

Bill as Introduced

HB 1371 - AS INTRODUCED

2010 SESSION

10-2435

01/04

HOUSE BILL **1371**

AN ACT allowing recording of an examination by health care providers performing independent medical examinations.

SPONSORS: Rep. Long, Hills 10

COMMITTEE: Labor, Industrial and Rehabilitative Services

ANALYSIS

This bill allows an injured employee to record or have a witness present during the independent medical examinations required under workers' compensation.

Explanation: Matter added to current law appears in **bold italics**.
Matter removed from current law appears ~~(in brackets and struck through)~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT allowing recording of an examination by health care providers performing independent medical examinations.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Workers' Compensation; Independent Medical Examinations. Amend RSA 281-A:38, II to read
2 as follows:

3 II. Any health care provider conducting independent medical examinations under this
4 chapter shall be certified by the appropriate specialty board as recognized by the American Board of
5 Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by
6 such board. The health care provider shall maintain a current practice in that area of specialty. The
7 independent medical examination shall take place within a 50-mile radius of the residence of the
8 injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile
9 radius is necessary to obtain the services of a provider who specializes in the evaluation and
10 treatment specific to the nature and extent of the employee's injury. The injured employee shall not
11 be required to submit to more than 2 independent medical examinations per year, unless within the
12 discretion of the commissioner, more than 2 examinations are necessary. *An injured employee*
13 *shall have the right to record the examination or have a witness present during such*
14 *examination.*

15 2 Effective Date. This act shall take effect January 1, 2011.

Amendments

Amendment to HB 1371

1 Amend RSA 281-A:38, II as inserted by section 1 of the bill by replacing it with the following:

2

3 II. Any health care provider conducting independent medical examinations under this
4 chapter shall be certified by the appropriate specialty board as recognized by the American Board of
5 Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by
6 such board. The health care provider shall maintain a current practice in that area of specialty. The
7 independent medical examination shall take place within a 50-mile radius of the residence of the
8 injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile
9 radius is necessary to obtain the services of a provider who specializes in the evaluation and
10 treatment specific to the nature and extent of the employee's injury. The injured employee shall not
11 be required to submit to more than 2 independent medical examinations per year, unless within the
12 discretion of the commissioner, more than 2 examinations are necessary. *An injured employee*
13 *shall have the right to record the examination or have a witness present during such*
14 *examination which shall be the injured employee's choice.*

Speakers

Hearing Minutes

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

PUBLIC HEARING ON HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations.

DATE: January 21, 2010

LOB ROOM: 307 **Time Public Hearing Called to Order:** 1:00 p.m.

Time Adjourned: 2:28 p.m.

(please circle if present)

Committee Members: Reps. Goley, S. Kelly, Gorman, Hofemann, J. Knowles, M. Knowles, Brennan, Craig, Weed, Rice, Mears, Infantine, Daniels, Bishop, Bridle, Gleason, Dumaine, H. Richardson, Pellegrino and Sedensky.

Bill Sponsors: Rep. Long, Hills 10

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Pat Long - Prime sponsor of the bill. Supports the bill. He speaks and advocates for employees. After independent medical exams, many workers are denied workers compensation. Many times they are not allowed to have an independent examiner go with them to the exam. This bill allows recording the exam.

Q: Can the recording be video or audio? ANS: Yes.

Q: Have there been objections to this? ANS: Yes, some doctors object.

Q: Who pays for the examination? ANS: I believe the insurance carrier does.

* **Stuart J. Glassman, NH Medical Society** - Opposes the bill. Current wording says that they can have someone present. This would mandate the practice of medicine for one part of medicine, but not others. This is a medical evaluation and has been upheld as such in other states. This bill would legislate medical practice. Also, the wording says record or have a witness. What if a recording were altered after the fact? This bill would only add to the confusion. You would have to hold the same status for all exams.

Q: Don't we often have laws that are restricted to certain circumstances? ANS: The medical society would not support mandating this in medical practice. Who knows what could happen to that recording. The Board of Medicine already has a process.

Q: I always bring a witness in during medical exams. Are you saying a Doctor could refuse to allow this? ANS: Yes, based on the regulations of the Board of Medicine.

Q: Aren't you putting an undue cost upon the employee? Couldn't a doctor refuse to do the exam? ANS: It doesn't specify.

Q: Could there be a difference between one exam of the patient, and another exam? ANS: Yes.

Q: Then why wouldn't it be prudent to have a recording of the exam? ANS: The person is entitled to get a copy of the report?

Q: The cost of bringing an independent examiner falls on the person being examined? ANS: Yes.

Q: You're not treating the individual as a patient. ANS: Our reports are for the medical questions only. The financial ramifications are a separate matter.

*** Davis Clark, Dr.** - Opposes the bill. He does independent medical examinations. He has allowed patients to have someone in the room with them, although it's not recommended. He has allowed recordings four times, once by an attorney that got somewhat out of hand. I didn't make my own, and my request for a copy was ignored.

Q: Have you ever had a recording used against you? ANS: No.

Q: What are your key concerns? ANS: 1. A slippery slope about regulating medicine. 2. A concern about getting a copy of a recording so it can't be manipulated.

Q: Can the patient get your report from you? ANS: I'm not allowed by regulation, but I tell them how they can get it from the insurance carrier.

Q: Could the carrier refuse? ANS: I don't see how they could. And I save a hard copy.

Q: So if one copy was retained and one given to the patient would be more palatable? ANS: Yes.

George Roussos, Orr and Reno - Opposes the bill. Anything that would interfere with unfettered examination would be a great concern. This bill would make it law that you would have to allow a witness. Workers compensation issues are a legal formality. You don't need a recording. The independent medical evaluation seems to be working well. This could make a more hostile process. Is this something that's necessary?

Q: Who picks the examiner? ANS: The insurance carrier or the employer.

Q: So if I don't like the examiner and refuse, I lose? ANS: Yes, basically.

Q: Are questions directly related to the injury? ANS: In taking questions, they may seem unrelated.

Q: If you found some condition unrelated to the injury, would that information be part of the IME? ANS: I would include it as an addendum.

Q: Don't you have a confidentiality responsibility? ANS: It would be worded non-specifically, with a recommendation that the patient see their health provider for further treatment.

Q: Is the purpose of the IME to confirm the injury, or to find another cause for the condition? ANS: The responsibility is to answer medical questions, not legal questions.

Q: Well someone didn't believe the original claim. Where are the ethics? ANS: Doctors in good faith can come to different conclusions. Doctors don't report to suit one side or the other.

Maureen Manning, Injured Workers as an Attorney - Supports the bill. Sometimes injuries are devastating. IME's are not really independent. Some of these doctors are paid \$1,000 to \$2,000 per exam. Workers are required to attend or lose their benefits. Some IME doctors consider it their job to "cross-examine" the workers. Many are defense-oriented. Their client is the insurance carrier, to whom they have a contractual obligation. Sometimes it takes 4 - 5 months to get a copy of an IME report. Some doctors note things on reports for which the patient says the doctor never tested, or never asked the patient about. For some 8 - 10 page reports, the patient reports that the entire exam lasted only five minutes.

Q: What percentage of annual claims result in IME's? ANS: Last year - 42,000 injuries reported. She would say that around half of reports wind up with IME's.

Q: Doesn't the IME doctor have to allow a witness? ANS: No, that's not so. And it would not be affordable for most people to bring their own health provider.

Q: What about the slippery slope concern? ANS: We're talking about regulating a medical business, not regulating medical practice.

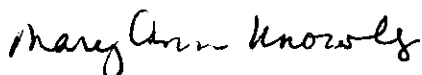
Q: What about using a fact-finder process? ANS: I think that's interesting, but how would it be administered? There are a lot of cases. But it would make it more independent.

Peter Webb - Supports the bill. Represents injured workers. 60% of his cases have IME's. Once a physician mistook him for an insurance carrier, and asked what kind of "spin" he should put on the claim.

*** Doug Gravel, NH Attorney General** - Supports the bill. This bill mandates nothing. It simply allows the possibility that the injured worker will have a complete record of the exam. There is not doctor - patient relationship, according to the doctors.

Q: What about saying: "the examination shall be recorded and a copy given to the examiner and examinee." Wouldn't that remove the adversarial element? ANS: Yes, it could take it off the table.

Respectfully submitted,



Rep. Mary Ann Knowles
Clerk

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

PUBLIC HEARING ON HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations.

DATE: 1-21-10

LOB ROOM: 307 **Time Public Hearing Called to Order:** 1:03

Time Adjourned: 2:28

(please circle if present)

Committee Members: Reps. Goley, S. Kelly, Gorman, Hofmann, J. Knowles, M. Knowles, Brennan, Craig, Weed, Rice, Mears, Infantine, Daniels, Bishop, Bridle, Gleason, Dumaine, H. Richardson, Pellegrino and Sedensky.

Bill Sponsors: Rep. Long, Hills 10

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

- ① Rep. Pat Long - sponsor - supports
He speaks and advocates for employees. After independent medical exams, many workers are denied workers compensation. Many times they are not allowed to have an independent examiner go with them to the exam. This bill allows recording the exam.
Q: Can the recording be video or audio?
R: Yes.
Q: Have there been objections to this?
R: Yes, some doctors object.
Q: Who pays for the examination?
R: I believe the insurance carrier does.

- ② * Stuart Glassman NH Medical Society - opposed
current wording says that they can have someone present. This would mandate the practice of medicine for one part of medicine, but not others. This is a medical evaluation and has been upheld as such in other states. This bill would legislate medical practice. Also, the wording says record or

P. 2
have a witness. What if a recording were altered after the fact?
This bill would only add to the confusion. You would have to hold the same status for all exams.

Q: Don't we often have laws that are restricted to certain circumstances.

R: The medical society would not support mandating this in medical practice. Who knows what could happen to that recording. The Board of Medicine already has a process.

Q: I always bring a witness in during medical exams. Are you saying a doctor could refuse to allow this?

R: Yes, based on the regulations of the Board of Medicine.

Q: ~~So this law would prevent someone~~ Aren't you putting an undue cast upon the employee. Couldn't a doctor refuse to do the exam?

R: It doesn't specify.

Q: Could there be a difference between one exam of the patient and another exam.

R: Yes.

Q: Then why wouldn't it be prudent to have a recording of the exam?

R: The person is entitled to get a copy of the report.

Q: The cost of bringing an independent examiner falls on the person being examined?

R: Yes.

Q: You're not treating the individual as a patient.

R: Our reports are for the medical questions only. The financial ramifications are a separate matter.

③ Davis Clark - private citizen - opposes

He does independent medical examinations. He has allowed patients to have someone in the room with them, although it's not recommended. He has allowed recordings four times, once by an attorney that got somewhat out of hand. I didn't make my own, and my request for a copy was ignored.

Q: Have you ever had a recording used against you?

R: No.

Q: What is your key concerns?

R: 1) A slippery slope about regulating medicine
2) A concern about getting a copy of a recording so it can't be manipulated.

Q: Can the patient get your report from you?

R: I'm not allowed by regulation, but I tell them how they can get it from the insurance carrier.

Q: Could the carrier refuse?

R: I don't see how they could. And I save a hard copy.

Q: So if one copy was retained and one given to the patient would be more palatable.

R: yes.

④ George Roussos Orr and Reno - opposes

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Q: Who picks the examiner

R: The insurance carrier or the employer.

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R: Doctors in good faith can come to different conclusions. Doctors don't report to suit one side or the other.

⑤ Maureen Manning - attorney - supports

Represents injured workers. Sometimes injuries are devastating. ^{IME's} They are not really independent. Some of these doctors are paid \$1,000 to \$2,000 per exam. Workers are required to attend or lose their benefits. Some IME doctors consider it their job to "cross-examine" the workers. Many are defense-oriented. Their client is the insurance carrier, to whom they have a contractual obligation. Sometimes it takes 4-5 months to get a copy of an IME report. Some doctors note things on reports for which the patient says the doctor never tested, or never asked the patient about. For some 8-10 page reports, the patient reports that the entire exam lasted only five minutes.

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R: Last year - 42,000 injuries reported. She would say that around half of reports wind up with IME's.

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R: No, that's not so. And it would not be affordable for most people to bring their own health provider.

Q: What about the slippery slope concern?

R: We're talking about regulating a medical business, not regulating medical practice.

Q: What about using a fact-finder process?

R: I think that's interesting, but how would it be administered? There are a lot of cases. But it would make it more independent.

⑥ Peter Webb - lawyer - supports

Represents injured workers, 60% of his cases have IME's. Once a physician mistook him for an insurance carrier, and asked what kind of "spin" he should put on the claim.

⑦ * Doug Grauel - NHAJ - attorney - supports

This bill mandates nothing. It simply allows the possibility that the injured worker will have a complete record of the exam. There is no doctor-patient relationship, according to the doctors.

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Sub-Committee Minutes

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

SUBCOMMITTEE WORK SESSION ON HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations.

DATE: February 2, 2010

Subcommittee Members: Reps. Goley, Kelly, Bishop, Brennan, Bridle, Daniels, Infantine, Mears, Pellegrino, Rice, Richardson, Sedensky, and Weed

Comments and Recommendations: Please see attached notes.

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep. Charles Weed
Subcommittee Chairman/Clerk

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

SUBCOMMITTEE WORK SESSION ON HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations. *Perhaps consider adding amendment that*

DATE: 2-2-10

the medical examiner receive a copy of recording, as well as the person being examined. Could the witness be a lawyer? In recording related to audio? video? steno-graphers? Psychology changes?

Subcommittee Members:

Reps.

If a or is unwilling to be recorded, could that be reason to find another physician. What info will come from recording about direct physical examination? Video recording will take 2 people. A worker who requests a right to record who is refused - if the worker leaves work will end immediately - if a process occurs now to try to reconcile differences about interpretation of

Comments and Recommendations:

Amendments:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

a medical report. Is the PINE independent if paid by the insurance carrier? What ethical standards are required of NME's "Indep Bd of med specialties"?

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Diff of opinions may be more related to diff info available rather than who is paying the bill.

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

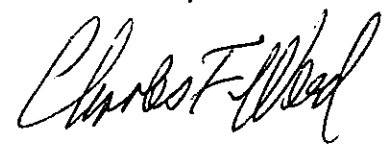
Seconded by Rep.

Vote:

Will this bill fix the problem? Can we agree about what the problem is?

adj 11:52

Respectfully submitted,



Rep.

Subcommittee Chairman/Clerk

Testimony

January 20, 2010

Jeff Goley, Chair and Members of the Committee
House Labor, Industrial & Rehabilitation Services Committee
Legislative Office Building, Room 307
Concord, NH 03301

Re: HB1370 & 1371

Dear Chair Goley and Members of the Committee,

I am an attorney representing injured workers in workers' compensation cases. I have been in practice since 1992. Workers' compensation makes up about half of my practice.

Please accept this letter in support of HB1370 and HB1371. Both bills deserve the committee's support and I recommend a vote of Ought to Pass for the reasons that follow.

HB1370

HB1370 is an information-gathering tool that will ultimately allow hearing officers to more accurately weigh information provided in the context of workers' compensation hearings. Independent Medical Examinations ("IMEs") are often provided as written reports only, with no opportunity for cross-examination.

Anecdotal evidence suggests that a small group of physicians are hired to provide testimony that is almost always unfavorable to the injured worker. Real data, however, do not exist in the public realm. HB1370 would allow parties to better judge the usefulness of the information provided in the form of IMEs by providing real data to confirm or deny the anecdotal evidence.

The bill would impose no public cost, or cost to insurance carriers or injured workers, and essentially the same information is already routinely provided by some of the same IME doctors in Superior Court litigation. I am unaware of any good reason to oppose this legislation.

HB1371

HB1371 is also intended to introduce fairness into the IME process. IME physicians sometimes attribute statements to injured workers that injured workers themselves do not recall making, or do not recall making in the context suggested in the IME report. Injured workers also frequently report feeling belittled or humiliated by IME doctors who come across as arrogant, dismissive, or otherwise biased. Many IMEs are described by injured workers as lasting only a few minutes, whereas the IME reports appear to describe a very thorough examination.

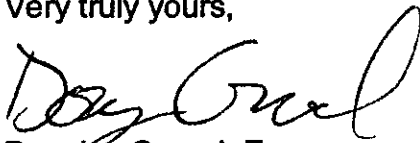
Hearing officers are generally left with no way to judge whether an IME examination was brief to the point of absurdity, as injured workers sometimes relate, or whether they are the comprehensive examinations that they pretend to be. Similarly, it can be impossible to reconcile the tone described by the injured worker with the tone of the written report.

Allowing the recording or witnessing of IMEs at the discretion of the injured worker will simply add a measure of validity-checking to a process that is otherwise cloaked in secrecy and, from the perspective of the injured worker, intimidation. It will impose no burden on insurance carriers or IME doctors, and it leaves control of the confidentiality of the process in the hands of the person most affected: the injured worker.

Thank you for your consideration of these bills.

Please do not hesitate to contact me if you have any questions or would like to discuss these bills further.

Very truly yours,



Douglas Grauel, Esq.
dgrauel@grauellaw.com

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Guidelines of Conduct

Each physician certified by the American Board of Independent Medical Examiners (ABIME) is expected to comply with these guidelines of conduct. Accordingly, each physician should:

1. be honest in all communications;
2. respect the rights of the examinee and other participants, and treat these individuals with dignity and respect;
3. at the examination:
 - a. introduce him/herself to the examinee as the examining physician;
 - b. advise the examinee they are seeing him/her for an independent medical examination, and the information provided will be used in assessment and presented in a report;
 - c. provide the examinee with the name of the party requesting the examination;
 - d. advise the examinee that no treating physician-patient relationship will be established;
 - e. explain the examination process;
 - f. provide adequate draping and privacy if the examinee needs to remove clothing for the examination;
 - g. refrain from derogatory comments; and
 - h. close the examination by telling the examinee that the examination is over and ask if there is further information the examinee would like to add;
4. reach conclusions that are based on facts and sound medical knowledge, and for which the independent medical examiner has adequate qualifications to address;
5. be prepared to address conflict in a professional and constructive manner;
6. never accept a fee for services which is dependent upon writing a report favorable to the referral service;
7. and maintain confidentiality consistent with the applicable legal jurisdiction.

*For information on becoming certified as an Independent Medical Examiner by ABIME, contact us at:
Toll Free: 877-523-1415 or 304-523-1415 or Fax: 304-523-1824
E-mail: info@abime.org or Visit www.abime.org*



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Opinion 10.03 - Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations

When a physician is responsible for performing an isolated assessment of an individual's health or disability for an employer, business, or insurer, a limited patient-physician relationship should be considered to exist. Both "Industry Employed Physicians" (IEPs), who are employed by businesses or insurance companies for the purpose of conducting medical examinations, and Independent Medical Examiners" (IMEs), who are independent contractors providing medical examinations within the realm of their specialty, may perform such medical examinations.

Despite their ties to a third party, the responsibilities of IEPs and IMEs are in some basic respects very similar to those of other physicians. IEPs and IMEs have the same obligations as physicians in other contexts to:

(1) Evaluate objectively the patient's health or disability. In order to maintain objectivity, IEPs and IMEs should not be influenced by the preferences of the patient-employee, employer, or insurance company when making a diagnosis during a work-related or independent medical examination.

(2) Maintain patient confidentiality as outlined by Opinion 5.09, "Industry Employed Physicians and Independent Medical Examiners."

(3) Disclose fully potential or perceived conflicts of interest. The physician should inform the patient about the terms of the agreement between himself or herself and the third party as well as the fact that he or she is acting as an agent of that entity. This should be done at the outset of the examination, before health information is gathered from the patient-employee. Before the physician proceeds with the exam, he or she should ensure to the extent possible that the patient understands the physician's unaltered ethical obligations, as well as the differences that exist between the physician's role in this context and the physician's traditional fiduciary role.

IEPs and IMEs are responsible for administering an objective medical evaluation but not for monitoring patients' health over time, treating patients, or fulfilling many other duties traditionally held by physicians. Consequently, a limited patient-physician relationship should be considered to exist during isolated assessments of an individual's health or disability for an employer, business, or insurer.

The physician has a responsibility to inform the patient about important health information or abnormalities that he or she discovers during the course of the examination. In addition, the physician should ensure to the extent possible that the patient understands the problem or diagnosis. Furthermore, when appropriate, the physician should suggest that the patient seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care. (1)

Report: Issued December 1999 based on the report "Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations," adopted June 1999.

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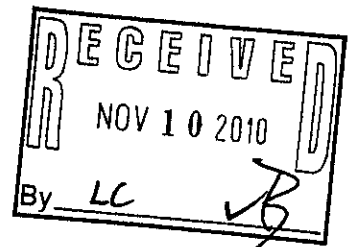
From American Medical News



State of New Hampshire

GENERAL COURT

CONCORD



MEMORANDUM

DATE: November 1, 2010

TO: Honorable John H. Lynch, Governor
Honorable Terie Norelli, Speaker of the House
Honorable Sylvia B. Larsen, President of the Senate
Honorable Karen O. Wadsworth, House Clerk
Tammy L. Wright, Senate Clerk
Michael York, State Librarian

FROM: Representative Patrick T. Long, Chairman

SUBJECT: Final Report on HB 1371, Chapter 227:2, Laws of 2010

Pursuant to Chapter 227:2, Laws of 2010, enclosed please find the Final Report of the Committee to Study Certain Aspects of Independent Medical Examinations.

If you have any questions or comments regarding this report, please do not hesitate to contact me.

I would like to thank those members of the committee who were instrumental in this study. I would also like to acknowledge all those who testified before the committee and assisted in our study.

PL:dm
Enclosures

cc: Members of the Committee:
Sen. Bette R. Lasky
Rep. Jeffrey P. Goley
Rep. Russell D. Bridle

FINAL REPORT

Committee to Study Certain Aspects of Independent Medical Examinations HB 1371, Chapter 227:2, Laws of 2010

November 1, 2010

HB 1371 (Chapter 227:2, Laws of 2010) established a committee to study certain aspects of Independent Medical Examinations. The charge of the committee was to study whether allowing an injured employee to record the independent medical examination (IME) required by workers' compensation is feasible and whether independent medical examination practitioners who perform 10 or more examinations in a calendar year should be required to file an annual report with the insurance department.

PURPOSE OF STUDY:

ISSUE: *Feasibility of recording:* The ability for the injured employee to qualify disagreements with the IME practitioners report.

ISSUE: *Feasibility of IME practitioners to submit an annual report:* Gathering information to assure IME's are independent with regard to the injured employee, insurance company and IME practitioner.

PROCESS AND PROCEDURES: The following is a review of each meeting. The minutes are attached with more in-depth information.

1st Meeting: August 10, 2010 10:00 a.m. State House Room 103

Representative Long elected Chairman

Representative Goley elected Clerk

Review of committee charge

Testimony on issues and/or questions that may need to be addressed.

Minutes attached

2nd Meeting: September 21, 2010 10:00 a.m., LOB Room 307

The committee agreed to hear testimony broken down as follows:

1. Feasibility of audio/video recordings

2. Feasibility of report filings

Testimony with questions from the committee proceeded.

Minutes attached

3rd Meeting: October 12, 2010 10:00 a. m. LOB Room 307

The committee proceeded with listening from those who have not offered testimony at prior meetings and the public was allowed to testify with new information that wasn't offered in past meetings.

The committee deliberated on all testimony heard and consensus was formulated by the committee as to the feasibility of both recordings and reports.

Minutes attached

FINDINGS:

There were 49,950 reported injuries while on the job in New Hampshire. Although we do not know the exact number of Independent Medical Examinations that took place in 2009, it would appear that hundreds of these examinations take place each year. Under the New Hampshire worker's compensation, the injured worker has the burden of proof regarding the causal relationship of the injury to employment and the necessity of medical treatment. It is clear that the injured employee retains the right to privacy even though they are in the worker's compensation system. As such, the injured worker alone should have the right to record examinations at their choice.

In an Independent Medical Examination, there is no patient-physician relationship as the doctors are hired by the insurance carriers or employers. These examinations are essentially part of an adversarial process. Also, the injured worker will lose indemnity benefits if they fail to attend the examination and the reports of the examination are often entered into evidence at the Department of Labor in the hearing process so these examinations are a significant part of the process.

Today's technology would allow for recording without obstruction to the examination. Any recording should not interfere with the examination and if the injured worker chooses to have both a witness and a recording, it should be done in such a way as to not interfere with the examination.

The injured workers have a right to both accountability and transparency. The Department of Labor is charged with processing the claims of injured workers and the committee believes that both recording of the examinations and some type of reporting by the doctors who do multiple examinations in a year would be helpful in fairly and accurately determining entitlement to benefits.

As to the issue of reporting of the independent medical examiners, the committee agrees that insurance carrier, self-insured employer or employer group, or claims adjusting company handling workers' compensation claims have a right under the law to these examinations. The examinations are supposed to be "independent" for the system as laid out in the statute to work. Although the information of payment alone is not determinative, the committee believes that this information would be helpful to the Department of Labor. The committee believes that more information on who is paying for these examinations and the findings of these doctors will help ensure that the examinations are independent.

RECOMMENDATIONS:

1. Recording of Independent Medical Examination, at the choice and expense of the injured worker, should be allowed with notice to the doctor.

2. Reports should be filed with the Department of Labor by doctors performing 10 or more Independent Medical Examinations a year indicating which insurance carrier, self-insured employer or employer group, or claims adjusting company handling workers' compensation claims retained them, how compensated for each examination, whether they were hired by a vendor and who the vendor is, whether the IME practitioners medical opinion differs from the treating physician, favors the insurance carrier, self-insured employer or employer group, or claims adjusting company handling workers' compensation claims retained them or a mix finding. The committee believes that the reports shall be made public.

APPENDICES LISTING

Appendix A: Civil Suit Audio Allowed (97-C-0135)

Appendix B: Amount of Exams per IME Practitioner (SEAK)

Appendix C: IME Fee Schedule (example: Dr. Glassman)

Appendix D: Plaintiff, Audio/No Witness and Practitioner Audio and Witness (Donna Duggan)

Appendix E: Video Allowed (Oklahoma Supreme Court)

Appendix F: Audio Only (US District Court, Tennessee)

Appendix G: Allowed Video and Witness (New York State Article 7)

Appendix H: 2009 Injured Employee Report (NH DOL)

HB 1371, Chapter 227:2, Laws of 2010
Committee to Study Certain Aspects of Independent Medical Examinations

COMMITTEE MEMBERS:

Senator Bette Lasky
Representative Jeffery Goley
Representative Patrick Long
Representative Russell Bridle

The committee members would like to thank the following individuals for their contributions to this report:

Dr. Stuart Glassman

Dr. Davis Clark

Mr. Peter Sheffer

Ms. Karen Malkey

Dr. Vladimir Sinkov

Attorney Peter Webb

Attorney Paul Salafia

Ms. Ellen Shemitz

Ms. Janet Monahan

Mr. Martin Jenkins, NH DOL

Ms. Karen Malkey

Ms. Jen Young

Attorney Maureen Manning

Attorney Doug Graul

Study Committee Minutes: HB 1371

August 10, 2010 at 10: a. m.

State House Room 103

Committee to study whether allowing an injured employee to record the independent medical examination (IME) required by workers' compensation is feasible and whether independent medical examination practitioners who perform 10 or more examinations in a calendar year should be required to file an annual report with the insurance department.

Committee Members Present: Senator Lasky, Representative Goley and Representative Long

Committee called to order by Senator Lasky at 11:04

Senator Lasky moved to nominate Representative Long as Chairman, 2ND Representative Goley

Motion carried

Senator Lasky moved to nominate Representative Goley as Clerk, 2ND Representative Long

Motion carried

Representative Long gave an overview on what the committee is charged with.

Mr. Martin Jenkins with NH DOL stated currently injured employees are allowed to bring a witness but no recording.

Representative Goley, Long and Senator Lasky discussed testimony from the House and Senate hearings, as it relates to IME's recordings.

Ms. Karen Malkey from the NH Orthopedic Center gave the Committee a few questions to consider:

1. Is recording a part of the medical record?
2. Who will cover expense?
3. Who owns the recording?
4. With filling out a report: Practitioners don't always know who they are working for.

Ms. Jen Young with the NH Insurance Department stated that the reports should go to the Labor Department and not the Insurance Department.

Senator Lasky reminded the committee that today was noticed as an organizational meeting.

The Committee set the next meeting on September 21st at 10 a.m. in LOB room 307.

Motion to adjourn Senator Lasky, 2ND Representative Goley

Motion carried

Meeting adjourned at 11:27

Representative Jeffrey Goley, Clerk

Study Committee Minutes: HB 1371
September 21, 2010 at 10: a. m.
LOB Room 307

Committee to study whether allowing an injured employee to record the independent medical examination (IME) required by workers' compensation is feasible and whether independent medical examination practitioners who perform 10 or more examinations in a calendar year should be required to file an annual report with the insurance department.

Committee Members Present: Senator Lasky, Representative Goley and Representative Long

Representative Long opened the Study Meeting at 10:00 a. m.

Representative Long welcomed students from UNH-Manchester who were observing the study committee process.

The Committee agreed to hear testimony broken down as follows:

1. Feasibility of audio/video recordings
2. Feasibility of Reports

Dr. Stuart Glassman: Audio only in his opinion would serve no purpose.

If video is allowed, the video should be done by a third party and would be an added expense. Copies should be given to both parties.

Representative Long asked, why would it be necessary for a third party to video?

Dr. Glassman response was that it would be necessary to have an objective and professional videographer so that both sides could receive a copy.

Dr. Davis Clark: Addressed the fact that exam room is small and it would be difficult to record video in. Also there would be HIPPA compliance issue's that would need to be addressed.

Representative Long asked, about added cost to video recordings.

Dr. Clark confirmed that an independent videographer would be an added cost.

Mr. Peter Sheffer-NHADA: Expressed concerns with adding cost and any video should be done by a third party.

Representative Long asked, why couldn't both parties be allowed to record?

Ms. Karen Malkey- NH Orthopedic Center: Allowing video would add another layer and would not benefit the *patient*. Her office currently has 6 spaces for IME's; she would recommend 3 rooms be set-up with video

recording equipment. This would reduce the amount of IME's performed and would also be difficult to add to medical record.

Dr. Vladimir Sinkov: The best way to record would be by a third party. It would be difficult to record in small rooms.

Senator Lasky asked if Dr. Sinkov does IME's?

Dr. Sinkov answered no.

Representative Long asked, if Dr. Sinkov believes that an injured employee and the examining Dr. has a Doctor/Patient relationship? Dr. Sinkov believed that they do, because not all patients get the ability to choose their doctor, and IME's are a second opinion and may recognize a better treatment.

Attorney Peter Webb: We should err on the rights of the injured employee. The injured employee should have the right to record their exam. The confidentiality belongs to the injured party, if they want to record and possibly compromise their confidentiality, it's their choice.

^{PAUL}
Attorney/Salafia: Having the injured worker record only shows a one sided view. No were else is this allowed. If we allow this it should be allowed throughout the medical industry. The injured employee should not have a right to record.

Ms. Ellen Shemitz-NH Association for Justice: The goal behind the bill is accountability and transparency. If recording becomes part of the medical record it would be under the same privacy protections as current medical records. There has been a discrepancy between injured workers and IME practitioners. An audio/video recording would help clarify what happened during the exam. Recordings is about a level playing field.

Senator Lasky asked; which recording would you prefer? Ms. Shemitz answered; the injured worker should have the choice.

Ms. Janet Monahan-NH Medical Society: Concerns with patient privacy, if passed this could be the norm and patients would not have a choice.

Board of Medicine has the ability to reprimand Dr's that are not following protocol.

Dr. Glassman: There is no language that allows a patient the right to record or have a witness present during a regular exam. I haven't heard of any concerns from the Labor Department or the Board of Medicine.

Representative Long asked; Do Dr's have a right to record?

Dr. Glassman answered; there's nothing that say's they can't.

This concluded the testimony on allowing video/audio recording during an exam.

The Committee took up testimony on the feasibility of IME practitioners filling a report.

Dr. Clark: Requiring the insurance carrier be identified may not be possible, practitioners aren't always aware of who the carrier is that requested the IME. Identifying causation and treatment may also be burdensome, as there may be multiple treatments and causations. The cost of the exam should not have to be given.

Representative Long asked; Are there any avenues with which an IME cost is public information?
Dr. Clark answered; only in a deposition.

Representative Goley asked: Would it be more favorable if IME practitioners were randomly chosen from a third party i.e. Labor Department pool.

Several participants answered that would be fair.

Next meeting is October 12, 2010

Meeting adjourned at 12:15 p. m.

Representative Jeffrey Goley, Clerk

Study Committee Minutes: HB 1371
October 12, 2010 at 10: a. m.
LOB Room 307

Committee to study whether allowing an injured employee to record the independent medical examination (IME) required by workers' compensation is feasible and whether independent medical examination practitioners who perform 10 or more examinations in a calendar year should be required to file an annual report with the insurance department.

Committee Members Present: Senator Lasky, Representative Goley and Representative Long

Representative Long opened the Study Meeting at 10:00 a. m.

Minutes of the September 21st meeting were provided to those in attendance; Representative Long asked the public to verify names and written accounts of testimony were accurate.

Name changes were corrected and there were no inaccuracies noted in written testimony.

Attorney Doug Graul: NH Association of Justice and self.

Schedules of IME's don't always know if injured employee is referred by plaintiff or defense.

Why wouldn't you allow the injured worker to record? The recording doesn't have to be under oath, the injured employee should have the choice.

Representative Long asked; how often in your experience do you find conflicting statements between the IME report and the injured employee?

Attorney Graul answered; it does happen on many occasions.

Representative Long asked; would a possible fix be having a pool of specialized doctors handled by NHDOL help in resolving this problem?

Attorney Graul answered; it may be a good idea.

Attorney Maureen Manning: 25 years representing injured employees

When injured worker accepts workers Compensation; they give their right away to take legal action against the employer.

IME system is not on a level playing field. It is biased.

In 2008, there were 47,000 reported injuries; many injured employees end up at IME's.

IME's can be used at the beginning of the workers compensation injury. IME's can also be used after a period of time where an injury is costly to an insurance carrier.

If an injured employee does not go to a scheduled IME appointment, there is a severe consequence of an immediate discontinuance of benefits paid (pay check).

8-12 doctors doing most of the IME's in the state, they receive a substantial amount of money. Typical fee is approximately \$900.00 per review, if medical records are above 2" (inches) a fee of \$450.00 an hour is added. Many exams fall within 10-15 minutes, with reviewing medical records prior to exam; doctor has already made a decision on IME about injured employee.

Courts are allowing the admittance of taped information into testimony.

NH DOL should allow the same information to be brought into hearings for injured employee.

Courts in civil cases have ordered recordings of IME's. IME reports, are almost 100% retained by insurance carrier.

Plaintiff attorney's sometimes send their clients to be examined, however, not by an IME.

Senator Lasky asked; injured employee can be required to attend IME up too twice a year?

Attorney Manning replied; yes, there are provisions that could allow, with the permission of NH DOL to do more.

Representative Long asked; with respect to the vendor appointments; does the vendor set-up the appointment or the insurance carrier?

Attorney Manning answered; Vendor

Representative Long asked; does NH DOL produce any report on IME's?

Attorney Manning answered; there is a bi-annual report (2008 report attached)

Representative Long asked; do insurance carriers know what doctor the vendors use?

Attorney Manning answered; I would assume yes.

Attorney Manning added that 80-90% of IME reports are not favorable to the injured employee and there are inaccuracies that are stated by the injured employee.

Dr. Glassman: RSA 281: A: 30 address the authority of the NH DOL over IME's.

Senator Lasky asked: if injured employee has a disagreement with the IME report, were would they go?

Dr. Glassman answered; it's up to the claimant or representative to show disagreement.

Dr. Glassman clarified that the vendor sends a letter to the IME practitioner requesting an IME and usually that letter identifies the hiring firm (vendor) insurance carrier and their attorney.

Representative Long asked; Dr. Glassman are you aware of any qualified doctor who is willing to perform IME's but are not contacted or contracted to do so?

Dr. Glassman answered; I wouldn't know that information.

Representative Long asked if anyone else would like to add more testimony. No one replied.

The committee began identifying pro and cons of recordings, and members present agreed that it is feasible to allow recordings.

Representative Goley would inquire about other states that may allow recordings, or any information that may be of interest to this committee.

Representative Long asked Mr. Jenkins (NH DOL) if recordings would help in NH DOL's determinations.

Mr. Jenkins replied; yes.

On the feasibility of reports; the committee felt that reports would help in determining patterns of possible bias.

The committee agreed that practitioner's income from IME's is not a determining factor in suggesting bias.

Representative Long suggested he write a draft of the final report and the committee would meet on October 21st at 11:00 a. m. to finalize the report.

Motion to adjourn

Representative Goley seconded by Senator Lasky

Meeting adjourned at 12:30 p. m.

Representative Jeffrey Goley, Clerk

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

163 N. Main Street

P. O. Box 2880

Concord, NH 03301 2880

603 225-5501

(A)

Audio Allowed

NOTICE OF DECISION

DAVID L NIXON ESQ
NIXON RAICHE MANNING & BRANCH
77 CENTRAL STREET
MANCHESTER NH 03101

97-C-0135 Marianne J. Hill et al vs. Uldric Despres

Enclosed please find a copy of the Court's Order dated 11/25/97
relative to:

Court Order

11/25/97
Court Copy (clp)

William McGraw, Clerk

cc: Fred J. Desmarais, Esq.

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

SUPERIOR COURT

Marianne J. Hill, et al.

v.

Ulric G. Despres

Docket No: 97-C-135

ORDER

A hearing was held on November 25, 1997 on the defendant's motion to compel production of expert reports [8] and the defendant's motion for a protective order to preclude tape recording of independent medical examination [9]. After hearing, the Court DENIES both motions.


The defendant seeks to compel production of expert reports, to which the plaintiff objects. The Court finds that the plaintiff has complied with Superior Court rule 35(f) with respect to expert disclosure and there is no rule which requires the plaintiff to specifically have an expert prepare a report at the defendant's request. Moreover, the expert is available for deposition, if the defendant desires further inquiry of his opinions.

The motion for a protective order to preclude tape recording of independent medical examination is DENIED. The defendant argues that there is no rule permitting the plaintiff to tape record the IME or to have a witness present during the IME. However, there is no rule that precludes the plaintiff from proceeding in this fashion if she so desires. This Court is not reaching the issue of whether this tape would be admissible at trial and defers that

ruling to the trial judge.

So ordered.

Dated: November 25, 1997


GILLIAN L. ABRAMSON
Presiding Justice

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Phone: (702) 990-2225
Fax: (702) 990-7711
DrRogerRussell@Yahoo.com
www.AdvancedSpineNV.com
Other Locations: Reno, Carson City, St. George, UT,
Specialty: Chiropractic, Forensic Chiropractic-Masters in biomechanical trauma, accident reconstructionist, chiropractic orthopedist, permanent impairment ratings.
Years in Practice: 18
Years Performed IME: 15
IMEs Performed: 2,000
Number of Times Deposited: 300
IME Training: AADEP, SEAK, ABIME
IME Certification: CICE

Jerrold M. Sherman, MD
Las Vegas, NV
Phone: (702) 369-9495
Fax: (310) 476-8438
Specialty: Orthopedics-Orthopaedic Surgery, Chief Executive Officer and Medical Director Outpatient Surgery Center.
Years in Practice: 33
Years Performed IME: 10
IMEs Performed: 500+
Number of Times Deposited: 100+
IME Training: SEAK
IME Certification: CIME, ABOS

NEW HAMPSHIRE

Davis W. Clark, MD
Concord, NH
Phone: (603) 224-0380
Fax: (603) 746-3360
daviswelarkmd@comcast.net
Other Locations: Exeter, York, ME
Specialty: Orthopedic Surgery-General orthopedics with extra experience in spinal injuries and diseases.
Years in Practice: 36
Years Performed IME: 7
IMEs Performed: 400
Number of Times Deposited: 29
IME Training: SEAK

Stuart J. Glassman, MD
Granite Physiatry, PLLC
Concord, NH
Phone: (603) 223-8145
Fax: (603) 223-8146
SJG@granitephysiatry.com
www.granitephysiatry.com
Other Locations: Lincoln, Gilford, Lebanon, Keene, Conway, Manchester, Durham
Specialty: Physical Medicine & Rehabilitation-Physiatry-IME, overall work, personal injuries.

Years in Practice: 14
Years Performed IME: 10
IMEs Performed: 2,500
Number of Times Deposited: 20+
IME Training: AAPM&R Disability Certification Course, 1996, ABIME 2007
IME Certification: ABIME 2007

David B. Lewis, DO
Lewis Physical Medicine Associates, PA
Bedford, NH
Phone: (603) 644-5133
Fax: (603) 644-3086
lpm@conversent.net
www.nhpsaindocs.yourmd.com
Other Locations: Nashua
Specialty: Physical Medicine & Rehabilitation-Physiatry, Electrodiagnostic Medicine-Musculoskeletal, neuro injuries, pain management, rehabilitation medicine, osteopathic medicine, spinal manipulation, treatment, functional/work capacity.
Years in Practice: 19
Years Performed IME: 16
IMEs Performed: 3,000+
Number of Times Deposited: 60+

Mayo Noerdlinger, MD
SportsMedicine Atlantic Orthopaedics
Portsmouth, NH
Phone: (603) 431-1121
Fax: (603) 431-3347
mnoerdlinger@smao.org
www.smao.org
Other Locations: York, ME
Specialty: Orthopedic Surgery, Sports Medicine-Orthopaedic & Sports Medicine, specialty in Shoulder Surgery.
Years in Practice: 7
Years Performed IME: 4
IME Training: ABIME
IME Certification: CIME

NEW JERSEY

Andrew K. Ankamah, MD
Jersey Sports & Spine Medicine, PC
Somerset, NJ
Phone: (732) 249-9400
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ankamahpmr@gmail.com
Specialty: Physical Medicine & Rehabilitation-Physiatry-Sports, Spine & Concussions, Musculoskeletal, Joint Pain, EMG/Nerve Conduction Studies, Traumatic Brain Injury, Workers Compensation Injuries, Orthopedic Related Injuries, Motor Vehicle Injuries, Nerve Injuries.
Years in Practice: 3
Years Performed IME: 2
IME Training: AAPMR: IME
Medico-Legal Interaction, Residency
IME

IME Certification: AAPMR: IME
Medico-Legal Interaction

Norman M. Batra, MD
Prudent Medical Assoc., LLC
Menuchen, NJ
Phone: (732) 548-2500
Fax: (732) 549-7070
Specialty: Physical Medicine & Rehabilitation-Physiatry.
Years in Practice: 24
Years Performed IME: 10
IMEs Performed: 2,000
Number of Times Deposited: 2

Steven Berkowitz, MD
Seaview Orthopedic and Medical Assoc.
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sberkowitz@seaviewortho.com
www.seaviewortho.com
Other Locations: Brick, Freehold
Specialty: Orthopedic Surgery-Orthopedic Medicine.
Years in Practice: 26
Years Performed IME: 13
IMEs Performed: 400
Number of Times Deposited: 60
IME Training: SEAK
IME Certification: CIME

Melvyn A. Blake, DDS, JD
Oral & Maxillofacial Surgeon Legal Advisor & Expert
Marlton, NJ
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Fax: (856) 596-1085
ddejd@aol.com
Specialty: Dentistry, Medical Legal Evaluations-Board Certified oral & maxillofacial surgeon, attorney, associate professor, Univ. of PA.
Years in Practice: 37
Years Performed IME: 30
IMEs Performed: 400+
Number of Times Deposited: 25
IME Training: SEAK

Ronald L. Brody, MD
Voorhees, NJ
Phone: (856) 753-0581
Fax: (856) 753-0806
Other Locations: Camden, Atlantic, Burlington, Cumberland
Specialty: Physical Medicine & Rehabilitation-Physiatry, Pain Management-Medicine-Pain management & rehabilitation, nerve conduction studies and electromyography.
Years in Practice: 17
Years Performed IME: 5
IMEs Performed: 75
Number of Times Deposited: 200
IME Training: SEAK
IME Certification: AB PM&R

Daniel J. Cardellicchio, DC
Perth Amboy, NJ
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dcnjdc@aol.com
Specialty: Chiropractic, Chiropractic Neurology-Auto injuries, plaintiff and defense, CICE, ABIME, acting practice.
Years in Practice: 17
Years Performed IME: 17
IME Training: ABIME
IME Certification: CICE

Philippe Chemaly, DO, MPH
Wayne Physical Medicine & Rehabilitation Assoc.
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Phone: (973) 595-6066
Fax: (973) 595-1127
www.waynerehab.com
Specialty: Physical Medicine & Rehabilitation-Physiatry, Pain Management-Medicine-Physical Medicine & Rehabilitation, Orthopedic rehabilitation, trauma rehabilitation, sports medicine, pain management.
Years in Practice: 10
Years Performed IME: 9
IMEs Performed: 400
Number of Times Deposited: 2
IME Training: ABIME

Joseph Corona, MD, ABOS
Summit Medical Group
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Phone: (908) 277-8704
Fax: (908) 277-8876
jtcoronamd@aol.com
Specialty: Orthopedic Surgery-Workers' Compensation Permanency Determinations, Defense.
Years in Practice: 32
Years Performed IME: 15
IMEs Performed: 8,000
Number of Times Deposited: 40

Edward M. Decter, MD, FACS
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www.cfomedicalservices.com
Other Locations: New Brunswick, Passaic
Specialty: Orthopedic Surgery-Knees and shoulders.
Years in Practice: 20+
Years Performed IME: 20+
IMEs Performed: Numerous
Number of Times Deposited: Numerous

C

IME DR. FEE

02/03/2010 WED 10:53 FAX

0022/002

12/23/2009 TUE 9:47 FAX 6032238146 GRANITE PHYSIATRY

0002/102



Granite Physiatry, PLLC
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Concord, NH 03301
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Stuart J. Glassman, MD

www.granitephysiatry.com

Legal Fees for Dr. Stuart Glassman's Services:

IME/PIR and Life Care Plan	\$900 (if records exceed 2 inches an additional fee of \$450* per hour will also charged.)
R/S, C/X, N/S	\$450* (7 calendar days notice)
Addendums	\$250
Telephone Conf call/meetings	\$450* per hour
Record Review	\$450* per hour, if records exceed 2 inches single sided or 1 inch double sided an additional fee of \$450 per hour will also charged.
Deposition/Video*:	\$500 per hour (minimum 2 hour, plus travel time)
Trial/Hearing Testimony*:	\$2,500 for half day up to four hours, including travel time), then \$500 for each hour over 1/2 day up to full day fee. Full day = \$5,000, including travel time.

**Cancellation/Reschedule for Deposition/Trial/Hearing Testimony:* In the event that the case is cancelled/rescheduled 7 days or less, a fifty percent fee (non-refundable) will be applied for the original date reserved and the balance for the new date will need to be received 14 days prior to the next rescheduled date.)

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Diplomat
American Board of
Physical Medicine &
Rehabilitation

Fellow, American
Academy of Physical
Medicine and
Rehabilitation

Diplomat, National
Board of Medical
Examiners

(D)

PLAINTIFF AUDIO - NO WITNESS
PRACTITIONER AUDIO AND WITNESS

10/13/2010 WED 8:22 FAX 603 436 1909 Boynton Waldron

004/007

Page 1 of 3

Donna Duggan

From: Christopher Grant
Sent: Tuesday, June 15, 2010 10:36 AM
To: Donna Duggan
Subject: FW: Moulton - Defense Medical Examination
Powa

Christopher E. Grant
Boynton Waldron
82 Court Street, P.O. Box 418
Portsmouth, NH 03802-0418
(603) 436-4010
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From: Christopher Grant
Sent: Tuesday, June 15, 2010 10:36 AM
To: 'Leigh Willey'
Subject: Moulton - Defense Medical Examination

Leigh,

I have reviewed the Consent form.

I am not certain that I understand what you have proposed, but if it included signing the original Consent form and the Addendum then it remains objectionable for the same reasons. The Addendum, minus the inclusion and reference to the Original form, would be fine.

Chris

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From: Leigh Willey [mailto:lwilley@devinemillmet.com]
Sent: Friday, June 11, 2010 11:52 AM
To: Christopher Grant

6/15/2010

Cc: Thomas Quarles
Subject: Moulton - Defense Medical Examination

Chris:

I want to recap and hopefully resolve where we are on this, so we can schedule a new date for this examination as soon as possible. It is my understanding that the Court has ordered and/or the parties are in agreement on the following matters concerning the medical examination of Ms. Moulton:

- The plaintiff's husband shall not be allowed in the examination room while the medical examination is taking place;
- The plaintiff shall be permitted to bring her own tape recorder into the examination room to make an audio recording during the medical examination.
- Carmen Viera (a/k/a Evie), Dr. Glassman's practice manager, will be present during the examination and will make an audio recording of the examination on behalf of Cranmore.
- The plaintiff and the defendant agree to exchange copies of their recordings within ten (10) days of the medical examination.
- Mrs. Moulton will fill out and sign the Health History Questionnaire that is attached to the Consent Form.
- The medical examination shall take place at Dr. Glassman's office in Concord, New Hampshire.

When we spoke last, however, you indicated to me that you objected to certain of the language in Dr. Glassman's Consent Form and as a result, your client, Mrs. Moulton would not sign the form. In particular, you objected to: (1) use of the word "independent" throughout the form; (2) the last three sentences of the fourth paragraph because this language purports to release Dr. Glassman from liability for any injury sustained by your client during the examination; (3) the first sentence of the sixth paragraph beginning with, "I understand that it is the office policy..." because Dr. Glassman's practice manager, Evie will also be present during the examination room; and (4) the remainder of the sixth paragraph because this is a civil case and the examination is not being performed pursuant worker's compensation laws and regulations.

I have attached a revised Consent Form from Dr. Glassman's office and an Addendum that was specially prepared for this case. The Consent Form has been revised to indicate that the worker's compensation laws and regulations are not applicable in this case. The Addendum amends the Consent Form for purposes of this case only and reflects the Court's Order and our agreements above. The Addendum supersedes any provision in the Consent Form that is inconsistent with or contrary to the language of the Addendum.

Please review this material early next week and get back to me as to whether we have a final agreement and can proceed to reschedule Ms. Moulton's examination.

Leigh

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Oklahoma Supreme Court Cases

BOSWELL v. SCHULTZ
2007 OK 94
175 P.3d 390
Case Number: 104840
Decided: 12/04/2007

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2007 OK 94, 175 P.3d 390

CODY HARRISON BOSWELL AND, CHERYL BOSWELL, Petitioners,
v.
KANDEE SCHULTZ, Respondent,
and
VICKI L. ROBERTSON, Judge of the District Court, *real party in interest.*

**APPLICATION TO ASSUME ORIGINAL JURISDICTION AND
PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION**

Honorable Vicki L. Robertson, Trial Judge

¶10 The petitioners, Cody and Cheryl Boswell, filed a lawsuit against the respondent Kande Schultz, seeking to recover damages for personal injuries sustained from an automobile accident. The respondent requested that the petitioners undergo medical examinations pursuant to 12 O.S. 2001 §3235. The petitioner, Cody Boswell, appeared for his medical examination with his attorney who began videotaping as soon as they entered the doctor's office. The doctor refused to proceed with the examination unless the attorney agreed to stop videotaping. Because the parties were unable to agree whether to allow the videotaping, the examination did not take place. The respondent filed a Motion to Compel, requesting the trial court order the petitioners submit to the examination because they had no legal basis to demand to videotape the examination. The trial court granted the respondent's motion and the petitioners filed an application to assume original jurisdiction in this Court. We hold that a party to a lawsuit who is required to submit to a medical examination pursuant to 12 O.S. 2001 §3235 is permitted to videotape the examination.

**ORIGINAL JURISDICTION ASSUMED;
WRITS GRANTED.**

Howard Israel, Oklahoma City, Oklahoma, for Petitioners.

KAUGER, J:

¶11 The issue presented is whether a party to a lawsuit who is required to undergo a medical examination pursuant to 12 O.S. 2001 §3235¹ may videotape his or her examination. We hold that he or she may. Therefore, we assume original jurisdiction and grant the writ of prohibition and writ of mandamus.

FACTS

¶12 On July 28, 2006, the petitioners, Cody and Cheryl Boswell, filed a lawsuit against the respondent, Kande Schultz, seeking to recover damages for personal injuries sustained from an automobile accident. As part of the pretrial discovery process, the respondent sought to have the petitioners undergo medical examinations by a doctor of respondent's choice pursuant to 12 O.S. 2001 §3235.²

¶13 The respondent chose Dr. Winzenread (doctor) to examine the petitioners. On May 24, 2007, the petitioner, Cody

Boswell, showed up for his examination with his lawyer, who brought along a video camera. The attorney began videotaping as soon as he entered the doctor's office, but was asked to stop by the doctor's receptionist. Apparently the doctor's policy was not to allow videotaping because it was: 1) an invasion of the privacy of the other patients in the office; 2) annoying and distracting to the doctor; and 3) intrusive and an interference with the doctor's examination. The petitioners refute the doctor's excuses, pointing out in the response to the motion to compel that the reason given at the time was that "unless the attorney who actually had - has the case scheduled and is paying for the exam - um- unless that attorney gives us permission or gives someone permission to videotape at the time, then it is not done."

¶4 Because the parties were unable to agree whether to allow the videotaping, the examination did not take place. The doctor also indicated that an examination of the other petitioner, Cheryl Boswell, would not take place either. On May 25, 2007, the respondent filed a Motion to Compel, requesting that the trial court order the petitioners submit to the examination because they had no legal basis to demand to videotape the examinations. The respondent also sought attorney's fees and costs incurred in filing the motion and cancelling the doctor's appointments. On July 5, 2007, the trial court granted the respondent's motion to compel. On July 11, 2007, the petitioners filed an application to assume original jurisdiction in this Court.

**¶5 A PARTY TO A LAWSUIT WHO IS REQUIRED TO SUBMIT TO
A MEDICAL EXAMINATION PURSUANT TO 12 O.S. 2001 §3235 IS
PERMITTED TO VIDEOTAPE THE EXAMINATION.**

¶6 The respondent argues that there is no legal basis to support the petitioners' demand to video the examination. The petitioners counter that: 1) 12 O.S. 2001 §3235² does not prohibit a person who is required to undergo a medical examination from videotaping the examination; and 2) the person being examined has a right to demand videotaping because it would have probative value and provide reliable proof if a doctor were biased and merely acting as a partisan for the opposing party.

¶7 In the nineteenth century, the United States Supreme Court in Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) expressed the common law view that court-ordered medical examinations were repugnant to a person's privacy and bodily integrity.⁴ However, over time and by at least the 1960's this view was no longer valid and this Court began to allow medical examinations of plaintiffs in personal injury suits recognizing that: 1) the object of all court litigation was, as far as possible, to arrive at the truth and administer justice; and 2) when persons appeal to the courts for justice, they are impliedly agreeing to make any disclosures which are necessary to be made in order that justice may be done.⁵ In other words, just as a plaintiff may be entitled to redress for an injury caused by a defendant, the defendant is entitled to verify the existence and extent of the injury.

¶8 Title 12 O.S. 2001 §3235⁶ was apparently born out of this controversy, because it statutorily sets forth the procedures for obtaining through discovery physical and mental examinations of parties to a lawsuit. Subsections (A) and (B) govern when the party's physical condition is an element of that party's claim or defense,⁷ while subsection (C) governs when the party's physical condition is not an element of that party's claim or defense.⁸ When a party's physical condition is in controversy and is relied upon as an element of that party's claim or defense, as it is in the instant cause, an adverse party "may take" a physical examination of the party.⁹ A representative of the party to be examined is expressly authorized to be present at the examination.¹⁰ After the examination, a detailed written report of the examiner setting out the findings, results, diagnoses, and conclusions is required.¹¹

¶9 The Legislature, in §3235(B), authorized a party to request conditions for the medical examination and allowed the trial court to impose conditions regarding the examination, but did not specify precisely what "conditions" are to be allowed.¹² In McCullough v. Mathews, 1995 OK 90, ¶¶1-2, 918 P.2d 25, the Court assumed original jurisdiction to determine whether anything or anyone other than the party being examined and the physician doing the examining, should be allowed in the examination room.

¶10 McCullough, construing §3235(D), recognized that the statute expressly authorizes the person being examined to bring a third party representative to the examination; and that the statute was without restriction as to who could serve as a third party representative --- an attorney or anyone else. Consequently, the Court held that an attorney was entitled to serve as a third party representative under the statute.

¶11 In McCullough, the trial court, as part of the conditions of the examination, had authorized that handwritten notes could be taken during the examination. We determined that the trial judge did not abuse his discretion in allowing handwritten notes to be taken, but we also recognized that an audio recording of the examination should be allowed. McCullough did not state the reason or purpose for allowing an audio recording; but in St. Clair v. Hatch, 2002 OK 101, ¶5, 62 P.3d 382, we noted that when the party to be examined is relying upon a condition that is an element of that party's claim or defense, §3235 favors the rights of the party seeking the examination to fully investigate and prepare its case, to

ascertain whether the plaintiff actually has the injuries which are alleged to have been caused by a defendant.

¶12 However, the purpose of the statute is twofold. The obvious counterpoint of allowing a "full investigation" would be to make certain that the injured party has an accurate and complete record of the proceeding, and to allow the party undergoing an examination to have reliable proof that the examiner is unbiased and not merely a shill for the opposing party. Allowing an electronic recording would expose the true facts and strike a balance to prevent either a false claim or a cursory exam.

¶13 Unless a contrary intent clearly appears, if a statute previously construed by courts of last resort is reenacted in the same or substantially the same terms, the Legislature is presumed to have been familiar with its construction, and to have adopted such construction as an integral part of the statute.¹³ After our ruling in McCullough, supra, the statute was recodified in 2001 without any changes. The Legislature did not override our construction of that statute and audio recording was approved as an authorized device allowed in the examination. A video recording would be a superior method of providing an impartial record of the physical examination.

¶14 The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment.¹⁴ In State ex rel. Remington Arms Co., Inc. v. Powers, 1976 OK 103, ¶4, 522 P.2d 1150,¹⁵ the Court recognized that rules and statutory enactments dealing with discovery are to be given liberal construction,¹⁶ stating:

The purposes of the discovery statute are to facilitate and simplify identification of the issues by limiting the matters in controversy, avoid unnecessary testimony, promote justice, provide a more efficient and speedy disposition of cases, eliminate secrets and surprise, prevent the trial of a lawsuit from becoming a guessing game, and lead to fair and just settlements without the necessity of trial. Discovery statutes permit obtaining of evidence in the sole possession of one party which is unavailable to opposing counsel through the utilization of independent means. For these reasons, the rules dealing with discovery, production, and inspection are to be liberally construed. The intent of the Oklahoma discovery statutes is to attempt to provide procedures which promote accurate information in advance of trial concerning the actual facts and circumstances of a controversy, rather than to aid in its concealment. The utilization of discovery enables attorneys to better prepare and evaluate their cases. Ascertainment of truth and the ultimate disposition of lawsuit is better accomplished when parties are well educated through discovery as to their respective claims in advance of trial. Pretrial discovery procedures are intended to enhance truth-seeking process, and good faith compliance with such procedures is both desirable and necessary. (Citations omitted.)

¶15 Other courts have construed similar discovery statutes and addressed whether to allow the examination to be recorded. The federal counterpart to §3235, Rule 35 of the Federal Rules of Civil Procedure, 28 U.S.C.A. (1991), is more restrictive than Oklahoma's statute¹⁷ in that it does not have a provision for the presence of a third party or representative of a party to attend the examination.¹⁸ Yet, federal courts have been divided on the issue of whether to allow the examination to be recorded.¹⁹ A few jurisdictions have rules or statutes which contain provisions similar to Oklahoma's statute,²⁰ providing for the attendance of a third party such as the examinee's representative or attorney, or allowing for the recording of the examination by stenography, audio recording or video recording.²¹ In states where audio recording or stenography is expressly allowed, but videotaping has been omitted from the rule or statute, some courts have declined to allow videotaping because of its specific omission.²²

¶16 Nevertheless, despite the lack of explicit legislative authorization,²³ many state courts have approved a variety of conditions such as the presence of counsel, a stenographic transcription of the examination, a tape-recording of the examination, and videotaping the examination.²⁴

The Supreme Court of Indiana in Jacob v. Chaplin, 639 N.E.2d 1010, 1013 (1994), in a personal injury case, explained the benefits of allow the examination to be recorded by electronic means. The court stated:

The examination, by its nature, requires a verbal exchange between examiner and examinee. The purpose of the examination is to further the litigation process. An opinion arrived at by the examiner is intended to aid the trier of fact in making a damages assessment. Statements made by the examinee are intended to aid the examiner in arriving at a proper opinion, and, by necessity, are material to such trial issues as proximate cause. It is inherent that such an important meeting that both examiner and examinee be permitted to choose whether or not to make written notes of the verbal exchange. It follows from this conclusion that both should as well be permitted to chose whether or not, in lieu of the laborious process of making notes, to openly record the verbal exchange by electronic means. In permitting the examination ordered in this case to be recorded, the trial court properly exercised its discretion and recognized the justness of permitting

recording to take place in an open manner, in the absence of some overriding reason to prohibit that recording. We fail to see any reason why electronic recording of the examination would in and of itself impede an examiner's ability to conduct a fair and complete examination.

¶17 The Supreme Court of Kentucky, in a unanimous opinion in Metropolitan Property & Casualty Ins. Co. v. Overstreet, 103 S.W.3d 31, 38 (2003), traces the history of allowing an external presence in an independent examination beginning with the Federal Rule, and Overstreet provides a thorough discussion of how different state courts have handled the issue. Overstreet allowed the videotaping of an independent examination upon a showing of good cause and recognized the adversarial purpose of such examinations, noting:

By its very terms, CR 35.01 applies only when the mental or physical condition of the examinee is 'in controversy.' The examining party, almost by definition, moves for a CR 35.01 examination with the hope of furthering its litigation position. Thus, the examining physician will nearly always be hired with an adversarial mind-set. . . . [W]e recognized that expert witnesses are often compensated handsomely and it is widely believed that they may be expected to express opinions that favor the party who engaged them and who pays their fees. . . . [C]ertain expert witnesses derive a significant portion of their total income from testifying in litigation. . . . We would close our eyes to reality, . . . were we to pretend simply because CR 35.01 examinations should be conducted with only the health of the examinee in mind, that they always are so conducted. (Id.) (Citations omitted).

¶18 The Kentucky and Indiana Courts' reasoning regarding electronic recording is persuasive. The respondent has made no showing as to why electronic recording of the examination should be limited to audio recordings when a video recording is a superior method to providing an impartial record of the examination. A videographer has the ability to accurately record the physical aspects of the examination, and the use of technology is becoming more prevalent in the legal field. The examination is a discovery examination, not one in which a plaintiff is being treated.²⁵ A defense-selected physician should not have the right to dictate all the terms under which a plaintiff's examination will be held.

¶19 Here, the doctor expressed concerns that videotaping would be an invasion of privacy of the other patients in the office, annoying and distracting, and intrusive and an interference with the doctor's examination. We agree that videotaping other patients would violate other patients' privacy rights. Furthermore, there may be circumstances where a videographer is annoying and distracting to the doctor or interfering with the examinations. None of these concerns are reasons to prohibit videotaping the examination altogether because they can all be readily addressed by an agreement between the parties or by order of the trial court when the time, place, manner, conditions and scope of the examination are set.²⁶ Nor should we be concerned at this juncture about the possibility of a physician attempting to use a videotape at trial over the objection of the examinee because a waiver of the physician/patient privilege²⁷ does not bestow the physician with any rights. Accordingly, we hold that a party to a lawsuit who is required to submit to a medical examination pursuant to 12 O.S. 2001 §3235²⁸ is permitted to videotape the examination. Therefore, we assume original jurisdiction and grant the writ of prohibition and writ of mandamus.

CONCLUSION

¶19 Our decision to allow an examinee to videotape a court-ordered independent examination was foreshadowed by our decision in McCullough v. Mathews, 1995 OK 90, ¶¶1-2, 918 P.2d 25. In McCullough we recognized that the broad language of 12 O.S. 2001 §3235²⁹ allows the examinee to bring a third party representative to a court-ordered independent examination. We also determined that in addition to handwritten notes, audiotaping by the examinee, which was incorporated into the statute by the 2001 recodification of §3235,³⁰ would be allowed as a "condition" of the examination. While audio recording is capable of providing proof that the examination did not involve a malingering patient or a cursory examination, we now hold that a video recording may be a superior method of providing an impartial record of the examination. Accordingly, a party to a lawsuit who is required to submit to a medical examination pursuant to 12 O.S. 2001 §3235³¹ is permitted to videotape the examination. The writs of prohibition and mandamus are granted.

ORIGINAL JURISDICTION ASSUMED; WRITS GRANTED.

EDMONDSON, V.C.J., OPALA, KAUGER, WATT, COLBERT, JJ., concur.

WINCHESTER, C.J., HARGRAVE, TAYLOR, JJ., LAVENDER, S.J., dissent.

FOOTNOTES

(F)

Audio Only

RELATED TOPICS

Pretrial Procedure

Depositions and Discovery

Disclosure of Opinions of Expert Witnesses

Underwood v. Fitzgerald
United States District Court, M.D. Tennessee, Nashville Division August 10, 2005 229 F.R.D. 548
Original Image of 229 F.R.D. 548 (PDF)

229 F.R.D. 548
United States District Court,
M.D. Tennessee,
Nashville Division.

Jaimee UNDERWOOD, Plaintiff,

Return to list 2 of 83 results search term V.

James FITZGERALD, et al., Defendants.

Jesse James Dedman, et al., Plaintiffs,

v.

Continental Express, Inc., et al., Defendants.

Nos. 3:04-0680, 3:04-0764. Aug. 10, 2005.

Synopsis

Background: In civil litigation, defendant moved for examination of plaintiff.

Holdings: The District Court, Brown, United States Magistrate Judge, held that:
1 plaintiff was not entitled to have her expert present as observer at examination performed by defendant's expert or to be given protocol and questions in advance, but

2 plaintiff was entitled to audiotape examination.

Motion granted in part, and denied in part.

West Headnotes (2)

Change View

1 **Federal Civil Procedure** Physical or Mental Examination of Person
Plaintiff was not entitled to have her expert present as observer at Rule 35 examination performed by defendant's expert or to be given protocol and questions in advance, where protocol and questions involved were often not determined until examination was underway, foreknowledge could skew results, and mere presence and body language of observer could unintentionally send signals or distract plaintiff during course of examination. Fed.Rules Civ.Proc.Rule 35, 28 U.S.C.A.

Cases that cite this headnote

2 **Federal Civil Procedure** Physical or Mental Examination of Person
Plaintiff was entitled to audiotape Rule 35 examination performed by defendant's expert, where recording device was unobtrusive, quiet, and likely to be forgotten after first few minutes of examination. Fed.Rules Civ.Proc.Rule 35, 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

*549 Larry G. Hayes, Jr., Jackson, Kweiler, McKinney, Warden & Hayes, Aubrey B. Harwell, III, Neal & Harwell, Philip Norman Elbert, Neal & Harwell, Nashville, TN, for Jaimee Underwood, Jesse Dedman, Plaintiffs.

R. Clay Porter, Dennis, Corry, Porter & Smith, LLP, Atlanta, GA, William N. Bates, Farrar & Bates, Nashville, TN, Elenore Cotter Klingler, Dennis, Corry, Porter & Smith, LLP, Atlanta, GA, James R. Farrar, Farrar & Bates, Keith F. Blue, Farrar & Bates, Nashville, TN, Bruce E. Munson, Huckabay, Munson, Rowlett & Moore PA, Little Rock, AR, Donald Presley Paul, Miller & Martin, LLP, G. Brian Jackson, Miller & Martin, LLP, Nashville, TN, for James Fitzgerald, Continental Express, Inc., Defendants.

Opinion**ORDER**

BROWN, United States Magistrate Judge.

The defendants Fitzgerald and Continental Express have requested permission to file a reply brief in this matter (Docket Entry No. 122.) This motion is GRANTED and the requested documents may be filed.

Presently pending before the Magistrate Judge is Docket Entry No. 110, the defendants Fitzgerald and Continental Express's motion for a Rule 35 examination of the plaintiff Underwood by Drs. Montgomery and Walker. The plaintiff has objected to this examination unless (1) their expert, Dr. Kenner, is allowed to attend the examination as an observer; (2) they are advised in advance of the various tests and protocols that will be involved in the matter; and (3) the examination be audio or video taped. The motion (Docket Entry No. 110) is GRANTED in part and DENIED in part.

The parties all conceded that there is no controlling Sixth Circuit law on this issue. Statutory and case law in other jurisdictions and states is, to put it politely, all over the ballpark.

1 The Magistrate Judge has considered the briefs of the parties, as well as their excellent oral arguments in this matter on August 8, 2005. It is the opinion of the Magistrate Judge that a Rule 35 examination is proper and that the individuals selected to carry out the examination are duly qualified. While the Magistrate Judge appreciates the concerns expressed by the plaintiff in this matter, the Magistrate Judge does not believe that the plaintiffs' are entitled to have their expert present as an observed in the matter and to be given the protocol and questions in advance. The defendants have pointed out that due to the nature of this type examination, the protocol and questions involved are often not determined until the examination is underway. They also point out that having an individual know the particular protocols or examinations to be used can skew the results.

The Magistrate Judge believes that the presence of an observer at an examination of this nature could distort the results. The presence of an observer who is in this case already known to the plaintiff, inasmuch as he has conducted examinations of her, could skew the result. Although it was stated that Dr. Kenner would have no speaking part in the matter and would simply be an observer, his mere presence and body language could unintentionally send signals or distract the plaintiff during the course of the examination.

*550 Likewise, the Magistrate Judge believes that the disclosure of the particular tests to be used in advance, or even to take a break during the course of the examination to discuss the test to be given would likewise be counter productive.

Finally, the Magistrate Judge believes that video taping would be distracting, given the nature of this particular examination. However, the Magistrate Judge does believe that the plaintiff has a point that an audio taping of the proceedings would not be unduly intrusive. A recording device is unobtrusive, quiet, and in the Magistrate Judge's experience often forgotten after the first few minutes of a proceeding. The use of a recording device will ensure that no inappropriate questions are asked and will help all parties recall exactly what occurred at the examination.

In connection with the motion, the defendants have asked for the tape recordings of any examinations given to the plaintiff by her experts and doctors. The plaintiffs shall provide such recordings to the defendants for such witnesses as they intend to use at the actual trial itself. In addition, the plaintiffs advised that they would be willing to record any examinations that their experts conduct in the future of the plaintiffs for trial in this matter.

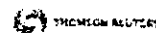
Accordingly, all further examinations conducted for evidence in this matter by medical experts will be recorded, unless the parties agree otherwise.

It is so ORDERED.

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G

CONSOLIDATED LAWS AND COURT ACTS OF
NEW YORK

Workers' Compensation

Article 7. Miscellaneous Provisions

Current through Laws 2010, Chapter 310

§ 137. Independent medical examinations

1. (a) A copy of each report of independent medical examination shall be submitted by the practitioner on the same day and in the same manner to the board, the insurance carrier, the claimant's attending physician or other attending practitioner, the claimant's representative and the claimant.

(b) If a practitioner who has performed or will be performing an independent medical examination of a claimant receives a request for information regarding the claimant, including faxed or electronically transmitted requests, the practitioner shall submit a copy of the request for information to the board within ten days of receipt of the request. Nothing in this subdivision shall be construed to abrogate the attorney-client privilege.

(c) Copies of all responses to such requests for information as are described in paragraph (b) of this subdivision, including all materials which are provided in response to such a request, shall be submitted by the responding practitioner to the board within ten days of submission of the response to the requestor. Nothing in this subdivision shall be construed to abrogate the attorney-client privilege.

2. In any open case where an award has been directed by the board for temporary or permanent disability at an established rate of compensation and there is a direction by the board for continuation of payments, or any closed case where an award for compensation has been made for permanent total or permanent partial disability, a report of an independent medical examination shall not be the basis for suspending or reducing payments unless and until the rules and regulations of the board regarding suspending or reducing payments have been met and there is a determination by the board finding that such suspension or reduction is justified.

3. (a) Only a New York state licensed and board certified physician, surgeon, podiatrist or any other person authorized to examine or evaluate injury or illness by the board shall perform such independent medical examination. Where a claimant resides out of state a practitioner qualified to examine or evaluate injury or illness by the board shall perform such independent

medical examination.

(b) Any practitioner performing the independent medical examinations shall be paid according to the fee schedule established pursuant to section thirteen of this chapter.

4. All independent medical examinations shall be performed in medical facilities suitable for such exam, with due regard and respect for the privacy and dignity of the injured worker as well as the access and safety of the claimant. Such facilities must be provided in a convenient and accessible location within a reasonable distance from the claimant's residence.

5. All independent medical examinations shall be performed by a practitioner competent to evaluate or examine the injury or disease from which the injured worker suffers. Such examination shall be performed by a practitioner who is licensed and board certified in the state of New York or any other person authorized to examine or evaluate injury or illness by the board.

6. No practitioner examining or evaluating a claimant under this chapter nor any supervising authority or proprietor nor insurance carrier or employer may cause, direct or encourage a report to be submitted as evidence in workers' compensation claim adjudication which differs substantially from the professional opinion of the examining practitioner. Such an action shall be considered within the jurisdiction of the workers' compensation fraud inspector general and may be referred as a fraudulent practice.

7. The claimant shall receive notice by mail of the scheduled independent medical examination at least seven business days prior to such examination. Such notice shall advise the claimant if the practitioner intends to record or video tape the examination, and shall advise the claimant of their right to video tape or otherwise record the examination. Claimants shall be advised of their right to be accompanied during the exam by an individual or individuals of their choosing.

8. Independent medical examinations shall be performed during regular business hours except with the consent and for the convenience of the claimant. Claimants subject to such examination shall be notified at the time of the exam in writing of the available travel reimbursement under law.

9. A practitioner is not eligible to perform an independent medical examination of a claimant if the practitioner has treated or examined the claimant for the condition for which the independent medical examination is being requested or if another member of a preferred provider organization or managed care provider to which the practitioner belongs has treated or examined the claimant for the condition for which the independent medical

examination is being requested.

10. The ability of a claimant to appear for an exam or hearing shall not be dispositive in the determination of disability, extent of disability or eligibility for benefits.

11. At the time of the independent medical examination the claimant shall receive a notice from the entity performing the independent medical examination, on a form which shall be approved and promulgated by the chair, stating the rights and obligations of the claimant and the practitioner with respect to such exam, and such notice shall include but not be limited to a statement that the claimant's receipt of benefits could be denied, terminated, or reduced as a result of a determination which may be based upon the medical evaluation made after such independent medical examination, and the claimant's rights to challenge or appeal such a determination.

(H)

VII. Workers' Compensation Division

WORKERS' COMPENSATION

The Workers' Compensation Division of the New Hampshire Department of Labor was created in 1947 and has the responsibility for administration of the State's Workers' Compensation Law (RSA 281-A). This law originally enacted in 1911, requires employers to maintain insurance coverage to provide no fault workers' compensation for employees in case of accidental injury, death or occupational disease, "arising out of and in the course of employment" (RSA 281-A:2 XI).

The law specifies the level of medical and wage replacement income benefit to be paid to injured workers and at the same time bars the employee from suing the employer for the injury. The division's coverage section is responsible for ensuring that all employers maintain this specific insurance coverage. The claims section's duties include scheduling and conducting hearings on contested cases, and monitoring the service of the insurance carriers to determine that benefit payments are provided timely. The Vocational Rehabilitation section is responsible for monitoring the vocational rehabilitation process.

Administering and enforcing the many provisions of the workers compensation law is the division's primary objective. Educational efforts to inform all parties involved of the workers' compensation process have been a top priority of this division. It is crucial that employers, employees and insurers understand their rights and responsibilities under the law. An annual educational conference sponsored by the New Hampshire Adjusters' Association with assistance from the Department of Labor, business community round table meetings and periodic special topic workshops, along with over 9,316 individual contacts each year comprise the division's educational efforts.

To further educate employees and employers alike, the division has developed a web site. The website address is www.labor.state.nh.us. Included in this web site are the laws and regulations, frequently asked questions, forms and explanations as to benefits, rights and responsibilities of all parties involved.

The legislative initiatives over the last 17 years have provided a significant opportunity to improve the overall performance of the New Hampshire Workers' Compensation System. Employers have demonstrated strong efforts in consistently providing alternative work for employees who are unable to perform the duties of their regular job. Employees have joined management staff in addressing workplace safety issues with the formation of joint loss management committees. The division continues to receive input as a result of this effort on behalf of both parties.

**REPORTED INJURIES AND COMPENSABLE DISABILITIES
 COMPARED WITH AVERAGE ANNUAL EMPLOYMENT IN FISCAL
 YEARS 2007-2009**

Injuries reported to the Department of Labor increased to 46,907 in FY 2008 with a low incidence rate of 7.3. In FY 2009, the number of injuries reported was 49,950 with an incidence rate of 7.6. The chart below represents the overall consistent increase in the incidence rate of injuries reported over the past 5 years with an increase in non-agricultural employment in fiscal year 2009.

The pattern of incidence rates of lost time cases seems to be consistently over the period of the last five fiscal years, which is reflected in the section below. In FY 2008 there were 3,574 injuries that represented cases where the employee was disabled from work or out of work due to their injury for four or more days. There were 3,860 lost time cases in FY 2009.

REPORTED INJURIES

COMPENSABLE DISABILITIES

FISCAL YEAR	NON-AGRICULTURAL EMPLOYEE	INJURIES REPORTED	INCIDENCE RATE	LOST TIME	INCIDENCE RATE
2005	632,783	47,711	7.5	3,733	0.59
2006	638,425	46,473	7.3	3,644	0.57
2007	642,408	46,832	7.3	3,543	0.55
2008	644,442	46,935	7.3	3,574	0.56
2009	654,008	42,189	7.6	3,860	0.56

**NON-AGRICULTURAL EMPLOYMENT BASED ON NH DEPARTMENT OF EMPLOYMENT
 SECURITY, BUREAU OF LABOR STATISTICS FINAL MONTHLY ESTIMATES, AS REVISED.**

INCIDENCE RATE IS PER HUNDRED OF EMPLOYMENT.

OCCUPATIONAL INJURY AND DISEASE STATISTICS

The following three reports include statistics developed from the First Reports of Injury (FROI) received from employers. The first report breaks the FROI up by body part injured as reported by the employer. The second report represents the cause of the injury, and the third report represents the outcome of the injury as best described by the employer.

These reports must be sent in within 5 days of the employer receiving notice of the injury. The reporting of first reports is now done electronically through EDI.

INJURY BY BODY PART

Report 1 of 3

<u>Code</u> <u>Body Part</u>	<u>FY 2006</u>	<u>FY 2007</u>	<u>FY 2008</u>	<u>FY 2009</u>
00 Unknown- Zeros	755	645	479	449
01 NonApplicable	351	134	103	51
10 Neck	560	420	415	403
11 Back	2384	1606	1331	1091
12 Lower Back	3852	4547	4794	4308
13 Buttocks	119	115	136	129
20 Heart	34	38	47	40
21 Brain	25	31	46	59
30 Thumb	1780	1670	1529	1318
31 Finger	4941	5318	5354	4842
32 Hand	3622	3428	3321	2990
33 Wrist	1834	2011	2075	1952
34 Arm	2103	2409	2431	2278
35 Elbow	838	869	981	851
36 Shoulder	2184	2207	2379	2149
40 Toe	353	393	399	299
41 Foot	1270	1312	1244	1182
42 Ankle	1605	1658	1709	1556
43 Leg	537	299	220	178
44 Lower Leg	624	826	827	760
45 Knee	2836	2972	3231	3043
46 Upper Leg	268	300	266	256
47 Hip	254	290	339	367
50 Head	2048	1998	2011	1821
51 Mouth	303	296	270	269
52 Nose	183	221	204	214
53 Eye	2214	2166	1977	1786
54 Ear	151	145	110	142
60 Lungs	203	168	240	155
70 Neck & Head	106	34	44	47
71 Neck & Shoulders	163	81	57	40
72 Neck & Back	169	75	69	48
73 Back & Leg	55	72	36	35
74 Hip & Leg	11	15	16	20
75 Foot& Ankle	51	43	20	11
76 Hand & Wrist	329	316	275	250
77 Other Multiples	5675	5241	5196	4219
97 Other	1662	2477	2735	2570
99 Fatal	21	19	19	11
Totals	46,473	46,832	46,935	42,189

INJURY BY CAUSE OF THE INJURY

Report 2 of 3

Code	Description	2006	2007	2008	2009
AL	Animal	392	510	183	524
AP	Airborne Particles	1194	1444	1141	996
CA	Criminal Act	2	98	140	149
CL	Chemicals	613	322	297	287
EL	Electricity	80	95	83	79
HL	Hot Liquid	941	908	795	678
HO	Hit by Object	6744	5728	5333	4839
IN	Insect	310	179	102	1243
LA	Lifting Action	5005	7019	7516	5426
MV	Motor Vehicle Accident	787	816	783	641
MY	Machinery	428	1128	1285	1573
NA	NonApplicable	6	467	610	617
ND	Needle	430	219	126	326
OT	Other	5048	4705	4081	3246
PL	Plant	154	58	33	1300
PR	Person	2224	2305	2296	710
PS	Pinch/Squeeze	1158	1074	1025	897
QA	Quality of Air	177	450	483	306
RP	Repetitious	1452	1481	1469	1391
SL	Slip or Fall	7703	4991	4863	4163
SO	Sharp Object	5282	3365	2765	2502
TO	Tool	490	1601	2038	1794
TW	Twist	3503	1751	1552	1383
UK	Unknown	2275	6085	7914	7105
WE	Weather	74	33	22	14
Totals		46,473	46,832	46,935	42,189

INJURY BY OUTCOME

Report 3 of 3

<u>Code</u>	<u>Outcome Desc.</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>
100	Unknown	21,252	8843	6435	7371
101	NonApplicable	100	57	63	26
102	Cut or Puncture	7280	8344	8558	7862
104	Bruise	2298	7895	3368	6707
105	Muscle Pull/Strain	8153	14960	16771	14647
106	Burn	1049	1203	1156	1040
107	Bites and/or Scratches	1478	647	420	369
108	Broken or Fractured Bone	765	848	966	816
109	Amputation	26	49	41	51
110	Splinter	249	99	5190	53
120	Heart Attack	23	42	56	42
121	Stroke or Seizure	30	118	163	170
130	Carpal Tunnel	185	231	236	237
131	Tendonitis	280	89	34	23
132	Frost Bite	3	11	11	9
140	Heat Exhaustion	62	47	55	15
141	Occupational Disease (Other)	78	63	146	82
142	Hepatitis Exposure	8	4	10	31
143	Cancer or Exposure (asbestos)	5	5	7	3
144	Body Fluid Exposure	177	98	74	77
145	Electrical Shock	84	97	105	71
146	Hernia	130	126	151	107
147	Rash or Dermatitis	309	304	266	249
148	Allergic Reaction	128	515	780	690
149	Stress	99	551	567	571
160	Fumes, Dust, Smoke Inhale	219	287	280	173
161	Other Respiratory	35	39	11	4
170	Eyeglasses & Contacts	36	327	362	295
171	Vision	1855	878	590	344
180	Hearing Aid	1	1		
181	Hearing Loss	49	35	44	43
199	Death	21	19	19	11
Total		46,473	46,832	46,935	42,189

TIMELINESS OF FILING

Employers are required by law to file an injury report with the Department of Labor within five days of being notified by the employee that an occupational injury or illness requiring medical attention has occurred. Failure to file in a timely manner results in delays in payments owed to claimants and health care providers alike. To discourage this, the statute provides this department with authority to assess civil penalties of up to \$2,500 to employers for each late report. The division monitors the filing process and contacts employers who fail to report within the required time. An "Employer's Guide to Workers' Compensation" is enclosed with these contact letters to help the employer handle claims properly in the future. First time offenders are assessed a civil penalty of \$100, with the penalty increasing on a graduated basis to \$2,500 for repeat offenders.

In fiscal years 2008 and 2009, the division assessed 4,160 civil penalties on employers who had exceeded the maximum time allowed for their injury reporting. This breaks down to 2,291 penalties assessed in FY 2008 totaling \$218,550. In FY 2009, 1,869 penalties totaling \$188,150 were issued to employers who sent late first reports. If an employer does not pay the fine within a month, the fine will be raised and is represented within the figures given. Since the pool of New Hampshire employers is in a constant flux and these businesses undergo staff changes as well, a continued effort is ongoing in educating employers about their obligations under the Workers' Compensation Law.

INDEMNITY BENEFITS

The maximum and minimum levels of workers' compensation benefits are tied to the State's Average Weekly Wage (SAWW), a figure calculated annually by the Department of Employment Security. The SAWW in calendar year 2006 was 812.00 increasing to 837.00 in calendar year 2007. The maximum workers compensation rate is determined by multiplying the State's Average Weekly Wage by 150%, as such, the associated maximum compensation rates rose from \$1,218.00 in FY 2008 to \$1,255.50 in FY 2009.

PERMANENT IMPAIRMENT AWARDS

Permanent impairments involve injuries that cannot be resolved or substantially improved through medical treatment. These also include injuries such as amputations, loss of vision or hearing, or permanent loss of function of an extremity. The Workers' Compensation Law provides for payment of an award in the event a worker's injury results in one of the impairments scheduled in RSA 281-A:32. The following two tables present figures relating to the occurrence of injuries causing permanent impairments, the types of injuries recorded and average awards paid.

PERMANENT IMPAIRMENT INCIDENCE AND COST FY05-09

FY	PERMANENT IMPAIRMENT	COMPENSABLE DISABILITIES	INCIDENCE RATE	IMPAIRMENT TOTAL COST
2005	1,223	8,236	6.7	12,391,530
2006	1,208	6,715	5.5	13,763,152
2007	1,146	6,405	5.5	13,911,834
2008	1,051	8,124	7.7	11,477,541
2009	1,120	8,608	7.6	11,586,733

	FY05		FY06		FY07		FY08		FY09	
	AVG.		AVG.		AVG.		AVG.		AVG.	
	#	AWARD	#	AWARD	#	AWARD	#	AWARD	#	AWARD
ARM	408	\$8,569	394	\$12,870	400	\$14,362	351	9,676	450	9,085
HAND	45	\$8,114	55	\$9,804	54	\$10,044	56	11,566	38	6,248
THUMB	24	\$3,456	34	\$4,747	35	\$7,580	39	5,230	26	6,521
FINGER	81	\$4,396	96	\$4,585	96	\$3,731	30	7,246	34	6,317
LEG	248	\$6,452	266	\$6,837	227	\$6,347	246	6,583	251	8,804
FOOT	38	\$5,366	34	\$4,567	45	\$6,413	38	6,358	25	6,854
TOE	1	\$58	0	0	1	\$698				
HEARING										
Binaural	3	\$9,970	1	\$10,510	0	\$0	1	13,613	2	2,910
One Ear	0	\$0	0	\$0	0	\$0				
VISION										
Both Eyes	0	\$0	1	\$2,179	0	\$0				
One Eye	4	\$12,964	2	\$4,799	4	\$9,283		8,798	5	7,960
WHOLE/MULT	110	\$16,640	122	\$15,716	100	\$16,704	74	23,765	69	17,373
WHOLE/BACK	260	\$16,811	203	\$17,921	184	\$19,366	167	19,343	162	19,035
AVERAGE	1222	\$10,137	1208	\$11,393	1146	\$12,139	1051	10,920	1,120	10,345

IT SHOULD BE NOTED THAT THE NUMBER OF AWARDS IN EACH FISCAL YEAR INCLUDE ONLY THOSE MEMOS OF PERMANENT PARTIAL DISABILITY AWARDS FORMS WHICH HAVE BEEN REVIEWED, APPROVED AND PAID BY THE INSURANCE CARRIERS AND SELF INSURERS.

WORKER'S COMPENSATION HEARINGS

Hearings are scheduled to resolve disputes, which arise between the parties under the New Hampshire Worker's Compensation Law, RSA 281-A. In fiscal year 2008, 2871 hearings were scheduled and in fiscal year 2009, 2915 hearings were scheduled. The table that follows illustrates the number of hearings actually concluded either by decision or lump sum settlement.

NUMBER OF FORMAL HEARINGS

	<u>FY2006</u>	<u>FY2007</u>	<u>FY2008</u>	<u>FY2009</u>
TOTAL SCHEDULED	3109	3081	2871	2915
HEARING/DECISION	1428	1383	1313	1302
LUMPSUM SETTLEMENT	980	869	834	879
TOTAL HEARINGS CANCELLED	320	336	267	227
\$ OF SETTLEMENTS (MILLIONS)	\$38.8	\$37.9	\$51.7	\$39.3
TOTAL CONCLUDED	2408	2252	2147	2181

The injured employees request the bulk of hearings as the carrier has the obligation to review the claim and either accept or deny the claim within 21 days of the receipt of the claim. Claims are often denied because the carrier has not received the requested records from the treating physician. Often times after a claim has been denied, the carrier will reverse their denial and accept the claim upon receipt of the medical documentation.

A review of the total sample of all requests for hearings indicates that in FY 2008, 68.99% of the hearings were requested by claimants, 30.65% by the carriers and .35% by another party. In 2009, 67.60% of requests were made by claimants, 32.17% by the carriers and .21% by another party. The most common issues requested by injured workers are causal relationship to employment (did the injury happen out of and in the course of employment), extent of disability (is the injured employee entitled to indemnity benefits) and medical, hospital and remedial care (are the medical bills related to the injury). Carrier requested hearings are mostly on the issue of extent of disability (is the employee still disabled as a result of the injury) and non-cooperation with vocational rehabilitation (is the injured employee cooperating with the vocational rehabilitation process).

Decisions rendered in FY 2008 reflect that 41% favored the claimant and that 50% favored the carrier with 9% producing a split decision in which both parties won on some aspect. Statistics for FY 2009 show 44% for the claimant, 49% for the carrier and 7% for both.

An analysis of the time that elapses between the request for the hearing and the date on which the hearing was first scheduled reflects that an average of 62.1 days elapsed from request to scheduled hearing date in FY 2008 with the time decreasing to 57.46 days in FY 2009. The time delay generally occurs in clarifying issues and parties needed for attendance at the hearing.

In New Hampshire, parties to workers compensation hearings are not required to be represented by legal counsel, but many choose to retain an attorney. At the time of scheduling, 82.1% of the claimants retained counsel in FY2008, with 91.8% retaining counsel in FY2009. Carriers retained counsel 95.1% of the time in FY2008, and 92% of the time in FY2009. These numbers may become larger when the hearing occurs.

WORKERS' COMPENSATION APPEALS

The Compensation Appeals Board began conducting appeal hearings on April 12, 1991.

APPEAL HEARINGS	FY 2006	FY 2007	FY2008	FY2009
APPEALS REQUESTED	886	840	826	805
APPEALS SCHEDULED	908	774	937	673
APPEALS CANCELLED*	453	416	491	320
DECISIONS RENDERED	455	358	446	353
DECISIONS SUSTAINED	266	238	301	244
DECISIONS REVERSED	189	120	145	109

(* Appeals Cancelled also includes appeals that were Continued and Withdrawn.)

Since the appeal to the Compensation Appeals Board results in a new or de novo hearing at which additional evidence may be introduced, the decision of the appeal board may be different from the one issued by the hearing officer at the department level. For statistical purposes if the board decision is substantially different, it is counted as reversed. If it is substantially similar, it is counted as sustained.

WORKERS' COMPENSATION COVERAGE

The number of New Hampshire employers covered by workers' compensation insurance totaled 68,374 by the end of fiscal year 2008 and 73,034 by the end of fiscal year 2009. The goal of the coverage unit is to educate and elicit compliance with New Hampshire Workers Compensation Laws to ensure that all employers in the State of NH provide their employees with workers compensation coverage. The coverage area within the Department of Labor tracks employers through their coverage activity and allows the department to identify and pursue employers in violation of coverage requirements. The following charts are demonstrative of the activity within the coverage area.

	FY 2006	FY 2007	FY 2008	FY 2009
INSURED EMPLOYERS	67,527	69,325	68,374	73,034
COVERAGE ACTIVITY:				
VOLUNTARY COVERAGE	53,538	56,695	57,761	63,802
ASSIGNED RISK	13,989	12,630	10,613	9232
REINSTATEMENTS	16,145	17,003	16,259	16,884
<u>TOTAL</u>	<u>83,672</u>	<u>86,328</u>	<u>84,633</u>	<u>89,918</u>
TERMINATION ACTIVITIES:				
1. CHANGE OF CARRIER	2858	4534	2838	2716
2. OUT OF BUSINESS	392	370	377	416
3. BUSINESS SOLD	393	348	294	213
4. NO EMPLOYEES	593	630	517	567
5. PREMIUM PAYMENT DUE	13756	15084	14866	14593
6. REQUEST OF CARRIER	8941	7874	7976	7528
7. TERMINATION OF VOLUNTARY ACCEPTANCE	30	46	228	91
<u>TOTAL</u>	<u>26,963</u>	<u>28,886</u>	<u>27,096</u>	<u>26,124</u>

The following amounts reflect a summary of statistical data for civil penalties collected in the Workers' Compensation Coverage Division. These penalties are collected from carriers for failure to accurately file coverage forms with the department and are collected from employers for failure to obtain or maintain workers' compensation coverage.

COLLECTED FROM	FY2006	FY2007	FY2008	FY2009
CARRIERS	\$579,455	\$715,060	\$2,265,109	\$1,581,992
EMPLOYERS	\$107,191	\$129,405	\$114,515	\$168,825
<u>GRAND TOTAL</u>	<u>\$686,646</u>	<u>\$844,465</u>	<u>\$2,379,624</u>	<u>\$1,600,817</u>

**PAID OUTS BY CARRIER AND SELF INSURED
DIRECT LOSSES PAID BY CALENDAR YEAR**

	TOTAL	CARRIER	SELF INSURED
1977	149,252,541	108,328,336	40,924,205
1998	146,366,459	109,011,525	37,354,934
1999	155,752,534	118,108,466	37,644,068
2000	157,765,656	121,963,011	35,802,645
2001	171,805,723	132,906,795	38,898,928
2002	173,592,437	137,214,741	36,377,696
2003	181,268,664	142,406,240	38,862,424
2004	176,355,359	133,333,292	43,022,067
2005	178,870,260	136,540,976	42,329,284
2006	179,237,459	132,895,999	46,341,460
2007	175,263,530	126,370,716	48,892,814
2008	196,043,393	140,430,888	55,612,505

VOCATIONAL REHABILITATION SERVICES

It is the understanding and philosophy of the department that the vocational rehabilitation of occupationally disabled individuals is the most efficient and economical approach to the resolution of problems experienced by injured employees to establish an alternative to their previous occupation. It is the department's goal to ensure that, when appropriate, full rehabilitation is afforded to each individual, with a return to suitable employment as the eventual outcome. The department monitors and, as necessary, directs the process.

All referrals of injured employees by the insurance companies for vocational rehabilitation are reported to the department. Other reports required are the Individual Written Rehabilitation Plan (IWRP), as of 01/01/91, and the notification of the closure of services. In FY 06, the rehabilitation unit staff received 298 referrals, and the injured employees were contacted via mail to reinforce their cooperation with the process. All the other cases are now closed in the following statuses: 74 have returned to work; 89 received lump sum settlements; 11 cases were closed because the injured employee was too disabled for services; 61 referrals were closed at the carrier's request; and, 62 were closed for "other reasons." This last category includes reasons such as relocation out of state, refused service, death, Labor Department Hearing Decision, medical management only, and other circumstances not elsewhere classified.

In reviewing FY 07, there were 243 referrals. All but 3 of those cases are currently closed. The closure breakdown is: 49 have returned to work; 68 received lump sum settlements; 7 cases were closed because the injured employee was too disabled; 55 referrals were closed at the carrier's request; and, 61 were closed for "other reasons."

In FY 06, the average length of time from date of injury to date of referral has gone up (from 600 days in FY 05) to 755 days. In FY 07, the average dropped significantly to 636 days. Research has shown that early intervention is a significant factor in achieving a positive outcome. The average duration of services (from date of referral to date of closure) continues to decrease to 186 days in FY 06 and to 171 in FY 07. The time frame needed for a vocational rehabilitation case to progress from the date of injury to the date of closure has increased to 31.2 months in FY 06 then dropped back down to 26.4 months in FY 07. Since the vocational rehabilitation statistics are based on the date of referral to vocational rehabilitation, the data collected reflect the FY 06 and FY 07 years even though the closures occurred through 2009. Data for the fiscal years 2008 and 2009 will be available in the next biennial report.

The following is a summary of the services being provided in the Individual Written Rehabilitation Plans filed with the department on behalf of the employees receiving vocational rehabilitation services. In FY 06 and 07, job placement occurred in 37.5% of the cases (that's a 2% decrease), while 12% were receiving vocational counseling, exploration, and/or testing (an increase of 2%). Educational training in FY 06 and FY 07 occurred in only 2% of the cases, a decrease of 0.6% from the previous biennium. Skill training has decreased (by 1.1%) to 1.5% of the cases. Many injured employees still continue to need computer skills to enhance their job placement. There have been 60 formal Training Agreements approved by the department in FY 06, and 42 in FY 07. Again the total is a 17% decrease from the previous biennial report. The

number of cases having no IWRPs ever written for service has gone up another 1% to 40.5% of the referrals.

Other functions of the vocational rehabilitation staff include dispute resolution, review of requests for job modification reimbursement, and review of reports of extended disability (form 74 WCA). Most dispute resolution is done via the telephone. However, there are occasions when rehabilitation meetings are held at the department. In this biennium, the number of hearings scheduled for non-cooperation with vocational rehabilitation has almost remained the same while the number of hearings scheduled on eligibility for vocational rehabilitation has decreased by 25%.

All requests for reimbursement for job modification are reviewed and approved or denied by this office. In calendar year 2006, 55 applications were approved, and 1 was denied. A total of \$37,170.95 was reimbursed to 36 employers. In 2007, 36 applications were approved, and 1 was denied. The 22 employers received a total of \$25,679.10.

Effective 01/01/95, any person providing vocational rehabilitation services under RSA 281-A:25 as a vocational rehabilitation provider has to be certified by the Department of Labor. The governor appoints a Vocational Rehabilitation Provider Advisory Board. The responsibilities of this Board include the review of the applications and renewals. Currently, there are 68 Certified Vocational Rehabilitation Providers (CVRP) in 7 states serving injured employees from NH. Again, there is a decrease (12%) from the previous biennium in the number of CVRPs available to provide vocational rehabilitation services. Many providers are seeking other areas of work because of the lack of Workers' Compensation referrals. Training sessions are provided two or three times a year to these individuals by the department's Vocational Rehabilitation staff.

Formal presentations and informal discussions are on going. The educational effort is continuous. With all the parties being well informed, the injured employee should benefit by being returned to the employment world with a restored earning capacity.

WORKERS' COMPENSATION MANAGED CARE

Workers' Compensation Managed Care has been providing case management to injured workers since 1994. There are currently seven (7) approved Managed Care Organizations in New Hampshire that provide case management services statewide. Approval to operate a managed care organization in NH is granted by the Workers' Compensation Advisory Council on the recommendation of the Department of Labor.

The program criteria and approval process is outlined in the Workers' Compensation Managed Care rules, LAB 703. The organization is required to submit to the Department of Labor a copy of their managed care program. The Commissioner reviews the program criteria to confirm that it meets the necessary components as specified in managed care rules. Additionally, the commissioner shall review each managed care program for purposes of determining the program's continued compliance with the standards for approval and delivery of service prior to the expiration of 3 years from the date the program's approval was ratified by the advisory council. Subsequent reviews shall take place at least once every 5 years thereafter, or whenever the commissioner determines that such a review is required.

Managed Care Organizations offer the services of an injury management facilitator (IMF) and a comprehensive network of medical providers to assist the employee with their workers' compensation claim. The IMF is able to provide education on the workers' compensation process to employers and employees. These services are the keys to successful implementation of managed care.

Injury management facilitators, who are approved by the WC Advisory Council, provide case management to the injured employee. The IMF's role is to coordinate among the injured employee, health care professional and insurer to provide the employee with timely, effective and appropriate health care services in order to achieve maximum medical improvement and an expeditious return to work. They must follow the protocols of the Managed Care Organization who has retained their services.

The Department of Labor closely monitors the performance and impact of managed care organizations in NH. Injury management facilitators are required to participate in training seminars and/or use training tapes on the laws and rules of Managed Care and benefit provisions of the Workers' Compensation law.

**Commerce, Labor & Consumer Protection Committee
Hearing Report**

To: Members of the Senate
From: Greg Silverman, *Legislative Aide*
Re: Hearing report on:
HB1370 - requiring independent medical examination practitioners to file a report with the insurance department.
HB 1371 - allowing recording of an examination by health care providers performing independent medical examinations.
Hearing date: May 4th, 2010

Members of the Committee Present: Senator Hassan, District 23; Senator DeVries, District 18; Senator Roberge, District 9; Senator Cilley, District 6; Senator Bragdon, District 11.
Members of the Committee Absent: Senator Reynolds, District 2.

Sponsors: Rep. Pat Long, Hills 10.

What the bill does:

HB370: This bill requires health care providers performing 10 or more independent examinations per year to file a report with the insurance department.

HB1371: This bill allows an injured employee to record and/or have a witness present during the independent medical examinations required under workers' compensation.

Who supports this bill: Peter Webb; Davis Clark; Mary Robidoux; Maureen Manning; Edward Michalosky, CAI New Hampshire.

Who opposes this bill: Peter Webb; Stuart Glassman MD, New Hampshire Medical Society; Davis Clark; Dave Juvet, BIA; Dan Bennett, NH Auto Dealers Workers Trust; Gary Woods, NH Med Society; Bob Nash, Insurance Agents; Curtis Barry, Association Members W.C Trust; Palmer Jones, NHMS; Peter McArdle, NH Association of Domestic Ins

Summary of testimony received:

Rep. Pat Long, Hills 1.

- Prime Sponsor.
- 1371: Many injured employees do not voluntarily go to an IME but are obliged to by the insurance company. They should be able to have a witness present.
- 1370: This process will help to ensure professionalism and transparency for IMEs.
- Not a process to reprimand doctors.

Palmer Jones, NH Medical Society.

- Oppose HB 1370 and 1371.
 - This bill should be referred to the Workers Compensation Advisory Committee.
- The House Commerce Committee did not fully comprehend the complicated details and unintended consequences associated with these bills.

- There are a limited number of physicians performing IME's because of required qualifications.
- These bills will limit the ability of doctors to perform IMEs.
- The law presently says someone can have a person in the room.
- Law says presently you can have a person in the room.

Maureen Manning, Manchester.

- Supports HB1370 and HB1371.
- Attorney who represents injured workers in compensation cases.
- IMEs are commonly performed to support the insurance carrier's denial.
- Physicians perform over 300 IMEs every year and earn up to \$1,000 for each exam.
- The law currently allows a witness in the room, but it must be their medical doctor at the workers expense.
- Some doctors allow a witness and tape recording, others don't.
- If there is only a doctor and patient in the room, a hearing with the DOL can turn into a he said/she said argument about the IME.
- The Workers Compensation Advisory Board is an executive branch committee, not a representative body which receives testimony from the public.
- The House Commerce Committee had at least two work sessions, a lengthy hearing, and performed a great amount of research.
- In relation to HB1370, physicians doing IMEs should have to disclose their data.
- Superior court judges routinely instruct them to provide this information.

Tom Callaghan, Chair and Business Representative of the Workers Comp Advisory Council.

- Takes no position on HB1370 and HB1371.
- Recommends they be sent to the workers compensation advisory council.
- The council voted unanimously to recommend the legislature refer these bills.
- The Advisory board is made up of Labor, Business, Medical, Workers Compensation Insurance, and Legislative representatives.
- The meetings are open to the public in addition to the minutes.

Mary Robideaux, Former IME Patient.

- Supports HB1370 and HB1371.
- Had a work related injury in 1989 and surgery in 1991 which allows her to work today.
- During her workers compensation hearing, her account of the IME and the physicians conflicted.
- In addition a doctor had discussed insurance settlement issues with her.
- This seemed very inappropriate and not independent.

Peter McArdle, NH Assn of Domestic Insurance Companies.

- Opposes HB1370 and HB1371.
- It is accepted practice that workers compensation legislation is directed towards the workers compensation advisory board.

Barbara O'Dea, Physician in Nashua and Manchester.

- Opposes HB1370 and HB1371.
- Certified IME examiner and physician who takes pride in her independence.

- Concerned about the practical implication of these bills.
- Causality is not a clear cut issue in certain cases.
- Someone could be willing to edit a tape or video recording of the exam.
- Many times a witness isn't an observer, but a biased participant.

Dr. Glassman, NH Medical Society.

- Opposes HB1370 and HB1371.
- No evidence exists of a confirmed bias in the IME process.
- The issue of bias in the IME process has never been brought to the Workers Compensation Advisory Council for a formal discussion in the last 18 months.
- Ethics standards already exist for IMEs.
- Recording will increase the costs of IMEs and all recordings will need to be authenticated.

Dr. Davis Clark, NH Medical Society.

- Opposes HB1370 and HB1371.
- Supports idea of sending this to Workers Comp Advisory Council.
- Reporting will be burdensome because the insurance company is unknown.
- While fee schedules should be available annual income reporting is inappropriate.
- Recording requirements will raise the cost of the exam process and may discourage doctors presently doing IMEs from continuing.

Gary Woods, NH Medical Society.

- Opposes HB1370 and HB1371.
- Was on workers comp advisory committee.
- Nothing on bill to check to see if a doctor was wrong in their decisions.

Peter Webb, Brookline, NH

- Supports HB1370 and HB1371.
- Attorney for injured workers compensation claimants.
- These bills increase transparency for all parties.
- The vast majority of workers compensation claims are denied based upon the IME.

Bob Clegg, NH Assn. for Justice.

- Supports HB1370 and 1371.
- The medical community has said it makes sense to have a videotape in the examining room.
- The House Commerce Committee spent countless hours on this issue and has full expertise over the issue.
- The Workers Comp. Advisory Committee is politically appointed rather an elected body.
- Page 1 line13.
- The word "record" would rely on legislative intent as to the use of audio or video.

Action: HB1370: Senator Hassan made a motion of Inexpedient to Legislate. Senator Bragdon seconded the motion. The committee voted 6-0 in favor. The bill will be taken out by Senator Hassan.

HB1371: Senator DeVries made a motion of Ought to Pass. Senator Hassan seconded the motion. Senator Reynolds moved the Amendment Ought to Pass. Senator Cilley seconded the motion. The committee voted 6-0. Senator Hassan made a motion of Ought to Pass as amended. Senator DeVries seconded the motion. The committee voted 6-0 in favor.

HB 1371 Study Committee Contact List

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Voting Sheets

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

EXECUTIVE SESSION on HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations.

DATE: February 18, 2010

LOB ROOM: 307

Amendments:

Sponsor: Rep. Long	OLS Document #:	2010	0804h
Sponsor: Rep.	OLS Document #:		
Sponsor: Rep.	OLS Document #:		

Motions: OTP, OTP(A) ITL, Interim Study (Please circle one.)

Moved by Rep. Weed

Seconded by Rep. Kelly

Vote: 11-0 (Please attach record of roll call vote.)

Motions: OTP, (OTP/A) ITL, Interim Study (Please circle one.)

Moved by Rep. Weed

Seconded by Rep. Kelly

Vote: 10-1 (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,
Mary Ann Knowles
Rep. Mary Ann Knowles, Clerk

HOUSE COMMITTEE ON LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

EXECUTIVE SESSION on HB 1371

BILL TITLE: allowing recording of an examination by health care providers performing independent medical examinations.

DATE: 2/18/10

LOB ROOM: 307

Amendments:

Sponsor: Rep. Long

OLS Document #: 2010-0804 h

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Weed

Seconded by Rep. Kelly

Vote: (Please attach record of roll call vote.) 11-0

Motions: OTP OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Weed

Seconded by Rep. Kelly

Vote: (Please attach record of roll call vote.) 10-1

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Mary Ann Knowles, Clerk

LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

Bill #: HR 1371 Title: allowing recording of an examination by health care providers performing independent medical examinations
 PH Date: 1/12/10 Exec Session Date: 2/18/10

Motion: OTP Amendment #: 2010-0804 h

MEMBER	YEAS	NAYS
Goley, Jeffrey P, Chairman	✓	
Kelly, Sally H, V Chairman	✓	
Gorman, Mary J		
Hofemann, Roland P	✓	
Knowles, John		
Knowles, Mary Ann, Clerk	✓	
Brennan, William P		
Craig, James W		
Weed, Charles F	✓	
Rice, Chip L		
Mears, Lucy E	✓	
Infantine, William J	✓	
Daniels, Gary L	✓	
Bishop, Franklin C	✓	
Bridle, Russell D		
Gleason, John P		
Dumaine, Dudley D		
Richardson, Herbert D		
Pellegrino, Tony J		
Sedensky, John B	✓	
Harrigan, Timothy	✓	
	11	0

LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

Bill #: HB 1371 Title: allowing recording of an examination by health care providers performing independent medical examinations
 PH Date: 1 / 21 / 10 Exec Session Date: 2 / 18 / 10

Motion: OTP/A Amendment #: _____

MEMBER	YEAS	NAYS
Goley, Jeffrey P, Chairman	✓	
Kelly, Sally H, V Chairman	✓	
Gorman, Mary J		
Hofemann, Roland P	✓	
Knowles, John	✓	
Knowles, Mary Ann, Clerk	✓	
Brennan, William P		
Craig, James W		
Weed, Charles F	✓	
Rice, Chip L		
Mears, Lucy E	✓	
Infantine, William J		✓
Daniels, Gary L	✓	
Bishop, Franklin C	✓	
Bridle, Russell D		
Gleason, John P		
Dumaine, Dudley D		
Richardson, Herbert D		
Pellegrino, Tony J		
Sedensky, John B	✓	
Horrigan, Timothy	✓	
	10	1
TOTAL VOTE:		

Committee Report

REGULAR CALENDAR

February 18, 2010

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Committee on LABOR, INDUSTRIAL AND
REHABILITATIVE SERVICES to which was referred
HB1371,**

**AN ACT allowing recording of an examination by health
care providers performing independent medical
examinations. Having considered the same, report the
same with the following amendment, and the
recommendation that the bill OUGHT TO PASS WITH
AMENDMENT.**

Rep. Charles F Weed

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES
Bill Number:	HB1371
Title:	allowing recording of an examination by health care providers performing independent medical examinations.
Date:	February 18, 2010
Consent Calendar:	NO
Recommendation:	OUGHT TO PASS WITH AMENDMENT

STATEMENT OF INTENT

The bipartisan majority recognizes that current law allows a "medical practitioner" to be a witness in workers compensation cases requiring an independent medical examination. However, the cost of hiring such a medical professional often discourages the claimant. This bill provides the right for the claimant to record the medical examination or to bring a witness of the claimant's choosing. The majority thinks this bill protects process rights and provides accountability when work related injuries are contested.

Vote 10-1.

Rep. Charles F Weed
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

HB1371, allowing recording of an examination by health care providers performing independent medical examinations. **OUGHT TO PASS WITH AMENDMENT.**

Rep. Charles F Weed for LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES. The bipartisan majority recognizes that current law allows a "medical practitioner" to be a witness in workers compensation cases requiring an independent medical examination. However, the cost of hiring such a medical professional often discourages the claimant. This bill provides the right for the claimant to record the medical examination or to bring a witness of the claimant's choosing. The majority thinks this bill protects process rights and provides accountability when work related injuries are contested. **Vote 10-1.**

Original: House Clerk
Cc: Committee Bill File

HB 1371

OTP/A

The bipartisan majority recognizes that current law allows a "medical practitioner" to be a witness in workers compensation cases requiring an independent medical examination. However, the cost of hiring such a medical professional often discourages the claimant. This bill provides the right for the claimant to record the medical examination or to bring a witness of the claimant's choosing. The majority thinks this bill protects process rights and provides accountability when work related injuries are contested.

Charles Weed

A handwritten signature in black ink, appearing to be the initials 'CW' or similar, located at the bottom right of the page.

COMMITTEE REPORT

COMMITTEE: LABOR

BILL NUMBER: HB 1371

TITLE: _____

DATE: _____ CONSENT CALENDAR: YES NO

- OUGHT TO PASS
- OUGHT TO PASS W/ AMENDMENT
- INEXPEDIENT TO LEGISLATE
- RE-REFER
- INTERIM STUDY (Available only 2nd year of biennium)

Amendment No.
0804h

STATEMENT OF INTENT:

The bipartisan majority recognizes that current law allows a "medical practitioner" to be a witness in workers compensation cases requiring an independent medical examination. However, the cost of hiring such a medical professional often discourages the claimant. This bill provides the right for the claimant to record the medical examination or to bring a witness of the claimant's choosing. ~~The~~ The majority thinks this bill protects process rights and provides accountability when work related injuries are contested.

COMMITTEE VOTE: ~~10-1~~ 10-1

Copy to Committee Bill File
 Use Another Report for Minority Report

RESPECTFULLY SUBMITTED,

Rep. Charles F. Wood
For the Committee

JS