883, 888 (2004) (construing the Fair Debt Collection Practices Act by looking to its legislative history); In re Island Airlines, 47 Haw. 1, 123, 384 P.2d 536, 571 (1963) ("The rule is that the legislative history of an act may be examined in ascertaining the intention of Congress in that

act[.]"). Thus, McCully cannot stand for the unequivocal rule advocated by the majority.[4]

Indeed, the majority concedes that unlike this case, Vail, Treloar, Nelson, and Holi "involved either an appeal from an agency decision . . . , see Vail, 75 Haw. at 46-51, 856 P.2d at 1231-33; Treloar, 65 Haw. at 418-20, 653 P.2d at 422-24, or an administrative rule interpreting a statute, see Nelson, 97 Hawai'i at 387-88, 38 P.3d at 106-07; Holi, 113 Hawai'i at 205-06, 150 P.3d at 854-55[,]" but inexplicably states that this is a "distinction without a difference." Majority opinion at 32-33 n.7. Rather, the majority states that "the dispositive considerations in the cases were that the statute . . . contained broad or ambiguous language, that an agency had been charged with carrying out the mandate of the statute, that the agency had interpreted the broad or ambiguous language, and that the agency's interpretation was not palpably erroneous[,]" without citation to anything in the language of these cases. Majority opinion at 33 n.7.

[4] McCully involved the postal service's practice of allowing searches of parcels in its possession based on both state and federal search warrants. 64 Haw. at 408, 642 P.2d at 935. The defendants argued it was the practice of the agency itself that rendered the warrant invalid. See id. at 408, 642 P.2d at 935. Therefore, McCully is akin to situations involving direct appeals from agency decisions, which, as has already been noted, is not the situation presently before this court. As noted, the court in McCully did not utilize any of this court's established methods of interpreting an ambiguous statute, such as its context, Awakuni v. Awana, 115 Hawai'i 126, 133, 165 P.3d 1027, 1034 (2007), or legislative history, Keauhou, 104 Hawai'i at 219, 87 P.3d at 888. Because the situation before this court involves a determination of whether the actions of a private party, not an administrative agency, conformed to statutory requirements, McCully is distinguishable.

Contrary to the majority's position, the factual distinctions between an appeal from an agency decision and an appeal from the trial courts are the salient foundational facts that determine whether deference to an agency applies at all. Cf. Kalani, 108 Hawai'i at 285, 118 P.3d at 1228 (on appeal from trial court decision, statute interpreted de novo by examining legislative history); Paul's Elec. Serv., 104 Hawai'i at 416, 91 P.3d at 498 (discussing deference standard applied on appeal from agency decision). Respectfully, the majority distorts our accepted precepts of statutory construction. Its approach is a novel departure from our established principle that ambiguous statutes raised on appeal from a court's construction are to be defined by resort to legislative history. See In re Cunha, 104 Hawai'i at 271, 88 P.3d at 206; State v. Sullivan, 97 Hawai'i 259, 262, 36 P.3d 803, 806 (2001); State v. Edwards, 96 Hawai'i 224, 233, 30 P.3d 238, 247 (2001); Franks, 74 Haw. at 335, 843 P.2d at 672.

By way of seeming justification for its view, the majority opines that deference in this case "reflects a sensitivity to the proper roles of the political and judicial branches insofar as the resolution of ambiguity in a statutory text is often more a question of policy than law." Majority opinion at 20 (quoting In re Water Use, 94 Hawai'i at 145, 9 P.3d

at 457 (internal quotation marks omitted)).[5] To the contrary, such policy questions are precisely those to be resolved by reference to the legislature's intent rather than by reference to an agency's once-removed view of the same statute. In adopting its approach, the majority abdicates our "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history," Ka Pa'akai O Ka'Aina v. Land Use Commission, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (appeal from agency decision discussing deference in terms of administrative tribunal) (internal quotation marks and citation omitted), and creates uncertainty in our law on applicable standards of review.

Finally, the majority maintains that choosing not to defer to the insurance commissioner's interpretation in this case would result in forum shopping to attain a desired standard of deference. See majority opinion at 33 n.7. (citing Moss v. Am. Int'l Adjustment Co., 86 Hawai'i 59, 65, 947 P.2d 371, 377 (1997) (other citation omitted)).[6] Of course, the majority's contention regarding forum shopping is not raised or supported by anything in the record and is based, then, on pure speculation. But, more

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[5] Respectfully, the deference principle in In re Water Use is inapposite. In re Water Use, like Treloar and Vail, involved an appeal from an agency decision, a situation not before this court today. Here, the subject of review is the trial court's interpretation of a statute, not an appeal from the decision of an administrative tribunal.

[6] Contrary to the majority's implication, Moss has nothing to do with the deference principle as it relates to forum shopping. Instead, in Moss, the court held that a claimant could not file separate, concurrent actions in the three forums provided by HRS chapter 431:10C. 86 Hawai'i at 65, 643 P.2d at 377. Nothing in this concurrence disagrees with that proposition.

significantly, this argument by the majority is an attack on the statute itself. Without question, the legislature chose to ensure access through a variety of avenues for claimants to bring disputes involving insurance coverage. On its face, HRS chapter 431:10C allows an insured to challenge a denial of insurance benefits in three alternative ways -- through arbitration, HRS § 431:10C-213 (2005); in an administrative hearing, HRS § 431:10C-212 (2005); or in the circuit court, HRS § 431:10C-314 (2005). The benefits of providing claimants with multiple options obviously outweighed any concerns the legislature had about choice of forum. In limiting our review of the statute based on this ground, the majority's rationale casts HRS chapter 431:10C in conflict with its own plain language.

Assuming, arguendo, the agency's application of a statute is entitled to consideration, the overriding rule is that this court is duty-bound to determine whether such application comports with the language of the statute. See State v. Lo, 66 Haw. 653, 659, 675 P.2d 754, 758 (1983) (stating that "the starting point for interpreting a statute is the language of the statute itself" (citation omitted)). Further, "[t]he rule of judicial deference . . . does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose," and "we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the

statute's implementation." In re Water Use, 94 Hawai'i at 145, 9 P.3d at 457.

In short, none of the cases cited by the majority hold that a court should defer to an agency's interpretation of a statute in the situation we face today. Under our well-established tenets, in construing an ambiguous statute, this court is obligated to review legislative history to determine legislative intent. Sullivan, 97 Hawai'i at 262, 36 P.3d at 806; State v. Putnam, 93 Hawai'i 362, 367, 3 P.3d 1239, 1244 (2000). As noted infra, the legislative history in this case provides this court with a dispositive basis for interpreting the statute at issue. Therefore, we need not defer to the insurance commissioner's interpretation of HRS § 431:10C-308.5(b) in this case.

The district court in Engle, whose decision the majority relies on, itself examined the legislative history of HRS § 431:10C-308.5(b), determining that such legislative history established that record reviews were not IMEs.[7] We are no less adept at construing our own state statutes by resort to legislative history than the district court in Engle, the case relied on by the majority.

[7] The majority maintains that Engle supports the insurance commissioner's interpretation that an IME includes a physical examination. See majority opinion at 17, 31. According to the majority, deference to the insurance commissioner is appropriate because the legislative history of HRS § 431:10-C-308 is silent on "whether a record review alone is an [IME]." See majority opinion at 29. However, this conclusion by the majority is inconsistent, because Engle itself examined the legislative history of HRS § 431:10-C-308, finding that it "establishe[d] that mere record reviews are not IMEs[,]" 402 F. Supp. 2d at 1164, and the majority relies on Engle.

II.

HRS § 431:10C-308.5 governs charges for the medical services enumerated in HRS § 431:10C-103.5(a) (2005), which services are deemed to be necessary and appropriate treatment for injuries sustained in a motor vehicle accident. HRS § 431:10C-308.5, entitled "Limitation on charges," provides in pertinent part:

> (a) As used in this article, the term "workers' compensation supplemental medical fee schedule" means the schedule adopted and as may be amended by the director of labor and industrial relations for workers' compensation cases under chapter 386, establishing fees and frequency of treatment guidelines. References in the workers' compensation supplemental medical fee schedule to "the employer", "the director", and "the industrial injury" shall be respectively construed as references to "the insurer", "the commissioner", and "the injury covered by personal injury protection benefits" for purposes of this article.
>
> (b) The charges and frequency of treatment for services specified in section 431:10C-103.5(a), except for emergency services provided within seventy-two hours following a motor vehicle accident resulting in injury, shall not exceed the charges and frequency of treatment permissible under the workers' compensation supplemental medical fee schedule. Charges for [IMEs], including record reviews, physical examinations, history taking, and reports, to be conducted by a licensed Hawaii provider unless the insured consents to an out-of-state provider, shall not exceed the charges permissible under the appropriate codes in the workers' compensation supplemental medical fee schedule. The workers' compensation supplemental medical fee schedule shall not apply to [IMEs] conducted by out-of-state providers if the charges for the examination are reasonable. The independent medical examiner shall be selected by mutual agreement between the insurer and claimant; provided that if no agreement is reached, the selection may be submitted to the commissioner, arbitration or circuit court. The independent medical examiner shall be of the same specialty as the provider whose treatment is being reviewed, unless otherwise agreed by the insurer and claimant. . . .

(Emphases added.) In sum, the HRS § 431:10C-308.5 requirements are that (1) the "charges and frequency of treatment" are governed by the workers' compensation fee schedule, (2) the examination be conducted "by a licensed Hawaii provider" unless

the claimant "consents to an out-of-state provider," (3) the examiner "be selected by mutual agreement[,]" (4) if the insurer and claimant cannot agree on an examiner, "the selection may be submitted to the commissioner, arbitration, or the circuit court[,]" and (5) the examiner must be of the same specialty as the provider.

The term "IME" is not explicitly defined in the statute. When a term is not statutorily defined, this court "may resort to legal or other well-accepted dictionaries as one way to determine [its] ordinary meaning." Leslie v. Bd. of Appeals of the County of Hawaiʻi, 109 Hawaiʻi 384, 393, 126 P.3d 1071, 1080 (2006). An IME is defined in the dictionary as "[a]n assessment of a person's physical condition and health that is made by an impartial healthcare professional, usu[ally] a physician." Black's Law Dictionary 785 (8th ed. 2004). However, this definition of IME does not expressly require a physical examination. An IME is described further in HRS § 431:10C-308.5(b) as "including" separate items such as "record reviews, physical examinations, history taking, and reports."[8]

The verb "to include" is defined as "to place, list, or rate as a component of a whole or of a larger group, class, or aggregate." Webster's Third New Int'l Dictionary 1143

[8] According to Petitioners/Plaintiffs-Appellees Margret Gillan and Howard Keller, M.D. (Petitioners), this clause was added in 1998, to curb abuse by insurers who circumvented the price limitations on IMEs by paying independent medical examiners separately for physical examinations and other services such as record reviews.

(unabridged 1993) (emphasis added). Hence, there are two possible applications of the term "including." Respondent espouses the interpretation of the district court, "that an IME involves an in-person examination[,]" and not record reviews alone. (Internal quotation marks omitted.) In oral argument, the insurance commissioner took the position that an IME is a physical examination, and the other enumerated procedures are identified for billing purposes only, apparently eschewing other applications of the term. The majority opts for the first Webster's definition, i.e., that a record review is "a component of" an IME, which must include a physical examination of the claimant. See majority opinion at 33 (holding that "an actual examination . . . is an essential aspect of an [IME] under HRS § 431:10C-308.5(b)").

The second Webster's definition comports with decisions holding that the term "including" connotes an illustrative, rather than exclusionary, list.[9] Under this definition, HRS

[9] The term "including" may (1) provide illustrations of a general description without imposing limitations on the general description, (2) clarify examples of what is to be included in a class, or (3) distinguish between members and non-members of a general class without limiting the general class. See Cummins Inc. v. United States, 377 F. Supp. 2d 1365, 1372-73 (Ct. Int'l Trade 2005). In that light, "including" has been deemed illustrative rather than exclusionary. See, e.g., United States v. Cornelio-Pena, 435 F.3d 1279, 1284 (10th Cir. 2006) (where legislative history indicated that the term "include" was not meant to indicate an exhaustive list, it was treated as illustrative and the court did apply expressio unius est exclusio alterius); McWhorter v. McWhorter, 58 S.W.3d 840, 845 (Ark. 2001) (declining to apply expressio unius est exclusio alterius to limit the definition of "income" for purposes of child support order in light of legislative purpose of "interpret[ing] income broadly for the benefit of the child" (internal quotation marks and citations omitted)); Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, No. SC07-1397, 2008 WL 2679160 at *10 (Fla. July 10, 2008) (holding that "[t]he phrase 'including motions to quash' logically implies that motions to quash are included in addition to, not to

continue...

§ 431:10C-308.5(b) would apply "to any medical review, whether it involved a physical exam[ination] or a record review[,]" as Petitioners contend. Petitioners and the court seemingly apply the second definition, relying on the decision by the Circuit Court of the First Circuit in Sakoda v. AIG Hawaii, Civ. No. 04-1-0436-03 (BIA) (Haw. Cir. Ct. July 25, 2005), in which Judge Bert Ayabe concluded that record reviews should be treated as IMEs. Specifically, they emphasize Judge Ayabe's declaration that

> [i]f a party chooses to do a records [sic] review only and not conduct a physical examination, that is [its] choice. However, that does not mean that [it] do[es] not have to meet the requirements of HRS § 431:10C-308.5(b).
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> To hold otherwise would undermine the "reason and spirit of the law" -- to insure a fair process of review for both sides involved by selecting a neutral, unbiased examiner with an adequate amount of knowledge.

Id. (emphasis added).

III.

Because there are two possible interpretations of the term "including," we must resort to legislative history to

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[9]...continue
the exclusion of, other permissible motions"); Paxson v. Bd. of Educ. of School Dist. No. 87, Cook County, Ill., 658 N.E.2d 1309, 1314 (Ill. App. 1995) (holding that "the word 'including,' in its most commonly understood meaning, [is] a term of enlargement, not of limitation"). One scholar recently explained that the term "including" inherently implies a partial list, declaring that

> it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, "It is hornbook law that the use of the word including indicates that the specified list . . . is illustrative, not exclusive." Puerto Rico Maritime Shipping Auth. v. I.C.C., 645 F.2d 1102, 1112 n.26 (D.C.Cir. 1981).

Texas Prop. & Cas. Ins. Guar. Ass'n/Southwest Aggregates, Inc. v. Southwest Aggregates, Inc., 982 S.W.2d 600, 608-09 (Tex. App. 1998) (quoting Bryan A. Garner, A Dictionary of Modern Legal Usage 431-32 (2d ed. 1995)) (emphasis added) (ellipsis in original).

determine which one of the two shall apply. Univ. of Haw. v. Befitel, 105 Hawai'i 485, 488, 100 P.3d 55, 58 (2004) (assuming, arguendo, that there is "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in [the] statute[,]" it is ambiguous and therefore, this court must "look to legislative history for assistance in construing the statute" (internal quotation marks and citations omitted)). Pertinent to this issue, in Engle, the district court concluded that "the term [IME] refers to a procedure that includes an in-person examination[,]" 402 F. Supp. 2d at 1162, based on (1) the "ordinary and natural" meaning of the term "including," id. at 1162-63, (2) the legislative history of HRS § 431:10C-308.5, id. at 1165-66, (3) case law equating physical examinations conducted pursuant to the rules of civil procedure to IMEs, id. at 1162-63, and (4) its concern that interpreting "including" as introducing an illustrative list would (a) prevent insurers from utilizing "in-house providers" to make coverage determinations, id. at 1163, and (b) "give insureds a veto power" over the choice of any reviewing physician, id.

IV.

In contrast to the district court's conclusion (1), the term "including" is ambiguous, as set forth above. Thus, under well-established tenets of Hawaii's case law, resort to legislative history was required. The district court's conclusion (2) did consider the legislative history of the 1998

amendments, which added the language in controversy here. The district court decided that the legislative intent was to prevent medical examiners conducting physical examinations from inflating costs by "unbundling" the services rendered for billing purposes.[10] It explained that, in its view,

> [t]he purpose of the 1998 amendments was to require that charges for an IME include charges for all parts of the IME, not just for the physical examination portion. Thus, the statutory restrictions on IME charges extended to any record review, history taking, or report that was part of the IME. The legislative history does not indicate that the amendment was intended to subject record reviews that are not part of IMEs to IME regulations. To the contrary, the Committee Report distinguishes between IMEs and parts of IMEs such as "the report or other ancillary procedures incident to the conducting of an IME."

Engle, 402 F. Supp. 2d at 1164 (quoting Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794) (emphases added). It is not disputed that the 1998 amendments were intended to prevent the unbundling of services provided by medical examiners with regard to IMEs.

The portion of the legislative report quoted above states that the 1998 amendments were designed to prevent examiners from circumventing cost containment measures by "submitting a separate charge for the report or other ancillary procedures incident to the conducting of an IME." Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794. It appears, then, that the legislature intended that all of the procedures conducted in association with a single IME would be included in a

[10] In this regard, the district court's understanding of the relevant legislative history is consistent with the position advocated by the insurance commissioner at oral argument.

single bill, which would be governed by the workers' compensation fee schedule. Hence, a record review must be considered a subsidiary part of the IME, not a separate and independent example of an IME. Based on legislative history, the term "including" in HRS § 431:10C-308.5(b), then, must be construed in consonance with the first dictionary definition of that term. See supra. In my view, this is dispositive of the question of whether a record review is an "IME" or not under this particular statute.

V.

A.

Consequently, I respectfully disagree with any extension of other reasoning in Engle because such reasoning may adversely affect the future application of the subject statute. As to its conclusion (3), the district court explained that "[n]umerous court orders . . . use 'IME' to refer to the 'Physical and Mental Examination' procedures set forth in [Hawai'i Rules of Civil Procedure (HRCP) Rule] 35 and [Federal Rules of Civil Procedure (FRCP) Rule] 35." Engle, 402 F. Supp. 2d at 1162 (citations omitted). The majority apparently agrees. See majority opinion at 17 (citing Engle for the proposition that "[c]ourts routinely use the term 'IME' to describe procedures in which in-person examinations were conducted[]").

In response to the foregoing, the majority asserts that it "merely cite[s] the Engle decision as illustrative of how

courts have generally employed the term [IME,]" and "do[es] not cite Engle for the proposition that HRCP Rule 35 and [FRCP] Rule 35 are in fact instructive in determining whether a record review alone constitutes an '[IME]' under HRS § 431:10C-308.5." Majority opinion at 17 n.6. To the contrary, Engle's conclusions on this point cannot be separated from its cited authority. As noted above, Engle's interpretation of an IME is based on references to HRCP Rule 35 and FRCP Rule 35.

Indeed, following this reasoning in Engle, the majority also rests on "the district court['s] observ[ation] in Engle . . . [that] there is in fact a logical distinction between a physical examination and a record review." Majority opinion at 31. The "logical distinction" that Engle drew between an IME and a record review was based on its conclusion that an "in-person examination is a necessary part of an IME." Engle, 402 F. Supp. 2d at 1164. But Engle reached this conclusion by comparing IMEs conducted pursuant to HRS § 431:10C-308.5 to examinations conducted under FRCP Rule 35 and HRCP Rule 35, thus confirming that Engle did treat HRCP Rule 35 and FRCP Rule 35 as "instructive." See id. at 1162.

However, in my view this comparison is inapposite. FRCP Rule 35, entitled "Physical and Mental Examinations," states that where the physical or mental condition of a party is at issue, the court may order that person to undergo a physical or

mental examination for good cause and with proper notice.[11] HRCP Rule 35 is virtually identical.[12] However, FRCP Rule 35 and HRCP Rule 35 examinations are plainly not analogous.

Significantly, the legislative history of HRS § 431:10C-308.5(b) is devoid of any reference to those rules. Both iterations of Rule 35 permit one party to hire any medical examiner it desires to examine the other and testify on behalf of the former. Manifestly, such an examiner is not "independent" in the sense mandated by HRS § 431:10C-308.5. The expert's fees are

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[11] FRCP Rule 35(a), entitled "Order for Examination," provides, in its entirety:

> (1) *In general.* The court where the action is pending may order a party whose mental or physical condition -- including blood group -- is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
>
> 2) *Motion and Notice; Contents of the Order.* The order:
>
> (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and
>
> (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(Emphases added.) (Italics in original.)

[12] HRCP Rule 35(a), pertaining to orders for physical and mental examinations, states, in its entirety, that

> [w]hen the mental or physical condition (including the blood group) or a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(Emphasis added.)

not limited in any way by the rules because they are not based on an underlying purpose of cost containment. The court orders the examination upon a motion by the parties. The moving party is not required to obtain the consent of the party to be examined as to the identity of the examiner. Thus, it is evident that examinations under the two Rule 35 versions are not comparable to IMEs under HRS § 431:10C-308.5.

Likewise, the cases cited by the district court are plainly inapposite. Sice v. Oldcastle Glass, Inc., No. Civ. A.03-BB-114, 2005 WL 82148, at *3 (D.Colo. Jan. 10, 2005), involved a FRCP Rule 35 "IME."[13] Similarly, the court in Glover v. Grace Pacific Corp., 86 Hawai'i 154, 160, 948 P.2d 575, 581 (App. 1997), simply assumed that the examination requested pursuant to HRCP Rule 35 was an IME.[14] The statement from Liftee v. Boyer, 108 Hawai'i 89, 94, 117 P.3d 821, 826 (App. 2004), quoted by the district court, finding that a doctor who had

[13] In Sice, a motion for an "IME" pursuant to FRCP Rule 35(a) was granted. However, it must be noted that it was the defendant who identified the requested examinations as IMEs. See Sice, 2005 WL 82148, at *1 (explaining that the court was clarifying its order "granting the defendant's Motion to Require Attendance at [FRCP Rule] 35 [IME] Appointments"). Morever, the Sice court was determining whether "good cause" existed for two of the examinations requested and whether they were the type of examinations contemplated by the rule. Id. at *2-3. Accordingly, that court's analysis does not inform the construction of HRS § 431:10C-308.5(b).

[14] In Glover, the ICA held that if the defendant had filed "a motion for an IME . . . pursuant to HRCP Rule 35," 86 Hawai'i at 159, 948 P.2d at 580, it would have been granted because "Glover's physical injuries and damages were in controversy" and his "claim of physical injuries provided good cause for an IME order[,]" id. at 160, 948 P.2d at 581 (footnote and internal quotation marks omitted).

performed a physical examination "was doing a Rule 35 IME," is incomplete.[15]

B.

As to point (4)(a) of the district court's analysis, on their faces, the restrictions applicable to an IME would apply only where the schedule governing workers' compensation applies. Contrary to the district court's assertion that defining a record review as an IME would prevent insurers from "us[ing] in-house providers at all," Engle, 402 F. Supp. 2d at 1163, it is manifest that the workers' compensation schedule does not apply to examinations by in-house personnel who are compensated directly by the insurer. Additionally, an employee of the insurer could not be deemed an "independent" examiner. Thus, it follows that the insurer's employee could not conduct an independent medical examination under HRS § 431:10C-308.5. Finally, the term "medical" indicates that the examination is to be performed by a medical professional, not an insurance adjuster. Consequently,

[15] In discussing Liftee, the district court excerpted a transcript of proceedings in which the first circuit court seemingly correlated a HRCP Rule 35 examination to an IME. See Engle, 402 F. Supp. 2d at 1162 (quoting Liftee, 108 Hawai'i at 94, 117 P.3d at 826). However, the full quotation is far more ambiguous. The first circuit court found that the doctor, in examining the plaintiff, "was doing a Rule 35 IME or medical examination," such that he was defendant's agent, "and therefore [the doctor's report] becomes an admission under [Hawai'i Rules of Evidence Rule] 803(a) albeit a vicarious admission through an agent." Liftee, 108 Hawai'i at 93, 117 P.3d at 825 (emphasis added). With all due respect, this remark, taken in context, cannot be reasonably equated with a definitive conclusion that a HRCP Rule 35 examination is the same or similar to an IME under HRS § 431:10C-308.5. Furthermore, inasmuch as the first circuit court in Liftee was applying the Hawai'i Rules of Evidence-related hearsay exceptions, and was not construing either HRCP Rule 35 or HRS § 431:10C-308, this statement cannot be accorded any weight.

it is evident that an in-house review of claims is not an IME and is therefore not affected by the requirements of HRS § 431:10C-308.5(b).

As to point (4)(b) of the district court's analysis, again the statute's requirements do not apply to insurers' paid personnel. The district court's apparent concern that extending HRS § 431:10C-308.5 to procedures (if independently denominated as an IME) other than physical examinations would require insurers "to retain licensed Hawaii providers absent insureds' consent[,]" id. at 1163, and empower claimants to "veto" the insurers' attempts to retain examiners of their choice to evaluate claims, id., then, is without basis. The district court does not acknowledge the express "independent" language in the statute. Moreover, the statute plainly states that if the parties cannot agree on a provider to perform the IME, "the selection may be submitted to the commissioner, arbitration, or circuit court." HRS § 431:10C-308.5(b). Hence, contrary to the district court's decision, the claimant does not have any "veto power" at all that would impinge on an insurers' choice of in-house personnel. See Engle, 402 F. Supp. 2d at 1163.

Based on the foregoing, I would respectfully decline to adopt these aspects of the district court's construction of HRS § 431:10C-308.5.

VI.

Finally, I note that the court's belief that the "reason and the spirit of the law" support the view that a record review should be treated as an IME, is not without appeal. Two significant propositions are evident in the legislative history. First, the legislature intended to contain the costs of IMEs. In 1992, the legislature amended portions of HRS chapter 431, article 10C, relating to motor vehicle insurance. See 1992 Haw. Sess. L. Act 124, §§ 1-18, at 210. Related to those amendments, the House Committees on Consumer Protection and Commerce and Judiciary reported that the amendments served dual purposes, namely "reducing litigation [in combination] with medical cost containment," with the ultimate goal being that ninety percent of motor vehicle insurance claims would be resolved without litigation. Hse. Stand. Comm. Rep. No. 1271-92, in 1992 House Journal, at 1391 (emphases added). To that end, "[t]he major provisions" of the bill included the "adoption of a fee schedule modeled on the worker's [sic] compensation medical fee schedule[.]" Id.[16] The language central to this dispute, viz., "including record reviews, physical examinations, history taking, and reports," was added to HRS § 431:10C-308.5(b) in 1998. 1998

[16] Similarly, the Conference Committee considering the bill announced that its "purpose . . . [was] to amend the no-fault [insurance] law with the intent of reducing and stabilizing the soaring cost of motor vehicle insurance[.]" Sen. Conf. Comm. Rep. No. 161, in 1992 Senate Journal, at 825 (emphasis added). The Conference Committee also reiterated the original intent behind the no-fault insurance scheme, "to keep ninety per cent of motor vehicle accident victims out of the tort recovery system while providing them with adequate and fair benefits." Id. at 826.

Haw. Sess. L. Act 275, § 26, at 935.[17] The Conference Committee believed that this change, with the other amendments, would "continu[e] the trend of decreasing automobile insurance rates of [Hawaii's] driving public[.]" Hse. Conf. Comm. Rep. No. 117, in 1998 House Journal, at 999.

Second, the legislature intended to reduce litigation costs. In 2000, HRS § 431:10C-308.5(b) was amended, in relevant part, to add the provisions related to the selection of the independent medical examiner, with the preference for mutual selection by the claimant and the insurer. See 2000 Haw. Sess. L. Act 138, § 2, at 270. The Conference Committee reported that the bill was intended

> to establish a fair selection process that favors selection by agreement. Where the parties are unable to agree, a neutral forum (Department of Commerce and Consumer Affairs, arbitration, or circuit court) will make the selection. It is emphasized that the selection should not be a perfunctory matter, but that every effort should be made to select a neutral examiner with a balance [sic] approach that favors neither insurer or [sic] claimant. Those examiners who have acquired reputations for favoring one side or the other should not be selected. Examiners . . . that do not rely heavily on IME income that might affect bias, are to be favored.

Hse. Conf. Comm. Rep. No. 37, in 2000 House Journal, at 865 (emphases added). As with the 1992 and 1998 amendments, the

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[17] The Senate Committee on Commerce, Consumer Protection, and Information Technology reported that the bill "[l]imits charges for [IMEs] to work that includes record reviews, physical examinations, history taking and reports[.]" Sen. Stand. Comm. Rep. No. 3143, in 1998 Senate Journal, at 1276. However, as noted before, the reach of HRS § 431:10C-308.5(b) is limited. The Conference Committee reported that those limitations were "designed to eliminate abuses and excessive charges associated with [IMEs]. The bill clarifies that the workers' compensation fee schedule charge allowable for IMEs may not be exceeded by submitting a separate charge for the report or other ancillary procedures incident to the conducting of an IME." Hse. Conf. Comm. Rep. No. 117, in 1998 House Journal, at 1000 (emphasis added).

House Committee on Consumer Protection and Commerce related that "the intent of this measure is to promote judicial economy, conserve administrative resources, and streamline the resolution of disputes." Hse. Stand. Comm. Rep. No. 639-00, in 2000 House Journal, at 1209 (emphasis added).

As recognized in oral argument in the instant case, a record review may be a sufficient basis for a determination of whether or not the medical treatment being claimed is appropriate and reasonable. The selection of a neutral examiner in such circumstances would obviate much of the controversy that was engendered in this case. However, the treatment of a record review as an event independent from that of a physical examination in the definition of IME in HRS § 431:10C-308.5(b) would require legislative amendment. Such an amendment would be in keeping with the objective of "promot[ing] judicial economy, conserv[ing] administrative resources, and streamlin[ing] the resolution of disputes." Hse. Stand. Comm. Rep. No. 639-00, in 2000 House Journal, at 1209.