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 struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1371 – AS INTRODUCED

10-2435
01/04

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

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

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

HB 1371 – AS AMENDED BY THE HOUSE

11Mar2010... 0942h

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

AMENDED ANALYSIS

This bill allows an injured employee to record and/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 struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1371 - AS AMENDED BY THE HOUSE

11Mar2010... 0942h

10-2435
01/04

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

II. Any health care provider conducting independent medical examinations under this chapter shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by such board. The health care provider shall maintain a current practice in that area of specialty. The independent medical examination shall take place within a 50-mile radius of the residence of the injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile radius is necessary to obtain the services of a provider who specializes in the evaluation and treatment specific to the nature and extent of the employee's injury. The injured employee shall not be required to submit to more than 2 independent medical examinations per year, unless within the discretion of the commissioner, more than 2 examinations are necessary. ***An injured employee shall have the right to record the examination and/or have a witness present during such examination. In the event that a witness is present, including but not limited to a witness recording, taking notes, or observing, on behalf of the injured employee, the witness shall not interfere in the examination in any way. The injured employee shall be required to sign an authorization, as prepared by the commissioner, to the effect that he or she understands that his or her medical history and condition or conditions will be discussed during said examination and that he or she waives any right to privacy that he or she may have under the circumstances of voluntarily allowing a witness to be present on his or her behalf.***

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

CHAPTER 227
HB 1371 – FINAL VERSION

11Mar2010... 0942h
5/12/10 2011s

2010 SESSION

10-2435
01/04

HOUSE BILL ***1371***

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

SPONSORS: Rep. Long, Hills 10

COMMITTEE: Labor, Industrial and Rehabilitative Services

AMENDED ANALYSIS

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

This bill also establishes a committee to study certain aspects of independent medical examinations.

- -

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

CHAPTER 227
HB 1371 - FINAL VERSION

11Mar2010... 0942h
5/12/10 2011s

10-2435
01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

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

227:1 Workers' Compensation; Independent Medical Examinations. Amend RSA 281-A:38, II to read as follows:

II. Any health care provider conducting independent medical examinations under this chapter shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by such board. The health care provider shall maintain a current practice in that area of specialty. The independent medical examination shall take place within a 50-mile radius of the residence of the injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile radius is necessary to obtain the services of a provider who specializes in the evaluation and treatment specific to the nature and extent of the employee's injury. The injured employee shall not be required to submit to more than 2 independent medical examinations per year, unless within the discretion of the commissioner, more than 2 examinations are necessary. ***An injured employee shall have the right to have a witness present during such examination. In the event that a witness is present, including but not limited to a witness taking notes or observing, on behalf of the injured employee, the witness shall not interfere in the examination in any way. The injured employee shall be required to sign an authorization, as prepared by the commissioner, to the effect that he or she understands that his or her medical history and condition or conditions will be discussed during said examination and that he or she waives any right to privacy that he or she may have under the circumstances of voluntarily allowing a witness to be present on his or her behalf.***

227:2 Committee Established. There is established a committee to study whether allowing an injured employee to record the independent medical examination is feasible and whether independent medical examination practitioners should be required to file a report with the insurance department.

227:3 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Three members of the house of representatives, appointed by the speaker of the house of representatives.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

227:4 Duties. The committee shall study whether allowing an injured employee to record the independent medical examination 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.

227:5 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named senate member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

227:6 Report. The committee shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2010.

227:7 Effective Date.

I. Section 1 of this act shall take effect January 1, 2011.

II. The remainder of this act shall take effect upon its passage.

Approved: June 28, 2010

Effective Date: I. Section 1 shall take effect January 1, 2011.

II. Remainder shall take effect June 28, 2010.

Amendments

Sen. Hassan, Dist. 23
May 10, 2010
2010-1978s
01/10

Amendment to HB 1371

Amend the title of the bill by replacing it with the following:

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

Amend the bill by replacing all after the enacting clause with the following:

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

II. Any health care provider conducting independent medical examinations under this chapter shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by such board. The health care provider shall maintain a current practice in that area of specialty. The independent medical examination shall take place within a 50-mile radius of the residence of the injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile radius is necessary to obtain the services of a provider who specializes in the evaluation and treatment specific to the nature and extent of the employee's injury. The injured employee shall not be required to submit to more than 2 independent medical examinations per year, unless within the discretion of the commissioner, more than 2 examinations are necessary. ***An injured employee shall have the right to have a witness present during such examination. In the event that a witness is present, including but not limited to a witness taking notes or observing, on behalf of the injured employee, the witness shall not interfere in the examination in any way. The injured employee shall be required to sign an authorization, as prepared by the commissioner, to the effect that he or she understands that his or her medical history and condition or conditions will be discussed during said examination and that he or she waives any right to privacy that he or she may have under the circumstances of voluntarily allowing a witness to be present on his or her behalf.***

2 Committee Established. There is established a committee to study whether allowing an injured employee to record the independent medical examination is feasible and whether independent medical examination practitioners should be required to file a report with the insurance department.

3 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Three members of the house of representatives, appointed by the speaker of the house of representatives.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

4 Duties. The committee shall study whether allowing an injured employee to record the independent medical examination 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.

5 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named senate member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

6 Report. The committee shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2010.

7 Effective Date.

I. Section 1 of this act shall take effect January 1, 2011.

II. The remainder of this act shall take effect upon its passage.

Commerce, Labor and Consumer Protection
May 11, 2010
2010-2011s
01/05

Amendment to HB 1371

Amend the title of the bill by replacing it with the following:

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

Amend the bill by replacing all after the enacting clause with the following:

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

II. Any health care provider conducting independent medical examinations under this chapter shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by such board. The health care provider shall maintain a current practice in that area of specialty. The independent medical examination shall take place within a 50-mile radius of the residence of the injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile radius is necessary to obtain the services of a provider who specializes in the evaluation and treatment specific to the nature and extent of the employee's injury. The injured employee shall not be required to submit to more than 2 independent medical examinations per year, unless within the discretion of the commissioner, more than 2 examinations are necessary. ***An injured employee shall have the right to have a witness present during such examination. In the event that a witness is present, including but not limited to a witness taking notes or observing, on behalf of the injured employee, the witness shall not interfere in the examination in any way. The injured employee shall be required to sign an authorization, as prepared by the commissioner, to the effect that he or she understands that his or her medical history and condition or conditions will be discussed during said examination and that he or she waives any right to privacy that he or she may have under the circumstances of voluntarily allowing a witness to be present on his or her behalf.***

2 Committee Established. There is established a committee to study whether allowing an injured employee to record the independent medical examination is feasible and whether independent medical examination practitioners should be required to file a report with the insurance department.

3 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Three members of the house of representatives, appointed by the speaker of the house of representatives.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

4 Duties. The committee shall study whether allowing an injured employee to record the independent medical examination 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.

5 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named senate member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

6 Report. The committee shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2010.

7 Effective Date.

I. Section 1 of this act shall take effect January 1, 2011.

II. The remainder of this act shall take effect upon its passage.

2010-2011s

AMENDED ANALYSIS

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

This bill also establishes a committee to study certain aspects of independent medical examinations.

Committee Minutes

AMENDED

Printed: 04/09/2010 at 11:18 am

SENATE CALENDAR NOTICE

COMMERCE, LABOR AND CONSUMER PROTECTION

√Senator Margaret Hassan Chairman
√Senator Betsi DeVries V Chairman
√Senator Deborah Reynolds
√Senator Jacalyn Cilley
√Senator Peter Bragdon
√Senator Sheila Roberge

For Use by Senate Clerk's Office ONLY
☐ Bill Status
☐ Docket
☐ Calendar
Proof: ☐ Calendar ☐ Bill Status

Date: April 9, 2010

HEARINGS

Tuesday **5/4/2010**

(Name of Committee)	(Place)	(Time)
COMMERCE, LABOR AND CONSUMER PROTECTION	LOB 102	8:30 AM

EXECUTIVE SESSION MAY FOLLOW

Comments: Please note the addition of HB 1393. Please note the time changes for HB 1340, HB 1366, HB 1370, HB 1371 and HB 1470.

8:30 AM	HB1393	(New Title) relative to the treatment of New Hampshire investment trusts.
8:45 AM	HB1340	relative to condominium liens for assessments.
9:00 AM	HB1366	making certain technical corrections in the insurance laws.
9:15 AM	HB1370	requiring independent medical examination practitioners to file a report with the insurance department.
√9:30 AM	HB1371	allowing recording of an examination by health care providers performing independent medical examinations.
9:45 AM	HB1470	establishing a committee to study laws relating to condominium and homeowners' associations.

Sponsors:

HB1393
Rep. John DeJoie

HB1340
Rep. William Infantine

HB1366
Rep. Edward Butler

HB1370
Rep. Patrick Long

HB1371
Rep. Patrick Long

HB1470
Rep. Suzanne Harvey
Sen. Sharon Carson
Rep. L. Mike Kappler
Rep. Susan Almy
Rep. Paul Hackel
Sen. Amanda Merrill

START: 10:20

END: 11:45

Richard Parsons 271-3093

Sen. Margaret Hassan

Chairman

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.

RP

Date: May 4, 2010
Time: LOB 102
Room: 10:18 a.m.

The Senate Committee on Commerce, Labor and Consumer Protection held a hearing on the following:

HB 1370	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.

Members of Committee present:	Senator Hassan Senator DeVries Senator Reynolds Senator Cilley Senator Bragdon Senator Roberge

---

The Chair, Senator Margaret Wood Hassan, opened the hearing on HB 1370 and invited the prime sponsor, Representative Patrick Long, to introduce the legislation.

Representative Patrick Long: Thank you, Madam Chair, Honorable members of the Committee. My name is Pat Long. I represent Hillsborough District 10 in Manchester. My capacity has, working with injured employees, I came across, I came across some, what I perceived as an unfair burden on these injured employees with respect to independent medical examinations. With working with them I found that, I questioned the fact that they may be independent at all.

The way the bills are, Madam Chair, are 71 is actually the issue and 70 is one of the redresses for it. But, I will stick with 70.

Senator Margaret Wood Hassan, D. 23: Well, hold on just a second as you say that because we are past time for the introduction of 1371. So, I am wondering if it would be efficient to let people testify to both and have a hearing on both. I think that would move things along because I bet there are people here to do both things.

RP

So, let me just, for the record, note that I am also opening the hearing on House Bill 1371, which is also prime sponsored by Representative Long, and I am going to...

Senator Jacalyn L. Cilley, D. 6: Excuse me, Madam Chair.

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Jacalyn L. Cilley, D. 6: Then my question becomes how our esteemed aide splits the screen between the two?

Senator Margaret Wood Hassan, D. 23: Well, I know that we have done it for other bills. So, I am sure that we are going to figure out a way to do this.

Senator Peter E. Bragdon, D. 11: He is a smart fellow. He will figure it out.

Senator Margaret Wood Hassan, D. 23: Choose different colors for different comments or something. So, sorry for our editorial and organizational comments, Representative Long. Why don't you address both 1370 and 1371?

Representative Long: Thank you, Madam Chair. As I said, in my 15-plus years of working with injured employees, I came to realize that the independent medical exams, in my opinion, weren't, weren't what they were meant to or intended to be. I've witnessed several, several injured employees that would go through a year or two-year process, eventually dropping their workers' comp claim and soon afterwards going on Social Security disability insurance, which the federal, at the federal level, they recognized that they were injured.

When I looked into independent medical examinations, I came upon employees that had asked to either record or have their wife, or witness, or their husband present during these exams and they were denied. My sense is that this is a legal procedure. These injured employees; these injured employees aren't voluntarily going to this doctor. This doctor is not their patient, and I find it unusual that they weren't being allowed to record or have a witness present at these, at these proceedings.

So with that I add, put in a bill, 1371, which would allow the recording and/or having a witness present. I feel, as a legal procedure, that the injured employee has that, has that right to, you know, to record. And of course, they would know that, with respect to privacy, if you have a witness there that,

you know, the private information is going to come out and be aware that your witness will have that.

And with respect to 1370, I mean, some had said that or some feel that this, that 1370 is a witch hunt. You know, I believe 1370 gives the professionals that are determining these, whether it is a hearing officer or a judge, you know, that give them a better answering and credibility. Whether it be for or against the injured employee, I don't believe that this would be just a witch hunt on doctors that are performing IMEs. I believe that it would be, could go either way, you know, could add credibility to the IME doctors or it could take credibility away.

So, once again, it's in my opinion that the injured employees have been, are being harmed. You know, I'm not sure if independent medical exams was meant to become an industry or, I mean, I certainly believe that the insurances have the right to verify the injury. However, my sense is that it's gone above and beyond the independent status and both of these bills are a hopes to reel that back in.

Senator Margaret Wood Hassan, D. 23: Thank you. Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Representative, for your testimony. First, just, you mentioned that you worked with the injured employees for 15 years. I am not sure of your background. What is it that you do?

Representative Long: Actually, I worked as a worker advocate. I was a union business agent for the iron workers. But, the majority of my calls were, the union iron workers sort of know the system because they were brought up with that, but the majority of the people I worked for were people that weren't in a union and knew that I had some workers' comp experience and they would ask for my help.

Senator Peter E. Bragdon, D. 11: Thank you. And then, a question on the...

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Peter E. Bragdon, D. 11: If I understand this correctly then, you question whether or not the independent medical exams are truly independent because, I assume, it's the carrier that pays for them. And so that, in your mind at least, makes you think that perhaps they're not independent because the carrier's paying for the exam?

RP

Representative Long: That would be part of it. Not only that the carrier is paying for it, but they, the way, I mean, I've asked my doctors that I personally see if they were, if they did it, independent medical exams, and they used to. The two doctors that I asked used to, and they told me that it's, obviously, I wasn't given the right report. So, you know, to me there is a, you know, if we see these reports, we're going to see certain doctors doing a lot of independent medical reports.

Senator Margaret Wood Hassan, D. 23: Any further questions? Seeing none, thank you very much, Representative.

I am going to do my best to kind of follow two sign-in sheets, which have a lot of similarities. But, I am wondering, Mr. Jones, if you could come forward. I think it would be useful. Come on forward.

Palmer Jones: Good morning. My name is Palmer Jones with the New Hampshire Medical Society. We are here opposing House Bill 1370 and 1371. And, what we are asking for you to do is to refer these bills to the Workers' Comp Advisory Committee. We think they have the expertise and the background necessary to understand this situation.

It is clear that the House Commerce Committee, which did not have the experience, I do believe, the background to be able to understand all of these issues, clearly felt that, if a physician worked for an insurance company, that there was some built-in bias. You heard the first sponsor talk about that issue. Clearly, we have a limited number of these gentlemen and ladies who do this work right now. So yes, you're going to see their name a lot because there are certain qualifications you have to have to be able to do this kind of work.

The second reference was, I do believe, the law says presently that you can have a person in the room with you. That is not a change. I think it is already there in saying that they can have a second person there with you, if you look back at the law.

So, from our perspective, however, we think that the Workers' Comp Advisory Committee really does have the expertise and that we ask that you rerefer this bill or refer this bill to them to take a look at it. They have had a brief reference and a brief hearing. Let me say, they referenced it in their last meeting, and I think you'll have someone coming forward from the group to talk a little about that. But, we're asking you to send it to that group. We think they have the expertise to look at it.

These changes are significant. You will find, as you listen to physicians that follow me, that this clearly is not a minor change. These are significant changes that will impact the ability of physicians to want to do this kind of service. And, I will try and answer any questions you have.

Senator Margaret Wood Hassan, D. 23: Thank you. Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Mr. Jones. And, if I recall correctly, the qualifications for an independent medical exam, the doctor has to be board certified and also be within a certain number of miles.

Mr. Jones: That's correct.

Senator Peter E. Bragdon, D. 11: So, it's kind of restrictive in terms of who can do it?

Mr. Jones: Yes, and that is why you have a limited number. And, I think we've already...you'll hear from some physicians who are board certified and able to do this. You're going to find that they're, they may be hesitant to do this a lot. And, I am afraid we're going to lose good, quality physicians if you make these changes. But, that's why refer it to Workers' Comp.

Senator Margaret Wood Hassan, D. 23: Thank you.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Margaret Wood Hassan, D. 23: Thank you very much. Any further questions? Seeing none, thank you very much.

Mr. Jones: Thank you.

Senator Margaret Wood Hassan, D. 23: Maureen Manning, please.

Attorney Maureen Manning: Thank you, Madam Chair, and members of the Committee. My name is Maureen Manning. I'm an attorney in Manchester, New Hampshire, and I have had the pleasure over almost 25 years, at this point, of representing injured workers in the workers' compensation system here in New Hampshire.

A work injury can be devastating to the employee and to the family, and they often need to fight to get the benefits that the law provides for them. IMEs, independent medical exams, as they're supposed to be called, are done for multiple reasons. The most common ones are to support the carrier's denial

RP

at the very beginning of the claim. Because the carrier has 21 days to accept or deny the claim, they often have to deny the claim without an IME because it's not possible to get it scheduled so quickly. So, the claim is denied and then shortly thereafter there is an IME scheduled and they often support the denial.

Another common reason is to look at the extent of disability, whether an injured worker is still required, requiring the weekly disability checks, the income replacement checks. And also, to determine whether there is a causal relationship between the injury and the ongoing medical treatment that the claimant is needing. So, this is an, the need for IMEs is ongoing throughout the process, not just at the beginning. It is the beginning, the middle and the end. Even after a settlement, IMEs are very common regarding the medical issues, which in New Hampshire cannot be settled. So, it goes on throughout the case.

I would represent to you that calling them an IME is not an accurate name for them. Oftentimes there's little examination going on and they're not particularly independent. They should be called insurance medical exams because that is in fact what they are. Doctors are hired by the insurance companies. Some of them, some in this room, perform upwards of 300 IMEs a year. They receive upwards of $1,000 per IME.

There is a lot of evidence that could be presented to you. I have stacks of it here; others have stacks of it that hundreds of thousands of dollars are being paid by the insurance companies, which is a limited pool of insurance companies, to these IME doctors. And, there are a couple dozen that do a lot of them in the State, and if you do the math, there is a lot of money being made. There is one doctor who charges, I thought I brought my ruler but, who charges $900 for an IME, but $450 more an hour if the records are more than 2 inches thick. So, it's a business and there is no other way of saying it. Yes, they are professionals. Yes, they are medical doctors. I am not trying to say that they're not, but this part of the workers' compensation system is a business.

So, the law, at this point, gives the insurance companies the right to schedule two IMEs a year and they're, attending them is required. It's mandatory, and you risk losing your benefits if you do not attend them. Right now, the law does allow a witness, as Palmer Jones correctly stated, but that witness is the claimant's medical doctor at their expense. How am I to afford, if I am the claimant now receiving reduced disability benefits, to afford to pay my doctor to come and sit in an IME, which could be scheduled 50 miles from my town or where the doctor practices? It is not practical.

RP

Obviously, when this workers' compensation law was passed many years ago, the Legislature thought that it was important that an injured worker have a witness at these exams. That was part of the give and take of this system, the quid pro quo that we talk about in the workers' comp system. Part of it was that these exams would have to take place, but that the claimant would have the opportunity to bring their doctor. Since that is never exercised, for the practical reasons of the expense. I think that this idea is a good idea. To allow them to bring in a witness, which most, by the way, doctors, should say many of the IME doctors allow. They say we have nothing to hide. You can bring your witness in. Many of them allow tape recording without issue either. The problem is that they don't all allow it and that adversely affects the fairness in the system for the claimants who end up with an IME doctor who refuses both the witness and the recording.

Based on what my clients have told me, these exams are often what I would call an off the record cross examination. And, what happens is the doctor, the IME doctor, then comes in to the Labor Department hearing or writes a report saying a number of things. For instance, I checked the claimant's range of motion and they were not able to do the right amount of range, and my client says they never checked that. If it is just the doctor and the claimant in the room, then now you have the credibility finding that needs to be made by somebody with no independent evidence. There is no other part of the legal system that allows this sort of cross examination to go on off the record.

A doctor will often say in a report that the worker denied a particular type of injury when my client says, "They never asked me that. I didn't deny it, it was never asked." But, now it looks like this IME doctor writes a report saying that the claimant isn't being honest. These are real life problems within the system. Many of these IME doctors, we've taken depositions of them, and the, particularly in the court systems, you know, in a civil matter as opposed the Labor Department matter and they admit under oath that they are insurance based, defense-oriented, that they do most of their work for the insurance companies, and that they make hundreds of thousands of dollars doing it.

What we're asking is to level the playing field. To allow the doctors to do the exam. Have the claimants come and do them, but have them have a witness, or recording, or both. And, the reason for the "or both," is, if I'm a claimant with bilateral shoulder injuries and I would like a video recording, I may need somebody to help me do that. So, rather than make it particular, allow it to be a recording, allow a witness to come in, if needed, under the circumstances.

RP

I do not suggest that you send this to the Workers' Compensation Advisory Committee. That is an Executive Branch Committee. People, I believe, on that Committee are appointed by the Governor only, although I am not positive of that. That's the first that I have heard that suggestion. But, they are not a representative body. They frequently ask doctors to come testify before them. They have, to my knowledge, never asked claimants' lawyers or claimants to come testify before them and get them information. They do not have open hearings or a process that would allow for both sides to come in and talk to them, at least they have not done that in the past.

This body, the Legislature, the Senate and the House, you make the laws, and I would suggest that you not send it over there. I do not think that that's proper, and the suggestion that the House Commerce Committee were in over their heads, I'm not, I'm paraphrasing at this point, is incorrect. They held a very lengthy hearing. They had at least two work sessions. Almost everybody in this room was at both of those work sessions, including the doctors and the lawyers, and they knew what they were doing. They took a lot of time, and put a lot of energy, a lot of research. They had, by the time they were done, stacks of documents, which we could give you too. Both sides I'm sure could. So, they knew what they were doing and they passed this on to you to now look at. As I said, both of these bills would level the playing field.

I will speak very briefly on the issue of their disclosure. In a society of full disclosure, why would these doctors not have to disclose this information? They are part of a business in a workers' compensation system that are affecting individuals' rights. These people's rights, this is how they support their family, and whether or not they stay on workers' comp or whether their $2,000 MRI bill gets paid or not is real life stuff. And they should, these doctors, who are doing substantial amounts of IMEs, should have to report, so that then the bias can be flushed out. It's done every time any superior court judge in the State of New Hampshire has been asked on whether or not doctors should have to disclose some financial information, whether they should have to allow a recording or a witness. The superior court judges routinely say yes for the very reason that we're asking you here. Level the playing field, make it fairer.

I would be happy to answer questions, and as you can tell, I could probably talk a lot longer.

Senator Margaret Wood Hassan, D. 23: Thank you very much. Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Attorney for your testimony. A couple things.

One, you mentioned in terms of defending why there should be somebody present within the, for the examination. Not necessarily another medical provider paid for by the injured worker, and you used the example of range of motion. But, if somebody brings somebody with them who is not trained and doesn't know the medical practice, would it be possible that they may not know exactly what is being done, and so a test is being performed but they, not being trained, don't know what that test is? So, how could they, later on, come in and say that was never done when they don't have the training? So, I guess my question is, are we really solving the problem if we are inviting people into the room that really are not trained in the medical field?

Attorney Manning: Well, first of all, it happens a lot now because, as I said, many doctors allow it. And, what will happen is, is during the hearing process, the witness would be called to say, did you ever see the doctor ask the person to raise their arm to see how high the arm could go and how far back it can go? And, if the answer is no that doctor never did that. You don't need a medical degree to determine whether that was done. Maybe it goes to the weight of the evidence on some of the finer points of medicine, where the person who's the witness won't be able to really parse out those things. But, I think it can be, based on testimony and observation, any layperson would be able to talk about the things that come up in these hearings.

Senator Peter E. Bragdon, D. 11: Thank you, and...

Senator Margaret Wood Hassan, D. 23: Follow up or another question.

Senator Peter E. Bragdon, D. 11: Another type of question. I'm curious about the process. So, a worker comes to you who believes he was or she was injured on the job. I assume you send them for some kind of medical screening yourself.

Attorney Manning: No.

Senator Peter E. Bragdon, D. 11: You just take their word that they're injured?

Attorney Manning: They usually have a treating doctor already themselves. So, I am not involved in the medical process of it. Oftentimes it is an occupational health doctor that their company has sent them to. Sometimes it's their own PCP.

Senator Peter E. Bragdon, D. 11: And, are there cases where they don't or they always do?

Attorney Manning: In almost 25 years of practice I've never had anybody coming in to me telling me for the first time I have had this injury and do you think I should see a doctor? It's always the other way around.

Senator Peter E. Bragdon, D. 11: And, a follow up on that?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Peter E. Bragdon, D. 11: Would you then support requiring all physicians who do any diagnosis of people allegedly injured at work to file this report because if clearly if the allegedly injured worker is paying for the doctor, how is that different from the carrier? So, maybe all doctors should file this report that is being asked.

Attorney Manning: I don't have a problem with more information, so that's my first statement. But, really the claimant's not paying the bills within the workers' comp system either. It's the insurance company, and those doctors do fill out reports to the insurance company. There's a form any time a medical bill is created that is a workers' comp treatment. There's a medical; I don't have a copy of it, but it's a very detailed form advising the insurance company of all kinds of things. Not the finances, but they, the insurance company knows the finances because they get the bill.

Senator Peter E. Bragdon, D. 11: That's if the claim is accepted. If the claim is denied, who pays the bill?

Attorney Manning: Well then the bill...what would happen if the claim is denied, and the bill is outstanding is, oftentimes people come to me at that point. I have seen my doctor. They say it's work related. They've treated me. The bill has been denied. They come in to see me. We request a hearing at the Labor Department for that bill to be presented to a hearing officer. I have to present that evidence to the hearing officer, but I also have to give it to the insurance company and the defense lawyer prior to any hearing. They often get it many months before. The doctors, the treating doctors themselves, often send the bills with their records, because remember the bill has to get denied.

So, there is a triggering factor of the bill gets created; the doctor sends it; the insurance company looks at it; they have 30 days to accept or deny it. If they deny it, they already have it. They've got the information. They know what the cost is. And, you know, we're talking their treatment. Those bills for a

treating doctor, you know, is $100 a visit, $110 a visit, something in that range, specialists more, of course. But, the insurance companies had that information.

Senator Peter E. Bragdon, D. 11: And, follow up.

Senator Margaret Wood Hassan, D. 23: Yeah.

Senator Peter E. Bragdon, D. 11: To be clear. So, you never hire your own medical people to do extra tests for you?

Attorney Manning: To do what for me?

Senator Peter E. Bragdon, D. 11: Extra tests or tests on an allegedly injured worker.

Attorney Manning: I would say there's one exception to that. I can't say, I can't completely agree with you.

In a workers' compensation case, the system provides for permanent impairments to be compensated. So, when an injured worker is left with a permanent injury, they have an entitlement to compensation. The law requires that the insurance companies pay for one exam to have an evaluation done. That exam sometimes, not always, is arranged by me, because the treating doctor doesn't do it or the client says, you know, "Do you know someone who does these types of things?" And, I will send them to this five or six people, probably 10 people in the last 10 years, doctors that I've used in southern New Hampshire, who are trained in how to do the permanency evaluation. And, that's all full disclosure. The report and the bill goes to the insurance company. There is nothing...

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Margaret Wood Hassan, D. 23: Senator DeVries.

Senator Betsi DeVries, D. 18: I have a brief question, and thank you Attorney Manning. Do you have an opinion as to why there's such a small pool of IME physicians working in the State of New Hampshire?

Attorney Manning: I do, but I, you know, stating it on the record is uncomfortable for me, but...

Senator Betsi DeVries, D. 18: Would that be, would that be something that the Workmen's Comp Advisory Council would be well served by taking up?

Attorney Manning: No. I mean, I will state it on the record. My opinion is that doctors who get a lot of the work are giving the kind of reports that insurance companies want. And, exactly what Representative Long said, that doctors who don't, their work dries up. And, that's the reality of the system. It's the way the system works.

The House Labor Committee started talking about maybe the system should be different. Where we have a pool of truly independent doctors, that a name is, you submit to the Labor Department and say we need an IME for a back injury, a name is proposed and that's who the person goes to. That it's not picked from the insurance company. But the insurance companies have complete control over who goes where, and that's the bias in the system. In part, this will help take care of that, but the bias in the system is still there.

Senator Margaret Wood Hassan, D. 23: Any other questions? Seeing none, thank you very much. Is it Tom Callahan who's here from the New Hampshire Workers' Comp Advisory Council? Please come on up.

Tom Callahan: Thank you, Madam Chairman, Committee. Good morning. I am Tom Callahan. I am the current Chair and the business representative of the New Hampshire Workers' Comp Advisory Council.

And, in our last meeting, which was April 23rd, we always have a legislative update, and in that update several bills that are currently in the Legislature were updated to us, including the two that you are considering today at this hearing. And those generated a lot of interest, 70 and 71, amongst the Council members as well as those in attendance at the meeting. And so, we suspended our agenda and allowed for 15 minutes of comment, both by Council members and others attending, to discuss those two bills. It was clear from those attending that we only heard one side of these issues. Okay? And that's probably because the other things on the agenda at our Council meeting had a lot to do with the medical aspects of workers' compensation, specifically, whether it would be the 5th or 6th edition of the AMA Guide that New Hampshire would use for impairment, which we are undertaking at the request of the Legislature. Okay?

So, we heard a lot of comments. Again, not any in advocacy of the bill. Okay? So, a motion was passed that the Advisory Council would be willing to take up the matter of 1370 and 71, should the Legislature desire us to do so. And that we would make sure in that if we did take it up, that we would hear, you know, both sides of the story and research it and report back to you with findings. So, I am here to offer you that today should you be interested in doing it.

RP

And, I would be happy to answer any questions or comments that you have.

Senator Margaret Wood Hassan, D. 23: Thank you. Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Mr. Callahan. My understanding is the Workers' Comp Advisory Board is made up of representatives of both labor and business, representing both sides, as well as members of the Legislature. Is that correct?

Mr. Callahan: That's correct. In addition, there is a member of the medical community and a member of the workers' compensation insurance community.

Senator Peter E. Bragdon, D. 11: And, follow up on that?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Peter E. Bragdon, D. 11: I assume it was said earlier, that the things that the Workers' Comp Advisory Board does, or at least it was implied there, are not public. But, I was certainly in attendance at that April 23rd meeting. It seemed to be a very much public, publicly posted, and available to anybody who was interested.

Mr. Callahan: That's correct. Our meetings are open to the public. The minutes are available to the public. But, not a lot of people show up a lot of times.

Senator Peter E. Bragdon, D. 11: And, one final question?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Peter E. Bragdon, D. 11: If I recall, the motion that was made was not only that you'd be willing to hear it if the Legislature wanted you to, it was your recommendation that the Legislature send these bills to you to have the hearing, or at least a discussion of it, from your, from the perspective of the Board.

Mr. Callahan: That's correct. I think that the Advisory Council could be of benefit here. But, the same as it is, I think, ultimately will be of great benefit in the 5th and 6th edition, because we spent a lot of time researching it and we gather up the expertise to do so. I know you have that same ability, but maybe not in the same way or the same timeframes than we do. Our next

RP

meeting is May14th. So, the timing of this is reasonable in terms of what it does to delay the process.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Margaret Wood Hassan, D. 23: Thank you. Except for the fact that we're done with our work by May 14th. So, the last day for the Legislature, for us, to vote on this bill is May 12th. But, Senator DeVries.

Senator Betsi DeVries, D. 18: And thank you, Madam Chair. And, to continue the question that was already asked of you, as far as a representation of the Workmen's Comp Advisory, what is the distribution between an injured worker and insurance and/or business on that Advisory Council? Because these bills are representing the injured workers, not a business's.

Mr. Callahan: Right. There is one labor representative, one business representative, one insurance representative, one medical representative, and then representatives from the Legislature. Does that answer your question, Senator?

Senator Betsi DeVries, D. 18: Is that a three then that may have a common interest between the employer, the business, and the insurance company versus the one with the workers' labor rep?

Mr. Callahan: The medical representative, I would think, should and is impartial in that balance. Okay? I would assume that the insurance representative would be representing their interests, and the labor representative their interests. The business is employers and I want to provide information to you in reference to that question. Okay? Because I am the business representative, but my business is health care. Okay? And so, many of my partners, customers, and colleagues are physicians, hospitals, physical therapists, nurse practitioners, etc. I've worked in the workers' compensation arena my whole life in New Hampshire and essentially my whole career. None of my business enterprises in health care have any significant IME business. The business that IMEs make up is very modest. But, I, you know, I referenced to you a balancing, that's important for you to know, I think.

Senator Betsi DeVries, D. 18: Thank you. I would just follow up and say that, as a member of the Workmen's Comp Advisory, I would agree that you have handled many a difficult subject matters fairly as can be expected. I'm just not sure that the makeup really is suited to these two particular bills.

RP

Senator Margaret Wood Hassan, D. 23: Okay. Senator Bragdon.

Senator Peter E. Bragdon, D. 11: One last follow up. And just, if you could, state who the legislative members of the Advisory Committee are?

Senator Betsi DeVries, D. 18: We have one.

Senator Peter E. Bragdon, D. 11: Exactly.

Senator Margaret Wood Hassan, D. 23: I was just going to make sure we disclosed that.

Mr. Callahan: And, Representative Goley.

Senator Peter E. Bragdon, D. 11: Representative Goley. Thank you.

Senator Margaret Wood Hassan, D. 23: Thank you very much. Seeing no further questions, thank you for your testimony. Mary Robidoux, please?

Mary Robidoux: Hi, I'm Mary Robidoux. I'm a patient, I guess. I had an injury, a work related injury in 1989 and I had surgery in 1991, and then there was some problem with the surgery and I ended up with what they called a piriformis syndrome. And, I receive trigger point injections, two or three, well maybe a little more of that, times a year and deep tissue massage. This allows me to work. My injury was quite a while ago. I've already settled. I've already had a settlement and everything. I have gone and had independent medical exams.

Originally, I brought my mother with me just because I was a little nervous. I didn't know the doctor, and I didn't actually realize how important it was until one time, I'm not sure when it was, but maybe two or three exams in, when I had a hearing because they had denied that I need this treatment. The doctor said that I said one thing, and when I was at the hearing, I said "I didn't say that." And, the hearing master said, "Are you saying that the doctor is lying?" And I said, "Well, I'm just saying that I didn't say that, but my mother is here and she was there with me." So, they had my mother testify and she agreed with what I had said.

That's when I realized it's kind of important, not just for my own nervousness and feeling comfortable, but I needed someone else to kind of stand up for what I knew happened at the exam. So, I've had probably about 8 or 10, altogether, and the last one I had was on November 5th, 2008. And this was the first time that I had seen this doctor, Dr. Glassman, and he had me sign,

RP

he wanted me to sign a paper saying that this is office policy. There is no one allowed in the room with me and that's, that's it.

So, I was kind of nervous about signing that because I had my sister-in-law with me and I wanted her to come in as I have always had someone come in. Then, when I questioned him about it, he said, "It's the law. It's state law that you can't have anyone in with you." And I thought, you know, I have had a lot of these exams and I've never heard it was a state law. So, I asked him, "Could I have a copy of this law because I have never heard of it before." So, he gave me a copy of something, and sorry I don't have it, and when I read it it said, I didn't understand where it said that I couldn't have anyone in there. And then, I said, "Well, if you are concerned about the privacy, I am giving you my permission for her to hear anything." You know, I didn't know if that was the case. And, he said, "Nope, this is office policy, that's a state law. If you want to reschedule, you're free to reschedule."

Well, it already took me quite a while to get this exam because I'm a teacher and I work 8-3. So I really try to...as my injury was so long ago, and I wasn't even a teacher back then, I was trying to work around my work schedule. I didn't want to take any time off. So, I had the exam thinking also that if I said no, I'll reschedule it. First of all, I am going to get him again. If I had to reschedule it, in which he would not have let me have someone in there, and then it would seem like I wasn't being very cooperative.

So, and in this particular one, usually, you know, they've been very, just very noncommittal. Just ask me questions, you know, having different exams done. But, he didn't ask me anything about what my current procedures were for, and I always explain that the reason I have these procedures is so that I can continue to work, because otherwise I wouldn't be able to work. And, he didn't ask me any of that. He just said, he wanted to know how, what my settlement was, what did the doctor say. It was more than 10 years ago, I honestly had no idea, you know, I didn't have any of that information in front of me. So, the only thing he asked me about my current treatment was who was my doctor. That's it.

He wanted to see my scars from surgeries that I had, which had nothing to do with the triple point injections and the deep tissue massage. And, he wanted to know what my work schedule was, when I've changed jobs, when I...and I said, jeez I am not really sure, I can give you an approximate date. "Oh, that's okay." Then, when I gave him an approximate date he was very..."that's not the date that's in the notes."

So, it really wasn't a very comfortable exam, and I really didn't feel it was very independent. He wasn't there asking me about the treatment I was

RP

receiving. He really wanted to know the, my settlement issues, which, I don't know, didn't seem very independent to me.

Senator Margaret Wood Hassan, D. 23: Thank you very much for your testimony. Are there any questions? Seeing none, thank you very much. How about Peter McArdle, please?

Peter McArdle: Good morning, Madam Chairman, members of the Committee. For the record, I'm Peter McArdle. I represent the New Hampshire Association of Domestic Insurance Companies of which a couple of members are Liberty Mutual, and Acadia Insurance who write a substantial amount of workers' compensation in New Hampshire, and of course, in doing their business, they do order a number of IMEs in the course of a year. I'm here to speak in opposition to both bills.

I think that both of these bills assume two things. One, is that docs are prejudiced in their reviews and decision making process. And, I think, the other assumption is that insurance companies forum shop to find the docs that are going to give them the decision that they are looking for to deny a claim. And, I think that both of those are, at best, anecdotal and without any evidence that they occur.

I used to sit on the Workers' Comp Advisory Board years ago, and it was a practice, at that time, that all workers' compensation bills submitted into the Legislature went before the Advisory Board first before they went back to their various committees. And that's a practice that somewhere along the line is no longer done, and I think it ought to be done. Again, maybe, I don't know how you handle it, this May 12th or May 14th issue, with this particular case. But, I do think it is a good idea to put these bills into the Workers' Comp Advisory Board and perhaps, you know, maybe interim study that would allow that to happen.

And, I have been in the insurance business for over 40 years, and both on the agent side and the company side, and I have never seen any evidence, personally, that insurance companies look to certain docs to get certain, to get certain outcomes, and as I say, there is a lot of people behind here, want to testify, and a lot of docs and so forth.

But, I think, I would recommend it go through Workers' Comp Advisory Board, and if it can't be done by May 12th, then to put it to interim study and let the Advisory Board do the work for next year. I will answer any questions.

Senator Margaret Wood Hassan, D. 23: Thank you. Any questions? Seeing none, thank you very much, Mr. McArdle. Is it Barbara O'Dou?

Dr. Barbara O'Dea: O'Dea.

Senator Margaret Wood Hassan, D. 23: O'Dea, sorry. Thank you. Come on up Doctor.

Dr. O'Dea: I'd just like to pass those out for the Committee.

Please see Attachment #1 – written testimony submitted by Dr. Barbara O'Dea, O'Dea Occupational Care, P.L.L.C.

Dr. O'Dea: Hi, I'm Dr. Barbara O'Dea. This is the first time that I ever did anything like this. So, hang in there with me.

Senator Margaret Wood Hassan, D. 23: And where are you from?

Dr. O'Dea: I work in Nashua and Manchester, New Hampshire. I am a board certified occupational medicine physician, and I have been practicing workers' comp type of cases for the past 20 years in this State. So, I have a fair amount of experience in this issue, and I also am a certified independent medical examiner. When you get certified you have to go through a national level of training and testing to get that. I first got that six years ago, and got recertified and all of the new rules and regulations just last summer.

And frankly, one thing I want to make clear to this Committee is that I take pride in the "I" in independent. I have a small, part-time practice and really try to actually take cases, frankly, from both sides because I think it keeps me fresh. It keeps me in a way that I can really try to be objective in all the cases that I see.

However, when I first heard about these bills, and I only heard about them a few weeks ago. So, I didn't have a chance to get involved when they first came in front of the Legislature. I really had some concerns about the practical implication of these bills.

The first thing I wanted to point out on the first bill, is that when we see cases, causality is frequently not a very clear-cut issue, as far as, are you pro-insurance company or pro-plaintiff. A classic example, if somebody comes into me with right arm issues and left arm issues. I might find, after listening to all of what's gone on, and I've actually seen their jobs, I've been to a lot of factories and workplaces in this town over the years, feel that the right arm may well be work related, but the left arm may be more related to

RP

their knitting at home or whatever. It could be all sorts of causality issues. But, it would really be a quote, "split decision." How would I comply with that law where it has me ask whether it is pro-plaintiff or pro-insurance company?

You might find that a wrist and an elbow are work related, but the shoulder claims that they have are not. And, those are very legitimate medical decisions that an independent medical examiner might make. And, I frankly, wouldn't have a clue of how to fill out that form if it was sent to me in the present, in the present way. So, I'm another one of those docs who feels that this whole thing should go back to that Workers' Comp Advisory Council to try to work out some of the nitty gritty of these type of issues.

The second bill, I feel even more strongly about. The whole issue of recording of exams is a real concern of mine, and frankly, it's because of the internet age and the advancement of technology. When patients come in, it can be a very adversarial situation, whether I want it to be or not, because they're sent there. They are not happy about being there. They are not there because they want to hear what I have to say. They are there because the insurance company is forcing them to be there.

So, if they come out with their recording tape, then I personally feel that means that I need to now record the exam. Because I think, in this day and age in technology, there's a real possibility that somebody can alter any tape that they have. So, if they have their tape, I need to have my tape, too. Now, that increases the cost of time for me. The cost of the equipment. I have no clue how to do this, so I would have to learn all about how to try to record situations like that. So, I have an issue with that. Doesn't mean it can't be done. But, I would think in terms of maybe even a third party. That would increase the cost of this whole thing.

The other thing is that I probably am the only person in this room, and I don't, maybe I'm wrong, but I have actually had experience with allowing somebody to videotape an exam of mine, and it was really a very tough experience. I had a small exam room. The person came with a friend. They set up a tripod, they set up lighting. They took all sorts of equipment to get it going. I agreed to let them do this. They had me repeat parts of my exam. Because the room was so small, they couldn't really get a good picture with the tripod. So, they insisted on taking the camera off the tripod and then going around me like I was being watched like a paparazzi doing my exam. It was extremely awkward. At the end of it, I asked them, you know, you've now done this, I would like a copy of what you did, and they absolutely agreed, and I never got a copy of the report.

RP

So again, now I'm thinking, first of all, I never should have let them do that. And, number two, if I need somebody to videotape an exam, I want to have my tripod up there. I'm going to have to have my camera person watching. And, let me tell you, in the typical exam room that most of us have, we don't have room for two sets of tripods and two sets of camera people. So, I think there are some real practical issues with the videotaping.

Now, last thing I want to just mention and this is, this is a tricky issue because my opinion on this has changed over the years back and forth. The whole issue of allowing somebody into an exam room with them. I tend to allow people to come in, simply because I know when that person comes for an independent medical exam, they are anxious. It is an unnerving situation. They are seeing a doctor they have never seen before. There is a lot on the line. So, I want to let them know that I'm trying to be objective. So, I usually tend to let folks in. However, it becomes a real difficult situation.

I know in this report it says that we would have the right to tell them, and I usually do tell them at the beginning. They are there as an observer. They are not there as a participant. But, typically if it's a friend of a person, or a spouse, or a significant other of the person, they never can resist putting their thoughts in there. You ask the patient how are you feeling? How's that back pain doing? And, it seems like the other person always seems to be doing the answering for them, or if the person answers, then the other person starts correcting them going saying, "No honey, you didn't feel that bad that day. Didn't it get bad the next day?" There literally is arguments back and forth. It takes an incredible amount of time to get through that.

I also get concerned that once again, if there becomes an issue were it is in front of the Labor Board, if I say something happens, and then now I have two people saying no that's not what you said, Dr. O'Dea. Then I have, then I'm stuck with not having, with having my credibility questioned because I now have two people that have their own agendas who might be saying that I did something wrong, that I physically did something wrong to that person during the exam. It means that I now have to bring my fourth person in. So, that's going to increase the cost of the exam. I have to have a heads up that this is going to happen because I have to take the time of somebody else in my office to physically be in the exam room with me.

So, there's just a lot of issues that I think when I first looked at these bills, I think they looked at it in very simplistic fashion. That the actually practical implication of these bills is really something that I think we need to step back and look at before you go down this path.

So, thank you very much for allowing me to say that. Any questions?

RP

Senator Margaret Wood Hassan, D. 23: Thank you. Are there any questions? Seeing none, thank you very much for your testimony.

Dr. O'Dea: Thank you.

Senator Margaret Wood Hassan, D. 23: And for your patience, which is a thank you to everybody in the room because I know how far behind we are. Dr. Glassman, please?

Dr. Stuart Glassman: I have some items to pass out. So, I guess there is six copies?

Senator Margaret Wood Hassan, D. 23: That would be great. And, if you could give them to Richard, that works great.

Please see Attachment #2 – documents submitted by Dr. Stuart Glassman, New Hampshire Medical Society.

Dr. Glassman: Here are a couple more. Well, thanks to the Committee for having me here to speak here, today. I passed out some information which I will be referencing as part of my talking points of my testimony.

Just to give my background, I am a board certified physician at Physical Medicine and Rehabilitation. I am currently the Medical Director of the Occupational Health Services Program for Concord Hospital. I oversee treatment of all the work injury cases that come through Concord Hospital, at Horseshoe Pond Medical Building. I'm on the faculty of Dartmouth Medical School as an Adjunct Assistant Professor. I'm also the Treasurer of the New Hampshire Medical Society. I have an active practice treating patients on a regular basis, including those with work injuries. I'm also a Certified Independent Medical Examiner, as well as the Medical Review Officer for Concord Hospital, where part of my work involves overseeing drug testing for any cases that come through the injured worker program for Concord Hospital.

I am opposed to both of these bills. I am speaking on behalf of the New Hampshire Medical Society, as well as my own practice, and I will take the time and go through them, and leave questions for the end, obviously.

Certainly, one of the questions looking at, and I will go through House Bill 1370 first, is it appears that the physicians who perform independent medical examinations appear to be targeted for special reporting, including financial questions. Representative Long talked about the issue of a witch hunt, which

RP

was brought up by the Representative Infantine at the prior House Committee meeting. It appears that no other type of physician in the State is being asked to provide these kind of financial information disclosures of any kind, which would become public information.

There has been no evidence of any studies of any kind submitted by any of the supporters of the legislation about any confirmation of any evidence of bias in the independent medical examination process. The independent medical examination, I'll wait for Senator Hassan...

Senator Jacalyn L. Cilley, D. 6: Go ahead.

Senator Margaret Wood Hassan, D. 23: I'm sorry.

Dr. Glassman: Not a problem. As I mentioned, there's been no evidence of any studies submitted by the supporters of this legislation that confirms any evidence of bias in the independent medical examination process, whether here in New Hampshire or nationwide. Independent medical examinations are objective medical examinations.

Very often, those reports done by independent medical examiners, who have to be board certified in the State of New Hampshire, who have to have active practices, the review of the medical information available is often much more thorough than the reviews done by the treating physicians. The physical examination documentation is often much more thorough, including muscle testing, range of motion, sensory examinations, score measurement, as Ms. Robidoux had mentioned. And, in many of the cases that we see as independent medical examiners, at some point in a treating case, many times physical examinations are not even listed by the treating physician. So, I certainly recommend that the Committee look at IME reports and see what's actually in the reports to look at the information being discussed.

As far as the issue of bias in the independent medical examination system, it has never even been brought up as an agenda topic for the Workers' Compensations Advisory Council. There was discussion of these bills at the last meeting. But again, the issue of bias in IMEs, in and of itself, has never been brought to the Advisory Council specifically as an agenda item. The first mention of these bills was back in January. There was no meeting of the Advisory Board until April 23rd, which was over three months later.

There have not been any communications from the Department of Labor concerning any bias issues for independent medical examiners. There are standards that exist already from the Department of Labor for who can perform independent medical examinations. I have passed out information to

RP

you concerning standards and ethics requirements for independent medical examiners from both the American Medical Association and the American Board of Independent Medical Examiners. That's in some of the information that I have passed out for you.

One of the concerns about HB 1370, which has been mentioned already, both by other people that have testified, is that physicians may choose not to perform independent medical examinations based upon these two bills. That will lead to a loss of oversight of these cases. Many times there's ongoing treatment for work injuries that may not comply with evidence based guidelines and there may not be any, you know, thorough oversight of specifically opioid narcotic pain medications. Many of these cases have years of records where there's no physical examination. There's no drug testing. Claimants say they go to the front desk; they pick up their prescription for Vicodin and Percocet. They're never even examined.

I've passed out a study from NCCI Holdings, which is a 24-page document. If you turn to page 12, you will see that New Hampshire is in the highest category for opioid costs for workers' compensation claims in the United States, as well as some other states, including California, Texas, Oklahoma, Alabama, South Carolina, and Massachusetts and Delaware. There was a prescription opioid abuse summit that happened on March 30th, which included the Department of Justice, the Department of State Safety for New Hampshire and the Association of Chiefs of Police.

Prescription opioid abuse in New Hampshire is a problem, and certainly some of those prescription abuse issues come from the workers' compensation realm. Independent medical examinations are part of the ability to look at cases and say, if someone has true pain, is recommended to be treated with these medications based on evidence based guidelines, you know, then obviously it makes sense. If not, well, where are the medications going? Are they being utilized? Is there drug testing? Are the treating physicians thoroughly looking at this issue? Independent medical examinations typically and routinely will comment on the question of ongoing prescription issues, including opioids. If you lose physicians who do this kind of work, you will have the potential for a much more rampant problem with prescription drug abuse in this State.

Both myself and Doctor O'Dea live in a town, where two years ago, a 18-year old high school student purchased fentanyl from a drug dealer in Manchester and died at a party. Now, if you have chronic pain, you're not going to sell your pain patch that lasts for three days. Where did that pain patch come from? Was it workers' comp? We don't know. Was it non-workers' comp? We don't know.

RP

Senator Jacalyn L. Cilley, D. 6: Doctor Glassman. Forgive me for interrupting.

Dr. Glassman: Yes.

Senator Jacalyn L. Cilley, D. 6: But, we are on a couple of bills and that seems a little far field. So, if we could just stick to, you know, your testimony on these...

Dr. Glassman: Again, the effect of...okay, and I will certainly do that. Looking at HB 1371, the issue of witnesses and recording. As was mentioned previously, right now the claimant does have the ability for a medical witness to be in the room, and obviously that medical witness will understand the medical examination process better than anyone else.

The issue of medical credibility issues of the IME physician versus the claimant. Well, that is going to be decided by the Department of Labor. They get all the records that we look at. They get all the reports. Our report is one part of the process. The Department of Labor, again, has not brought up any issues that we're aware of at both the Advisory Council, which I sit in the audience. I am not on the Council. But, again this issue of medical bias has never been brought up as an individual issue.

As far as recording, it would clearly increase the costs of the examinations. An audio recording will not give any information whatsoever about a physical examinations finding, which is certainly part of an independent medical examination. You won't be able to get any valuable information whatsoever about a physical exam finding with an audio recording. In addition, as the Department of Labor knows, every audio recordings is transcribed. You're going to have to then take any recording and transcribe them in order for them to actually be utilized efficiently. Otherwise, you're going to have everyone having to listening to audio recordings and then arguing the points of what they heard. They'll all have to be transcribed. That will also add to the cost as well.

At this point, a claimant does have the avenues to go down if they feel there is a bias issue. They can contact the Department of Labor. They can contact the New Hampshire Board of Medicine concerning this. And lastly, in contrast to what was said earlier, the rules of the superior court of the State of New Hampshire, which I passed out, 63-D, make no specific requirements for witnesses or recording for plaintiffs' examinations.

RP

Senator Jacalyn L. Cilley, D. 6: Thank you. Are there questions for Doctor Glassman? Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Doctor. You passed out something that I wasn't aware existed. But, I see from Doctor O'Dea's testimony that she also is part of this Certified Independent Medical Examiner. So, there is a national organization of Certified Independent Medical Examiners?

Dr. Glassman: Yeah. There are two. They are not a part of the American Board of Medical Specialties Board. But, there are examinations you can take to be certified to do independent medical examinations, one of which is the American Board of Independent Examiners. The other is the American Association of Disability Evaluating Physicians.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Jacalyn L. Cilley, D. 6: Thank you. Any further questions? Seeing none, thank you very much.

Dr. Glassman: Thank you very much.

Senator Jacalyn L. Cilley, D. 6: We have several more speakers. I'm going to ask, if you have heard the testimony before, please just summarize the points and say that you are in agreement. We are an hour past the time that we should have ended the entire hearing. We've got one more bill to hear. So, to the extent that you can be brief, I'd appreciate it. Davis Clark, please?

Dr. Davis Clark: Madam Chair, members of the Committee, I will try to be brief. I'm Doctor Davis Clark. I came to Concord in 1972, as a Board Certified Orthopedic Surgeon. Started Concord Orthapedics, which is, as many of you may know, is a 23-member orthopedic provider group at the present time.

Ten years ago, I turned the magic age that you are supposed to retire. I failed retirement. So, for the last ten years, I have gone back to helping in the operating room, seeing patients a couple of days in the office, and doing expert witness work, which led me to doing independent medical exams.

Last year, I did about 200 of these types of exams. 106 of them were what you are talking about today, as independent medical exams. Ninety some-odd of them were permanent impairment ratings, which are all done for the benefit of the claimant, and the rest were a few attorney reviews, and what have you.

RP

I would comment on, my comments on 1371 is that I've never objected to a family member or significant other in the office. This requires that, as Doctor O'Dea said, that the observer not become involved in the process. Presence of a legal type person in the office, I have allowed that three times, and two out of the three times, it made the examination very uncomfortable, and changed it really from a medical exam to a somewhat legalistic exam.

I think that one of the things that was brought up over in the House, a timely copy of the report to the, to the person who is being examined. It bothers me when they call and I'm, by contract or law, I'm not allowed to release a report to them. That's probably an issue you ought to direct to the insurance carriers rather than to us.

Audio recording, I would agree with what Doctor O'Dea said, a little burdensome, how to do it. We are going to have to learn if it ever passes. Video recording in an orthopedic office is an impossible, almost an impossibility, physically. Most orthopedic offices, architecturally, are designed to be 8 by 12 feet in diameter, or in size. You put an examining table, a cabinet with a sink, two chairs and a writing area for the doctor and there's not a lot of room for one tripod, never mind two.

By whom and who is going to be responsible for the validity of the recordings? Who is going to be responsible for taking care of them? Certainly this is going to raise the cost of this process because I am certainly going to pass it on to whoever requested the exam.

In terms of who, in terms of the reporting business. Lots of times, we don't know who the insurance carrier is. The vendors, most of the IMEs that most of us do are scheduled by what we call a vendor. It is a company, that the insurance company calls this company and they say can you find an orthopedic surgeon within 50 miles of so and so, and they can do this exam. And so, the vendor calls you and schedules the exam. You turn in your report to the vendor. I have no idea what the vendor's fees are as an intermediary, and then they, in turn, send the report back to the insurance carrier. It bothers me, I think, that the person is entitled to a report in a timely fashion.

In terms of, I would agree completely with Doctor O'Dea in terms of the difficulty of one opinion regarding either the claimant or the carrier, left hand-right hand, this kind of stuff. Pretty soon, we're all going to be required to use some kind of official guidelines for causation disability. One is ODG, another one is ACOG. They are out there. I have both of them in my computer. It has not become a law in New Hampshire yet, but it is in about

20 other states. HIPPA issues are, this thing is ripe with HIPPA issues, and I don't wish to get involved with the federal government. But, thank you.

I think it's important that we tell people what we earn. Last year, doing these exams, I charged $900 for a routine IME, and if took more than an hour of reading, then I charge $300 an hour. I spend 45 to 50 minutes with each person that I see. I've gotten so, a little paranoid, I write it on the chart now. And, I would support the idea of sending this to perhaps the Workers' Comp Advisory Council if that seems to be somebody that can do that.

Does anybody have any questions?

Senator Jacalyn L. Cilley, D. 6: Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, sir, for your testimony. I was just, you described your experience having an attorney in the room and how it kind of changed the atmosphere, and not that in any way affected you, you know, being independent as a professional.

Dr. Clark: Right.

Senator Peter E. Bragdon, D. 11: But, it changed the atmosphere.

Dr. Clark: It sure did.

Senator Peter E. Bragdon, D. 11: And, I guess I was, I was thinking about this report that was done. Let's say you do 10 IMEs in a given year, and you're keeping track of this, and you realize that of the 10 IMEs or 9 IMEs you have done so far, 9 of them you found to the side of the carrier and maybe only one has been on the side of the injured worker, allegedly injured worker, I guess I should say. And so, now you are doing number 10. You know you are going to have to report to the State the stats, like a baseball card, of every doctor, and it's going to say what their average is. And, are you concerned that in your mind at least, there is something that says, I better be careful because if my average is too high in one way or the other they will discredit me?

Dr. Clark: Let me tell you. One of the ways to get to be successful in this business is to be honest. And, I may be wrong with my opinion, but it is what my opinion based upon my knowledge at that point and time is. And, I subscribe to what Doctor O'Dea said, in terms of the "I" in independent is pretty darn important. And, what I found out is that insurance carriers, and particularly if an attorney gets involved in it, they would rather hear from you what you think, even if it is bad news, rather than find out about it in the

RP

court room or maybe in the Department of Labor. I've never been to, yeah, I went to the Department of Labor once on behalf of a plaintiff. But other, you know, they don't want to find out about it at the crucial hour. So...

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Jacalyn L. Cilley, D. 6: Further questions? Seeing no further questions, thank you very much. Could I have, could we have Gary Woods up, please?

Dr. Gary Woods: Madam Chair, and Committee. Thank you very much. I am Gary Woods. I am an orthopedic surgeon in Concord, hand surgeon primarily, and in the same office as Doctor Clark. I've been involved in workers' comp for perhaps too long. I helped formulate, from the medical perspective, 1409, back; I hate to say how many years ago. Stayed involved, was on the Workers' Comp Advisory Committee for 15 years. Chaired it for 5 years, and just allowed myself to retire about a year ago.

So, I've seen a lot of changes from, actually, one of the things that I authored was the issue of the American Board of Medical Specialties of being the guideline for criteria. I was actually sued for that, and the Attorney General's Office was able to help me get around that, because it was clear that this was an attempt to make higher quality care for patients, and I, as Chair, would always say, this Committee, this Workers' Comp Advisory Committee is actually a medical board. It just so happens that the patients were hurt at work, that's the only difference. We are taking care of patients, and so, that is the reason I offered that.

Now, I think that's the root. Trying to sort of tag people with a, you've done x number of this, or an x number of that, doesn't change the quality. The bill, as it says, even if you got all 10, were they all wrong? Who's going to make that judgment? Nothing here in the bill says that there's a mechanism to check to see if, in fact, someone who has 10 opinions for an insurance, that they were wrong. You are making the assumption that in fact, he's got 10 and they are all for insurance, voila he is in the pocket. Wrong assumption.

Just the act of having to put my name down and subject myself to that would make me not do them. I did them until I was Chair of Workers' Comp, because I felt it was conflict of interest. I did them only because, if I had an expertise in hand surgery, I felt it was worthwhile, and I had an obligation to do it. I would feel if I was subjected to this, my obligation would stop, and I think it will have the same chilling effect.

RP

As far as, and I oppose both bills I should say, and 1371, the right to choose, I think it would rapidly become a requirement because clearly as long as it's available, someone's attorney will say get it. And, the whole issue of are you going to have two. Well, we can solve that. We will just have one person do it, and they'll, just like you do at a hearing. But now, who's going to pay for that?

Authenticate it, having someone else there really does alter the doctor-patient relationship. You come into my office, and you may have trouble with your supervisor, and that's really the seed of the issue. You will tell me that, and I can name a couple companies where that's a problem. You get someone on record, and recording it, they are not going to say it. So, it does materially alter what happens.

There is a serious secondary effect, too. As soon as you record something, it wasn't recorded correctly. Number one, it can't be just, you know, a verbal recording. It has to be video. You can't see a person examining someone with just an audio recording. Now, did you have the person raise their hand? Well, with audio, you don't know that. Now, the observer, who supposedly said that didn't happen, we all know that you can take people and put them on the corner, street corner, and ask them to see that scene and ask them all to tell you what happened, and they will give you six different versions. Maybe the person was blowing their nose, writing a note, a hand went up, went down and they didn't see it. We can't make the assumption that just a side observer is going to be 100% correct. You have, it has to be video.

Now then, you get the situation where the attorney, and rightly so, working for the patient, says alright, now that test you did on Mrs. Jones, I don't see where that, you said that she responded such and such. Looking at the video, I don't think that's how she responded. So, now we have another layer of litigation back and forth. So again, the cost goes up.

Now, I think the goal is good. We want the highest quality, but I don't think either one of these bills will accomplish it. I would like to see this have a public discussion, and in fact, we did. When I was Chair, we did have public discussions, and in fact, attorneys were invited. We actually had open discussions, and on several occasions, we did specifically invite the attorneys that were involved to come and participate.

So if, I think that's a reasonable venue. I think even if they elected to recommend that it go for study, I think that is very reasonable, as well. Thank you very much.

Senator Jacalyn L. Cilley, D. 6: Thank you. I would just note that they have to have public hearings both in the House, and that's what we are doing this morning.

Dr. Woods: No, I understand.

Senator Jacalyn L. Cilley, D. 6: Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. And, you mentioned in your testimony that you chaired the Advisory Commission. There was some discussion earlier about the makeup of it, and it may or may not tilt either way depending on the issue. But, when the Advisory Council unanimously says, we ought to take a better look at this. Do you see that as carrying more weight than if it was some kind of a split decision?

Dr. Woods: Oh, absolutely. I mean, yes.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Jacalyn L. Cilley, D. 6: Thank you. Any further questions? Seeing none, thank you very much. Could we see Peter Webb, please? And, I see that Peter Webb is the next to the last speaker to, is it, Chris Graf?

Unidentified Speaker: He left.

Senator Jacalyn L. Cilley, D. 6: He left?

Unidentified Speaker: He had to leave.

Senator Jacalyn L. Cilley, D. 6: Are you going to take his place? And, you will be the last speaker. Is there anybody else? Okay. Mr. Webb.

Attorney Peter Webb: Thank you very much, Madam Chairman, fellow Senators. Thank you for your good work on the part of the people of this State. This issue on these two bills, which I support, come down to the issue of do you err on the side of transparency, or do you err on the side of secrecy. Make no mistake about this; this is not a doctor-patient exam.

The practitioner is used to that kind of, those terms in dealing with injured people, sick people. But, this is not the provision of medical care. This is an occasion where, unfortunately, gamesmanship does happen. We have some wonderful docs out there who do this work. God bless them. And, if they would be somewhat inconvenienced in the interest of transparency, I would recommend to you that that would be the way to error.

RP

There is no need to refer this for some intense study. It is a relatively simple concept where people who have the privacy right, the patient themselves, voluntarily waive that privilege. It is not the physician's privilege, and this person is not acting as a care provider. They're acting for a medical, as a medical evaluator for an adverse party. In any event, it comes down to transparency versus secrecy.

I, forgive me, am Peter Webb, and live in Brookline, New Hampshire, and practice law in Nashua, New Hampshire, and I represent injured parties.

When there is an IME, it is my routine sometimes to send all the medical records to the doctor chosen by the insurance company to make sure that they have a full record, so that we have a good honest exchange of information and ideas. Well, I did that and, in a case, again, I represent the injured party, not the people who schedule the exams, I received a call from the physician to whom I had sent those records. I didn't think fast enough, Doctor Jones is on the phone. I pick up the phone, Doc Jones says, that's not his name, Doc Jones says, "This is Doc Jones, Attorney Webb." He was obviously operating on the mistaken impression that I had referred the case to him because I gave him the medical records. And, Doc Jones said to me, "So, what kind of spin do you want me to put on this guy?" At that point, two and two were clear to me and I said, "Doc, you called the wrong guy."

We need transparency. Not for the fine practitioners who do a wonderful job and call them like you see them. But, for the individuals who have a cottage industry of providing insurance companies with the opinions they want. And, if they're somewhat inconvenienced, and if others are somewhat inconvenienced in the interest, the very important life or death interests, of the injured worker let's err on the side of the injured worker. Thank you.

Senator Jacalyn L. Cilley, D. 6: Thank you. Mr. Webb, could you tell me, in your practice, approximately, how many injured workers have you dealt with? Let's say last year.

Attorney Webb: Oh...

Senator Jacalyn L. Cilley, D. 6: Just give me a rough estimate.

Attorney Webb: I have been doing this since '79. I'm sure thousands of injured workers.

Senator Jacalyn L. Cilley, D. 6: Okay. How many last year? Just a rough estimate.

RP

Attorney Webb: Irresponsible estimate, let's say, 70.

Senator Jacalyn L. Cilley, D. 6: Okay. And, of those, what percentage went for an IME?

Attorney Webb: I would say easily 50% of them.

Senator Jacalyn L. Cilley, D. 6: And, I am not holding you to these numbers.

Attorney Webb: Yeah, sure, sure. It is an ever increasing number, and I would, I really think it is about 50%.

Senator Jacalyn L. Cilley, D. 6: Okay. So, 50% of roughly 35 injured workers. Of that, what percentage were denied their claim based on the IME?

Attorney Webb: The vast majority of them.

Senator Jacalyn L. Cilley, D. 6: Okay. Because, I mean, this is really coming down between docs and lawyers and I am trying to figure out what are the numbers. I mean what's the hard evidence? That's a great anecdotal story. The docs had great anecdotal stories.

Attorney Webb: Mine is not an anecdotal story. That suggests you've heard it from someone else.

Senator Jacalyn L. Cilley, D. 6: True.

Attorney Webb: I am not under oath. It always surprises me that these occasions are not under oath. And, what the testimony I've given you to is true to the best of my knowledge, I do believe.

Senator Jacalyn L. Cilley, D. 6: Well, your testimony is at a public hearing in a legislative body. So, it's close.

Attorney Webb: Well, I wish people would be sworn in. But, in any event, forgive me for interrupting.

Look, the IME docs perform a very important function. We have to have the other side of the equation heard here. It's got to happen, and God bless these guys for doing it, and there is a lot of money made doing it. I think there will

RP

be people willing to do it. It's a constant stream of clients into your office, you don't have to network, you don't advertise. It is a wonderful thing.

IMEs are very, very important. IMEs are not doctor-patient evaluations and if the physician is somewhat encumbered and quite frankly, I have never had to pay a doc to go to one of these. People routinely go with family members. A family member routinely goes in. It would be in the very rare case that anybody could afford to go to the extravagance of a video recorder or whatever we are theorizing. The point was made about cost. It is I who has to pay that cost. It is the injured worker who will have to reimburse me for setting up the video recorder, which I've never done and probably never will do. But, when one of these physicians comes up who invariable issues a report favorable to the employer, I would like to have the right to do so.

Senator Jacalyn L. Cilley, D. 6: Thank you. Are there other questions? Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Two questions. One, did you report this doctor to the Department of Labor, or to the Medical Society, or any applicable boards?

Attorney Webb: I was scared to death. I did not. I wimped out.

Senator Peter E. Bragdon, D. 11: Thank you. And, secondly...

Senator Jacalyn L. Cilley, D. 6: Follow up.

Senator Peter E. Bragdon, D. 11: Separate question, actually. But, one of the doctors who testified, I forget which one now, talked about a so-called split decision where the wrist may be deemed to be work related whereas the elbow is not. How do you suggest that we deal with that in these types of situations where it is being reported as one side or the other?

Attorney Webb: Issue your reports. Stand behind your report. What are you afraid of for goodness sakes? If that's your opinion, give them your report.

Senator Peter E. Bragdon, D. 11: Then, follow up.

Senator Jacalyn L. Cilley, D. 6: Follow up.

Senator Peter E. Bragdon, D. 11: The law says, the proposed law here says, you say whether you found for the worker or found against the worker. So...

RP

Attorney Webb: Stand by it, sir.

Senator Peter E. Bragdon, D. 11: Answer the question, sir.

Attorney Webb: My point is the physician should stand by their opinion. What is the stigma in sharing your honest opinion?

Senator Peter E. Bragdon, D. 11: I wish we'd get to that.

Attorney Webb: I don't think there is any stigma. You should call them as you see them. I refer cases to Doctor O'Dea. I think she calls them as she seems them.

Senator Peter E. Bragdon, D. 11: Follow up, Madam Chair.

Senator Jacalyn L. Cilley, D. 6: Follow up.

Senator Peter E. Bragdon, D. 11: The law says there is a form. You check off I found for the worker. I found against the worker. Doctor O'Dea or Bousseau, or something.

Attorney Webb: Yes. O'Dea. O'Dea.

Senator Peter E. Bragdon, D. 11: Says, part of it was for the worker, part of it was not. How do I fill out this form?

Attorney Webb: How about a "both" box? This is not a big deal.

Senator Peter E. Bragdon, D. 11: Just wanted to get clear what the question was, sir.

Attorney Webb: I don't mean to be difficult, and my apologies. I know you guys work hard to try to do the right thing. I just failed to appreciate the complexity of the issue. State your opinion. Have another box. Mixed opinion, I don't know.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Jacalyn L. Cilley, D. 6: Thank you. Alright, thank you very much.

Attorney Webb: Thank you.

Senator Jacalyn L. Cilley, D. 6: Bob Clegg. Last speaker.

Bob Clegg: Thank you, Madam Chair, members of the Committee. For the record, my name is Bob Clegg. I'm representing New Hampshire Association for Justice.

And, I would like to start of by saying that in the book, *The Occupational Medicine Practice Guidelines*, when it talks about IMEs, it actually says, and I quote, "Making a recording of the examination in one way or the other, e.g. videotape, might enhance the quality of the examination."

So, this isn't something that the trial lawyers came out and said, "Oh, let's do this." This is something that the medical people have actually started to say, this makes sense.

Senator Jacalyn L. Cilley, D. 6: Can you provide a copy of that for the Committee?

Mr. Clegg: Yes, ma'am. I will also tell you that we have a, and I will provide this, too, authorization to allow a witness during an independent medical exam, because somebody said what kind of a form would you use. So, we came up and it says, "I hereby authorize the presence of, during the independent medical examination with doctor whoever, and I understand that my medical history and conditions will be discussed during the exam, and I waive any right to privacy that I may have under the circumstances of my voluntarily allowing the witness to be present." And, everybody signs it. And, I will leave this, too.

So again, we tried to do everything we possibly could. Now, when it comes to, okay, was it for the doctor, or was it for the insurance company, or was it for the worker? I agree, add a third box that says check here and explain, and you can explain your split decision. So, it's not that difficult, again, to figure out how we do this. Somebody needs to know how many of these decisions are being done one way or the another.

Senator Jacalyn L. Cilley, D. 6: And, Mr. Clegg, that's exactly what I was asking. So, I'm wondering, because we are not going to be able to exec this today, I'm wondering if between now and Thursday if we can get any kind of data. You know how data driven I am.

Mr. Clegg: I will see if we can get you a copy of everything that we had in the House Labor Committee, which brings me to, well, let me first also leave, this is what doctors get for hourly rate. Here is one. "Hourly rate includes file review examinations, preparations, time, conference, meetings, telephone calls, travel time and testimony, it's $400 an hour." Here's one that gets $450 an hour to review the record and phone calls, $700 an hour for depositions in

RP

the office, and $3,000 for a half day of trial testimony or $5,000 for a full day. And, there is more here. Here's another one that gets, for a half day of testimony, $3,525.

So, it is not a cheap proposition and it's people who are actually making a great living.

Senator Jacalyn L. Cilley, D. 6: You will provide copies to the Committee?

Mr. Clegg: I am going to leave you all of these.

Senator Jacalyn L. Cilley, D. 6: I do see shaking heads behind you. So, I want to make sure that what we have...

Mr. Clegg: And, I will be more than happy to leave these, right now.

Please see attachment #3 – documents submitted by Bob Clegg, New Hampshire Association for Justice.

Senator Deborah R. Reynolds, D. 2: I have a question.

Mr. Clegg: Now...

Senator Jacalyn L. Cilley, D. 6: Do you want to ask a question?

Senator Deborah R. Reynolds, D. 2: No, no. Wait until he is done with testimony.

Mr. Clegg: Now, I heard testimony that said that doctors may not want to do IMEs because they don't want to be on record. They don't want to be videotaped. But yet, I heard from other doctors who are saying nobody ever calls me for an IME. So, while some doctors, and there's not a lot of doctors that are doing IMEs in the State of New Hampshire, may decide well, if somebody is going to actually keep an eye on me I'm not be interested any more. There are a lot of doctors who say, I am more than happy to do a few a day. So, I say, let's do it.

Now, the other thing is somebody said, "Well, it is very expensive to videotape." I made a lot of money building medical offices, and I can tell you, for less than $1,000, you can put four cameras in those rooms with an electronic taping device, and you can agree to turn that button on. And, also you can have two drives, so you make two copies. So when the patient leaves, he leaves with one.

RP

They are not expensive cameras. They are very cheap. They do come in color, and most everybody now is using these cameras around their homes. In fact, I have them as surveillance. I know it's not that expensive, and I know, having built those rooms, it is quite easy to make sure you get all four angles, and believe me, all four angles get covered.

Senator Jacalyn L. Cilley, D. 6: Don't accept an invitation for dinner.

Mr. Clegg: I don't have them in my bathroom.

Now, I wasn't going to testify until the head of the Medical Society stood up and said that the House Committee didn't have enough expertise to make this decision, and I find that rather insulting. And, I have to point out. How would you like to be a patient in a doctor's office getting an IME with the same attitude that you're too stupid to understand what's going on? Because that's basically what they said.

I think that the Labor Committee in the House is now and always has been more than capable of making decisions. With the likes of Representative Gary Daniels, Will Infantine, Chip Rice, there are a number of people on there who fully understand not only the legal side, but the business side, and the insurance side.

So, to say that it was a mistake they made, I beg to differ, and the idea that we send it off now to an appointed, a politically appointed committee instead of a duly elected group of representatives is also an insult.

So, every time we don't like what the Legislature does, we say, let's ship it off. So, let's ship off all the insurance bills to DOA, let them make the decision, and then when they bring it back, why even have meetings? We will just sign them off. I think that's the wrong way to go.

Where was the Workers' Comp Council when we were having this hearing in the House? We had hearings and we had numerous subcommittee hearings. It wasn't like it was done in one day. It was on and on and on, but they didn't feel like they needed to participate for whatever reason. I'm sorry if they only have the legislative update once the bill hits the Senate. Perhaps the Workers' Comp Council needs to start watching the bills in the House and the Senate.

So, with the Madam Chair, I will end my testimony.

Senator Jacalyn L. Cilley, D. 6: You have a question. Senator Reynolds?

RP

Senator Deborah R. Reynolds, D. 2: Yeah, I do. Thank you, Madam Chair. Thank you very much, Senator Clegg. My question to you has to do with the word "record" in line 13. And, I am wondering if you could share with us any, whether there was any kind of legislative intent regarding the tape recording of the, you know, of the exam versus video. Was there any...?

Mr. Clegg: There was some discussion on the audio, and I don't say that we don't agree that in some sense it's very difficult to determine when the doctor says lift your arm, "oh, you didn't lift it high enough."

Senator Deborah R. Reynolds, D. 2: Right.

Mr. Clegg: Now, there is an argument over what the high enough was.

But, the real intent was that most people now have a video recorder of some kind. I mean, I have a video recorder on my Blackberry, and, you know, I think anybody under 50 has a Blackberry. So, it's not like they are not available. And again, walking around a patient, I don't think that anybody looked for somebody to walk around a patient. I think what they wanted was they actually wanted to be able to actually film what was happening. So, you got voice, and you got action, and you got reaction.

Senator Deborah R. Reynolds, D. 2: Right. And, just as a follow up. So...

Senator Jacalyn L. Cilley, D. 6: Follow up.

Senator Deborah R. Reynolds, D. 2: Just so the record is clear. Are we, are we talking about videotaping? Are we talking, should we just leave the word "record" the way it is? Is that clear what we're talking about?

Mr. Clegg: Well again, I think you heard testimony, and I would have to speak only on, only for myself on this. I think that video recording is the most reasonable. As one of the doctors stated, it is very difficult to argue what you hear versus what you see. Somebody can only raise their arm this high, and the doctor says raise it above their head. It is pretty obvious, you either went up there or didn't.

Senator Deborah R. Reynolds, D. 2: Thank you very much.

Senator Jacalyn L. Cilley, D. 6: Any further questions? Senator Bragdon.

Senator Peter E. Bragdon, D. 11: Thank you, Madam Chair. Thank you, Mr. Clegg. I assume that you didn't mean to imply that Representative Infantine and Daniels supported this bill?

RP

Mr. Clegg: I meant to imply that there were numerous people on that Committee who are well versed in this issue, and I don't know what their votes were. However, I find it extremely insulting for somebody to sit before the Senate and decide that the people in the House aren't qualified to make these kinds of decisions. Do you know who makes that decisions whether we are qualified? It's the voter. And, if you don't like it, move into that community and vote against those people. Although, pretty hard when there is 21 people on the Committee.

Senator Jacalyn L. Cilley, D. 6: Any further questions? Thank you.

Mr. Clegg: Thank you.

Senator Jacalyn L. Cilley, D. 6: Alright. We're closing the hearing on House Bills 1370 and 1371.

Hearing closed at 11:45 A.M.

Respectfully submitted,

Richard Parsons, Senate Committee Secretary

6/29/10

3 Attachments

ATTACHMENT #1

O'DEA OCCUPATIONAL CARE, P.L.L.C.
Barbara O'Dea, M.D., C.I.M.E.
Certified Independent Medical Examiner
Board Certified Occupational Medicine and Internal Medicine

522 Amherst Street Suite 22, Nashua NH 03063
(603) 880-0448 fax (603) 881-5280

Commerce Committee
State of New Hampshire Senate

May 3, 2010

Re: HB 1370 and HB 1371 IME practice bills

This is in regards to my concerns about the proposed bills HB 1370 and HB 1371 affecting Independent Medical Exams. I am a Board Certified Occupational Medicine physician who has practiced in New Hampshire for 20 years. I am also a Certified Independent Medical Examiner. There are significant practical issues in regards to implementation of these bills.

The first bill requires recording the IME's findings regarding causality of each case. In my experience, there is frequently not a single answer to this question. For instance, the patient may claim both right and left arm issues. My finding could be that the right arm problem is work related, but the left arm is not. Another example is claim of wrist, elbow and shoulder problems all related to an injury. If I say that the wrist and elbow are work related, but the shoulder is not, is that "pro-plaintiff" or "pro-insurance company"?

I have particular issues with the second bill, especially about the recording of exams. With the current level of available technology, I have strong concerns that any recording, audio or video done by the plaintiff could be altered in a way to discredit the IME report, or even the IME examiner. Therefore, if a patient does a recording, I would feel compelled to do my own recording. This will increase the time and cost of the evaluation, and would require prior notice for setting up equipment.

This is particularly impractical when it comes to video recording. I once allowed an IME to be video recorded by a patient and his friend. They took considerable time to set up equipment, including a tripod for the camera. My exam room was small, and the angle for viewing the full exam was difficult. The friend then held the camera, circling the patient and me in very awkward postures, and asked for parts of the exam to be repeated "to get the shot". I asked for a copy of the recording from the patient, which he agreed to but I never received. Trying to have two cameras with tripods, one for the patient, and one for the examiner, would simply not be achievable in a typical exam room.

I have on occasion allowed patients to have a friend present during the interview when they request this. However, there are difficulties with this. Even when the friend is told at the beginning of the interview that they are there as an observer, and not a participant, they frequently try to answer questions for the patient, or try to expand upon the patient's answers. I have seen arguments between the patient and the person accompanying them about what the right answer is to a question about the patient's history, or even the patient's symptoms. The interference sometimes does not stop, even with repeated requests. This increases the time needed for the exam.

If the friend wants to be present during the exam itself, I try to have my own staff person present as well. Again, four people in a small exam room is difficult. Having to have a staff person present throughout the evaluation would increase the cost of the exam, and would create scheduling difficulties. Prior notice would be needed.

I only recently heard about the proposed bills, and I have tried to find out whether there are laws like this in other states regarding IMEs. There may be a law in New York regarding recording IMEs, but I am unaware of the details of this. These bills otherwise appear unprecedented.

I appreciate your consideration of these issues as you evaluate these bills.

Sincerely,

Barbara O'Dea M.D. C.I.M.E.

Barbara O'Dea, M.D., C.I.M.E.
Certified Independent Medical Examiner

ATTACHMENT #2

Talking Points in Opposition to HB 1370 and HB 1371

HB 1370:

-why are physicians who perform independent medical exams being targeted for special reporting, including financial questions?
-no evidence or studies submitted by supporters of this legislation that there is any confirmed evidence of bias in the IME process—they are objective medical examinations, often with a more thorough review of medical information available, and better physical examination documentation
-the issue of bias in the IME process has NEVER been brought to the NH W/C Advisory Council for any formal discussion as a concern in the past 18 months
-the question of causation is based upon the medical information available for review at the time of the IME, not the amount of income received for an IME or who referred a claimant
-no recent communications from the Dept. of Labor about any bias issues for any IME providers
-standards already exist from the DOL, the American Medical Association, and the American Board of Independent Medical Examiners concerning IME's and medical ethics
-HB 1370 will lead to physicians choosing not to perform IME's, which will remove a vital part of medical oversight of these cases(opioid abuse issues, medical error/misdiagnosis issues)—see NCCI Report December 2009, recent Prescription Drug Summit March 30, 2010 (NH Dept. of Justice, NH Dept. of Safety, NH Association of Chiefs of Police)

HB 1371:

-claimants already have the ability to have a medical witness present in the current RSA 281-A:38
-medical credibility issues of claimant versus IME physician are decided by the DOL panel after reviewing all the facts of the case
-again, no discussions about the IME process have occurred at the level of the NH W/C Advisory Council over the past 18 months; no confirmed evidence of any bias on the part of examining physicians
-recording will increase the costs of these examinations, and all recorded items will need to be authenticated to avoid the possibility of tampering
-audio recordings will be of no value for physical examination findings
-a non-medical witness for a claimant may be MORE biased (I.e. family member, attorney), and potentially bring false allegations against an IME physician in order to discredit the IME report
-currently, the claimant does have the ability to raise bias/ethics issues to either the DOL or the NH Board of Medicine
-Rules of the Superior Court of the State of New Hampshire (63.D.) do not have any requirements for claimant/plaintiff recording of IME's or witnesses being present

Browse Previous Page | Table of Contents | Browse Next Page

Superior Court Rules Table of Contents

RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE

STANDING PRETRIAL ORDERS

63. A. The life expectancy tables in textbooks such as C.J.S. and Am. Jur. (2d) are admissible as evidence to prove life expectancy.

B. Any party claiming damages shall furnish to opposing counsel, within six months after entry of the action, a list specifying in detail all special damages claimed; copies of bills incurred thereafter shall be furnished on receipt. Any party claiming loss of income shall furnish opposing counsel, within six months after the entry of the action, as soon as each is available, copies of the party's Federal Income Tax Returns for the year of the incident giving rise to the loss of income, and for two years before, and one year after, that year, or, in the alternative, written authorization to procure such copies from the Internal Revenue Service.

C. If, after an action has been entered for three months, a party submits copies of bills incurred to opposing counsel, and no objection has been made within thirty days, the bills may be introduced without formal proof.

D. In actions to recover damages for personal injuries, the defendant shall have the right to a medical examination of the plaintiff prior to, or during, trial.

E. Copies of all medical reports relating to the litigation, in the possession of the parties, will be furnished opposing counsel on receipt of the same.

F. X-rays and hospital records (which are certified as being complete records) if otherwise admissible and competent may be introduced without calling the custodian or technician. Any party shall have the right to procure from opposing counsel an authorization to examine and obtain copies of hospital records and X-rays involved in the litigation.

G. All experts, including doctors and law enforcement personnel, who are to testify at a trial, will be advised by counsel to bring their original records and notes to court with them.

H. The issue of speed of a motor vehicle on a public highway, if material, will be submitted on the grounds of reasonableness without regard to statutory provisions relative to rates of speed that are *prima facie* reasonable, unless counsel objects thereto at the pretrial settlement conference, or files written objection thereto at least seven days before the trial.

I. No claim is to be made at any trial that the operator of a motor vehicle, involved in the case, was not properly licensed, unless the claim has been made at the pretrial settlement conference, or unless the claim was filed in writing at least seven days before the trial.

Browse Previous Page | Table of Contents | Browse Next Page

Superior Court Rules Table of Contents

#2

Code of Medical Ethics

AMA Code of Medical Ethics
- Opinion 10.03
- History of AMA Ethics
- Frequently Asked Questions
- Purchase the Code of Medical Ethics

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. (I)

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

Related Links

Council on Ethical and Judicial Affairs

Contact CEJA

Related Articles

Articles on Medical Ethics

From *American Medical News*

Board of Independent

Navigation

Home

Register Online

Presidents Message

ABIME 2010 Anouncement

Board of Registry Information

CIME[SM] Certification Information

CICE[SM] Certification Information

Educational Courses

AMA Guides 6th Ed. Order Form

Downloadable Order Forms

Recertification Information

Educational & Exam Schedule

Journal of Disability Medicine

ABIME Guidelines of Conduct

How to Become ABIME Certified

Member Directory Search

Resource Links

Featured Services

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*

Complete Document

Can Be Viewed

In Bill Folder

#2

NCCI Holdings, Inc.

NCCI RESEARCH BRIEF

December 2009

by Barry Lipton, Chris Laws, and Linda Li

Narcotics in Workers Compensation

Introduction

Narcotics account for nearly one quarter of all workers compensation (WC) prescription drug (Rx) costs. Few members of the medical community would object to the use of narcotics to treat severe, chronic, cancer-related pain. However, the medical community seems divided over the suitability of narcotics to treat other forms of pain, such as those resulting from the majority of WC injuries.

Despite the serious risks associated with narcotics usage, some physicians prescribe narcotics for minor injuries, such as sprained ankles. This practice, according to the director of the FDA's new drug center, can be dangerous [1]. However, the *Journal of Pain* [2] says there is a "growing consensus that [narcotic] therapy is appropriate for chronic noncancer pain."

Currently, the FDA is in the process of establishing a federal program to ensure the safe, appropriate use of narcotics. *The New York Times* [1] discusses this future FDA program designed to control "the prescribing, dispensing and distribution of extended-release [narcotics]." One aim of the future program would be to ensure that only physicians who are properly trained in the safe use of narcotics can prescribe them. (See Appendix B for more information.)

Several recent articles and studies point to increased scrutiny of narcotics use. One article [3] notes that, in at least one state, diagnoses of "chronic pain" or "failed back syndrome," "virtually guarantee that the claim involves overprescription [of narcotics] because these are the diagnoses used to justify the use of narcotics." Another [4] states that overuse of narcotics has "shown adverse effects on the overall well-being and treatment of injured parties."

This study examines the use and prescribing patterns of this controversial category of drugs in WC.

Key Findings

- Narcotics account for nearly one quarter of all WC Rx costs
- The narcotics share of drug costs increases as claims age
- Narcotics costs per claim vary by state with apparent regional differences
- Narcotics are used mostly for back injuries in WC
- Narcotics use early in the life of claims is increasing
- Narcotics use can persist for many years
- Heavy narcotics use for WC injuries is related to substance-abuse treatments

Background

Narcotics, sometimes known as opioids or opiates, have been used in medicine for centuries [5]. The US Drug Enforcement Administration (USDEA) observes that [6], "in a legal context, narcotic refers to opium, opium derivatives, and their semi-synthetic substitutes." The USDEA goes on to note that [5] "narcotics are used therapeutically to treat pain, suppress cough, alleviate diarrhea, and induce anesthesia." However, the US Food and Drug Administration remarks on possible adverse effects of narcotics use [7], "The most serious of the known adverse events associated with opioid pain relievers are respiratory depression, central nervous system depression, addiction, and death. Adverse events are associated with improper dosing, indication, and patient selection, as well as abuse and addiction."

Generic Products

Generic Name	Drug Name	Applicant/Sponsors
Fentanyl	Fentanyl Extended-Release Transdermal System	Actavis
Fentanyl	Fentanyl Extended-Release Transdermal System	Lavipharm Labs
Fentanyl	Fentanyl Extended-Release Transdermal System	Mylan Technologies
Fentanyl	Fentanyl Extended-Release Transdermal System	Teva Pharms
Fentanyl	Fentanyl Extended-Release Transdermal System	Watson
Methadone	Methadose Tablets	Mallinckrodt
Methadone	Methadone HCL Tablets	Mallinckrodt
Methadone	Methadone HCL Tablets	Sandoz
Morphine	Morphine Sulfate Extended-Release Tablets	Endo
Morphine	Morphine Sulfate Extended-Release Tablets	KV Pharmaceuticals
Morphine	Morphine Sulfate Extended-Release Tablets	Mallinckrodt
Morphine	Morphine Sulfate Extended-Release Tablets	Watson Labs
Oxycodone	Oxycodone Extended-Release Tablets	Mallinckrodt
Oxycodone	**Oxycodone Extended-Release Tablets	Impax Labs
Oxycodone	**Oxycodone Extended-Release Tablets	Teva

** Discontinued products.

Source: US Food and Drug Administration http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm163654.htm

ATTACHMENT #3

JAN 25 2010

SHAHEEN & GORDON, P.A.

ATTORNEYS AT LAW

Donald C. Crandlemire
Attorney At Law

January 20, 2010

Michael S. McGrath, Esquire
Upton & Hatfield, LLP
10 Centre Street
PO Box 1090
Concord, NH 03302-1090

Re: Michele A. Bergh v. Carrie McLane

CONFIRMATION OF DISCOVERY DEPOSITION OF DR. JONATHAN W. SOBEL

Dear Mike:

This letter is written to notify you that a discovery deposition is scheduled to take place at your request on **Wednesday, February 10 beginning at 4:00 p.m.** at the office of Dr. Sobel as follows:

Dr. Jonathan W. Sobel
Orthopedic Specialists
3 Windham Road
Derry, NH 03038
(603) 432-0590

Dr. Sobel has indicated that his standard fee for his deposition is a minimum ½ day at $3,525.00. A $500.00 nonrefundable deposit is required at scheduling. Please confirm that these terms are acceptable to you and that your office will arrange to pay Dr. Sobel for his professional time in advance of the deposition date.

I confirm that your office has made arrangements for a stenographer to be present.

Thank you very much.

Very truly yours,

Donald C. Crandlemire
dcrandlemire@shaheengordon.com

DCC:sb
cc: client

Deposition scheduled for 11/5/10 @ 4:00 pm

From: Levy, Diane [dlevy@ehr.org]
Sent: Thursday, April 30, 2009 10:45 AM
To: Levy MD, Richard
Subject: MEDICO LEGAL FEES.doc

RICHARD L. LEVY, M.D., F.A.A.N.
Board Certified Neurology
3 Alumni Drive, Suite 104
Exeter NH 03833
Phone: (603)778-1000
Fax; (603(778-2753

MEDICO-LEGAL FEE SCHEDULE

1. Review records, phone calls, etc.: $450/hour

2. Office depositions: $700/hour, payable at the time of service

3. Trial testimony: $3000 for half day, $5000 for full day

4. Testimony and deposition cancellation policy: Due to lost work time, the following fees will be charged if cancellation occurs in less than 48 business hours: $750 for half day, $1500 for full day.

5. Independent Medical Exams: pre-payment of minimum fee $600 (exceedingly large records may incur additional charges. Cancellation in less than 48 business hours, and patient no shows are charged $300.

OFFICE POLICIES AND FEE SCHEDULE
DAVIS W. CLARK, M.D.
ORTHOPAEDIC SURGEON
1/02/09

BASIC HOURLY RATE **$400.00/hr.**

Includes file review, examinations, preparation time, conference, meetings, telephone calls, travel time, and testimony.

Authorization to allow a witness during my Independent Medical Examination

I hereby authorize the presence of _____ during the independent medical examination with Dr. _____ and understand that my medical history and condition(s) will be discussed during said exam and I waive any right to privacy that I may have under the circumstances of my voluntarily allowing my witness to be present.

_____ _____

Claimant date Doctor date

cited. Similarly, the examiner should explain the logic used to conclude whether the worker has reached maximal medical improvement or further functional recovery can be reasonably expected.

If an impairment rating is called for, the rater should describe the method used to determine the rating and the rationale for the rating assigned. He or she should also describe the examinee's capacity for social and work functioning as it relates to the degree of physical impairment.

Making Recommendations

The consensus view is that examiners should make recommendations in response to questions posed by, or implied by, the examination request. Recommendations should be based on the available evidence, or if lacking evidence, consensus views of what is effective (with benefits outweighing risks). Such recommendations may include the need for further testing to define the condition in question, either to further the analysis of causation or to clarify the diagnosis. Recommendations may also be called for regarding further treatment, the prognosis for further improvement, physical or mental impairment, the examinee's current or future work capacity, the need for vocational rehabilitation, and the potential for employment.

Advice Given to Examinees Before Undergoing Independent Medical Examinations

A number of Web sites for injured workers have appeared in the last several years. The information provided falls into four general categories: rights and responsibilities, as determined by state workers' compensation agencies or occupational medicine organizations (for example, the Cleveland Clinic); expert medical advice in response to queries (again, the Cleveland Clinic); bad experiences with IMEs or the perceived results of IMEs; and quasi-legal or legal advice on conduct at an IME.

Making a recording of the examination in one way or another (e.g., videotape) might enhance the quality of the examinations. Some advice proferred by examiners, such as for the examinee to see the attending physician immediately after the examination to get another assessment, may contribute to conflict between medical professionals, that is, the "dueling docs" syndrome. Refusal to allow testing may compromise the accuracy of the IME.

References

Administrative Code 2:235-5.10. Conduct of formal hearings: (4)(m)(1).

Brigham CR. *The Comprehensive IME System.* Falmouth, Mass: SEAK; 1997.

Brigham CR, Babitsky S, Mangraviti JJ. *The Independent Medical Examination Report: A Step-by Step Guide with Models.* Falmouth, Mass: SEAK; 1996.

Brigham CR. Perfecting the IME process. *Guides Newsletter* 2000;Sept/Oct:6-7.

Harris JS, Brigham CR. Independent medical examinations. In: Harris JS, Blais BB, Brigham CR, Kuhnen A, eds. *Management of Common Health Problems and Functional Recovery in Workers: The ACOEM Occupational Medicine Practice Guidelines.* Beverly Farms, Mass: OEM Press; 1997.

Kraus J. The independent medical examination and the functional capacity evaluation. *Occup Med.* 1997;12(4):525-56.

Pierce AS. The IME—what's in an acronym? *J Workers' Comp.* 1998;8(1):28-35.

Smith GL. *How to Write a Winning Workers' Compensation Report: A Programmed Text.* Beverly Farms, Mass: OEM Press; 1995.

Literature Reviewed

Able W. A system of impartial medical testimony. *J Indiana State Med Assoc.* 1966;59(4):357-8.

Adams W. *Impairment Rating Trends in the Texas Workers' Compensation System.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 1999.

Aranoff GM, Feldman JB, Campion TS. Management of chronic pain and control of long-term disability. *Occup Med.* 2000;1(4)5:755-70.

Austin A. *Independent Medical Examination Project. Focus Group and Interview Summary Report.* Olympia, Wash: State of Washington, Department of Labor and Industries; 2000.

Babitsky S, Mangraviti JJ Jr. *Understanding the AMA Guides in Workers' Compensation.* Gaithersburg, Md: Aspen; 1997.

Bagley HM, Kiffen DC, Blackmon JG Jr, Griffeth PC. Workers' compensation. *Mercer Law Rev.* Fall 1996. 48 Mercer L Rev 583.

Ballantyne DS, Mazingo CJ. *Measuring Dispute Resolution Outcomes—A Literature Review with Implications for Workers' Compensation.* Cambridge, Mass: Workers' Compensation Research Institute; 1999:WC-99-1.

Ballantyne DS. *Dispute Prevention and Resolution in Workers' Compensation: A National Inventory, 1997-1998.* Cambridge, Mass: Workers' Compensation Research Institute; 1998:WC-98-3.

Barth PS. *Resolving Occupational Disease Claims—The Use of Medical Panels.* Cambridge, Mass: Workers' Compensation Research Institute; 1985:WC-85-1X and WC-1-85.

Baslam A, Zabin AP. *Disability Handbook.* New York, NY: McGraw-Hill; 1990.

Benoit BG, Marshall TD, Ivan LP, et al. Legal issues in the practice of neurology and neurosurgery. *Can J Neurol Sci.* 1990;17(4):434-9.

Boden LI, Kern DE, Gardner JA. *Reducing Litigation: Using Disability Guidelines and State Evaluators in Oregon.* Cambridge, Mass: Workers' Compensation Research Institute; 1991.

Boynton B. Independent medical examinations: analyzing IME reports for workers' compensation cases. *National Medico-legal J.* 1996;7:1,6-7.

Brigham CR, Ensalada LH. Perfecting the IME process: evaluation. *Guides Newsletter.* 2001;March/April:9-12.
Brigham CR. Recommended reading list for impairment evaluation. *Guides Newsletter.* 2000;May/June:7-8.
Brigham CR, Ensalada LH. Non-organic findings. *Guides Newsletter.* 2000;July/Aug: 4-8.
Brigham CR, Babitsky S. Independent medical evaluations and impairment ratings. *Occup Med* 1998;13(2):325-44.
Bunn WB 3rd, Johnson CE. Causation in workers' compensation. *Occup Med.* 1996;11(1):113-20.
Campbell DC, Russell S. *The Texas Workers' Compensation Impairment Rating System: Variations and Features.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 2000.
Canadian Medical Association. *The Physician's Role in Helping Patients Return to Work after an Illness or Injury.* Ottawa, Ont: Canadian Medical Association; 1997. www.cma ca/inside/policybase 1997/3-1.htm
Carnathan ST. Due process and the independent medical examiner system in the Maine Workers' Compensation Act. *Maine Law Rev.* Fall/Winter 1993. 45 Me L Rev 123.
Chibnall JT, Tait RC, Merys SC. Disability management of low back injuries by employer-retained physicians: ratings and costs. *Am J Ind Med.* 2000;38(5):529-38.
Colledge AL, Johns RE Jr. Unified fitness report for the workplace. *Occup Med.* 2000;15(4):723-37.
Colledge AL, Johns RF Jr, Thomas MH. Functional ability assessment: guidelines for the workplace. *J Occup Environ Med.* 1999;41(3):172-80.
Cox RAF, Edwards FC, McCallum RI. *Fitness for Work: The Medical Aspects.* Oxford, England: Oxford University Press; 1995.
Cumming GR. The independent medical examination: cardiology assessment. *Can J Cardiol.* 1996;12(12):1245-52.
Demeter SL. Disability evaluation. *Occup Med.* 1998;13(2):315-23.
Demeter SL. Andersson GBJ, Smith GM. *Disability Evaluation.* St. Louis, Mo: Mosby; 1996.
Department of Labor and Industries. *Your Independent Medical Exam.* Olympia, Wash: State of Washington, Department of Labor and Industries; 2000. www.wagov/lni/pub/i245-224-00-htm.
Department of Labor and Industries. *Independent Medical Examinations: Report to the Legislature in Accordance with RCW 51.32.116.* Olympia, Wash: State of Washington, Department of Labor and Industries; 1998.
Drury DL, Vasudevan SV. Denied worker's compensation claims: what physicians can and cannot do. *WMJ.* 1998;97(11):20-2.
Eccleston SE, Yeager CM. *Managed Care and Medical Cost Containment in Workers' Compensation—A National Inventory, 1997-1998.* Cambridge, Mass: Workers' Compensation Research Institute; 1997:WC-97-6.
Ellis T. Multistate analysis. *Occup Health Safety.* April 1999. www.ohsonline.com.
Employer Consultants-Consultation Services. *Doctor's Desk Reference on Early*

Return to Work for Injured Workers. Seattle, Wash: Department of Labor and Industries, Region 2; 1995.
Engelberg AL. Disability and workers' compensation. *Prim Care.* 1994; 21(2):275-89.
Ensalada LH. The importance of illness behavior in disability management. *Occup Med.* 2000;15(4):739-54.
Fraser TM. *Fitness for Work.* Washington, DC: Taylor & Francis; 1992.
Gardner JA, Telles CA, Moss GA. *The 1991 Reforms in Massachusetts: An Assessment of Impact.* Cambridge, Mass: Workers' Compensation Research Institute; 1996:WC-96-3.
Gold JA. The occupational physician as expert witness. *Occup Med.* 1996;11(1):145-51.
Grant D. Independent medical examinations and the fuzzy politics of disclosure. *CMAJ.* 1997;156(1):73-5.
Greenwood JG. Low-back impairment-rating practices of orthopedic surgeons and neurosurgeons in West Virginia. *Spine.* 1985;10(8):773-6.
Guidotti TL. Applying epidemiology to adjudication. *Occup Med.* 1998; 13(2):303-14.
Guidotti TL. Evidence-based medical dispute resolution in workers' compensation. *Occup Med.* 1998;13(2):289-302.
Hadler NM. Criteria for screening workers for the establishment of disability. *J Occup Med.* 1986;28(10):940-5.
Hansen J. Scientific decision-making in workers' compensation: a long overdue reform. *Southern Calif Law Rev.* May 1986. 59 S. Cal. L. Rev. 911.
Hardberger P. Texas workers' compensation: a ten-year survey—strengths, weaknesses, and recommendations. *St. Mary's Law J.* 2000:32. St Mary's L J 1.
Harber P, Harris JS. Work-relatedness. In: Harris JS, Blais BB, Brigham CR, Kuhnen A, eds. *Management of Common Health Problems and Functional Recovery in Workers: The ACOEM Occupational Medicine Practice Guidelines.* Beverly Farms, Mass: OEM Press; 1997.
Harris JS. Delayed recovery. In: Harris JS, Blais BB, Brigham CR, Kuhnen A, eds. *Management of Common Health Problems and Functional Recovery in Workers: The ACOEM Occupational Medicine Practice Guidelines.* Beverly Farms, Mass: OEM Press; 1997.
Harris JS. Development, use and evaluation of clinical practice guidelines. *J Occup Environ Med.* 1997;39(1):23-34.
Harte D, Smith DA. Workers' compensation appeals systems in Canada and the United States. *Occup Med.* 1998;13(2):423-7.
Joseph GP. Less than "certain" medical testimony. *Med Trial Technol.* 1978;25:10-20.
Kizer D. *Amended QME Regulations as Approved by the Office of Administrative Law.* South San Francisco, Calif: Industrial Medical Council; 2000.
Kizer D. *Sanction Guidelines for Qualified Medical Evaluators.* South San Francisco, Calif: Industrial Medical Council; 2000.
Kizer D, Searcy A, Lum JB, eds. *Industrial Medical Council Physician's Guide: Medical Practice in the California Worker's Compensation System.* 2nd ed. South San Francisco, Calif: Industrial Medical Council; 1997.

Klein Z. Applying assessment skills to analyzing medical-related cases. *National Medico-legal J.* 1997;8:3.
Mayer TG, Gatchel RJ, Polatin PB. *Occupational Musculoskeletal Disorders: Function, Outcome and Evidence.* Philadelphia, Pa: Lippincott, Williams & Wilkins; 2000.
Miller TR. *Evaluating Orthopedic Disability—A Commonsense Approach.* 2nd ed. Oradell, NJ: Medical Economics Books; 1987.
Moon SD, Sauter SL. *Beyond Biomechanics: Psychosocial Aspects of Musculoskeletal Disorders in Office Work.* Bristol, Pa: Taylor and Francis; 1996.
National Council of State Legislatures. *State of Workers' Compensation.* www.ncsl.org/public/cataglog/3302IN.htm
Neuhauser F. *Report on the Quality of Treating Physician Reports and Cost-Benefit of Presumption in Favor of the Treating Physician.* San Francisco, Calif: Commission on Health, Safety and Workers' Compensation; 2000.
Nordin M, Andersson GBH, Pope M. *Musculoskeletal Disorders in the Workplace: Principles and Practice.* St. Louis, Mo: Mosby; 1997.
North DA, Higdon KM. Landmark Survey: Best practices in integrated disability management. *J Workers' Comp.* 1998;7(2):9-26.
Pease SR. *Performance Indicators for Permanent Disability—Low Back Injuries in Texas.* Cambridge, Mass: Workers' Compensation Research Institute; 1988:WC-88-4.
Pease SR. *Performance Indicators for Permanent Disability—Low Back Injuries in Wisconsin.* Cambridge, Mass: Workers' Compensation Research Institute; 1987:WC-87-4.
Pease SR. *Performance Indicators for Permanent Disability—Low-back Injuries in New Jersey.* Cambridge, Mass: Workers' Compensation Research Institute; 1987:WC-87-5.
Petersen DD. General Mills case study: the critical steps in managing workers' compensation costs. *J Workers Comp.* 1994;3(3):22-30.
Proctor T, Gatchel RJ, Robinson RC. Psychosocial factors and risk of pain and disability. *Occup Med.* 2000;15(4):803-12.
Pryor ES. Flawed promises: a critical evaluation of the American Medical Association's "guides to the evaluation of permanent impairment." *Harv Law Rev.* Feb 1990. 103 Harv L Rev 964.
Reiso H, Nygard JF, Brage S, et al. Work ability assessed by patients and their GPs in new episodes of sickness certification (Norway). *Fam Pract.* 2000;17(2):139-44.
Rondinelli RD, Katz RT. *Impairment Rating and Disability Evaluation.* Philadelphia, Pa: W.B. Saunders; 2000.
Sandler HM. Trends in occupational and environmental disease claims. *J Workers' Comp.* 1993;2(2):21-6.
Schulman B, Schwartz S, Boyle P. *Workers' Compensation/Occupational Health National Trends Study.* Seattle, Wash: University of Washington Department of Health Services; 1997.
Simon RI. The credible forensic psychiatric evaluation in multiple chemical sensitivity litigation. *J Am Acad Psychiatry Law.* 1998;26(3):361-74.
Snyder JW, Maier JC, Love BD. Injury and causation on trial: the phenomenon

of "multiple chemical sensitivities." *Widener Law Symposium.* Fall 1997. 2 Wid L Symp J 97.

Social Security Administration (SSA). *Disability Evaluation under Social Security.* Washington, DC: US Department of Health and Human Services, SSA; 1986.

Soderstrom E, Stewart J. Adjudicating claims. *Occup Med.* 1998;13(2):273-8.

Solomon DF. Medical expert testimony in administrative hearings. *J Natl Assoc Admin Law Judges.* 1997.

Spieler EA, Barth PS, Burton JF Jr, et al. Recommendations to guide revision of the AMA Guides to the Evaluation of Permanent Impairment. *JAMA.* 2000;283(4):519-23.

Talmage JB. Assessment and management of upper and lower extremity impairment and disability. *Occup Med.* 2000;15(4):771-88.

Telles CA, Fox SE. *Revisiting Workers' Compensation in Washington—Administrative Inventory.* Cambridge, Mass: Workers' Compensation Research Institute; 1996:WC-96-10.

Telles CA, Fox SE. *Workers' Compensation in Colorado—Administrative Inventory.* Cambridge, Mass: Workers' Compensation Research Institute; 1996:WC-96-8.

Telles CA, Shiman L. *Revisiting Workers' Compensation in Minnesota—Administrative Inventory.* Cambridge, Mass: Workers' Compensation Research Institute; 1997:WC-97-3.

Texas Workers' Compensation Commission and Research and Oversight Council on Workers' Compensation. *An Analysis of Texas Workers with Permanent Impairments.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 1996.

UC Data. *Evaluating the Reforms of the Medical-Legal Process Using the WCIRB Permanent Disability Survey.* San Francisco, Calif: California Commission on Health and Safety and Workers' Compensation; 1997.

US Chamber of Commerce. *Analysis of Workers' Compensation Laws.* Washington, DC: US Chamber of Commerce; 2000.

Vasudevan SV, Drury DL. The independent medical examination: purpose and process. *Wisc Med J.* 1999;98(2):10-2. http://wismed.org/wkrscomp/wmjmarapr99-vasudevan.htm.

Welch EM. Independent medical exams. In: *Materials for Michigan State Claims Adjuster Course.* East Lansing: Michigan State University; 2000.

Wise LM. Ethical considerations for the IME. *Chiropractic J.* 1999. www.worldchiropracticalliance .org/tcj/1999/sep/sep1999viewpoint.htm.

Websites and Web-Published Materials

The references in this section include a wide variety of materials and come from a wide variety of sources. To make the context of each of these sources clearer, the references are presented in topical groups. URLs for virtually all references are provided. The specific web pages referenced

below were of particular interest to us, but you can find other useful information on many of these sites by exploring them further, especially by going to their home pages.

MEDICAL AND HEALTH CARE ORGANIZATIONS

Physical Medicine Research Foundation, 1998. BC Whiplash Initiative: PMRF's Whiplash-Associated Disorders-A Comprehensive Syllabus. www.health-sciences.ubc.ca/whiplash.bc.

Cleveland Clinic Center for Corporate Health: www.clevelandclinic.org/corphealth/workcomp/pgime.htm.

HEALTH CARE SPECIALTY AND PROFESSIONAL SOCIETIES

American College of Chiropractic Consultants, Mission Statement: www.accc-chiro.com.

College of Physicians and Surgeons of British Columbia 1995. Policy Manual: The Independent Medical Examination. www.cpsbc.bc.ca/policymanual/i/i1.htm.

College of Physicians and Surgeons of Alberta 2000. Guideline: Medical Examinations by Non-treating Physicians (NTMEs). www.cpsa.ab.ca/policyguidelines/ntmes.html.

NIXON, RAICHE, VOGELMAN, BARRY & SLAWSKY

PROFESSIONAL ASSOCIATION

DAVID L. NIXON
LESLIE C. NIXON
*LAWRENCE A. VOGELMAN**
*THOMAS T. BARRY***
*DAVID P. SLAWSKY**
KIRK C. SIMONEAU

**Admitted in NH and NY*
***Admitted in NH and VA*

Attorneys at Law
Seventy-seven Central Street
Manchester, New Hampshire 03101

TELEPHONE 603-669-7070
WATS 1-800-207-7000
FAX 603-669-7080

ROBERT E. RAICHE, SR.
CLIFFORD J. ROSS
ROBERT CHRISTY
OF COUNSEL

MARTIN F. LOUGHLIN
1995-2007

April 16, 2010

Maureen Raiche Manning
80 Merrimack Street
Manchester, NH 03101

Re: Independent Medical Exams

Maureen,

Enclosed for your information and review is Chapter 7 of the Occupational Medicine Practice Guidelines regarding Independent Medical Examinations and Consultations.

Best regards.

Very truly yours,

Leslie C. Nixon, Esq.

LCN/jlm
Enclosure

cc: Senator Robert Clegg

PS: See P. 156

7 Independent Medical Examinations and Consultations

The occupational health practitioner may refer to other specialists if a diagnosis is uncertain or extremely complex, when psychosocial factors are present, or when the plan or course of care may benefit from additional expertise. An independent medical assessment also may be useful in avoiding potential conflict(s) of interest when analyzing causation or when prognosis, degree of impairment, or work capacity requires clarification. When a physician is responsible for performing an isolated assessment of an examinee's health or disability for an employer, business, or insurer, a limited examinee-physician relationship should be considered to exist. A referral may be for:

- **Consultation:** To aid in the diagnosis, prognosis, therapeutic management, determination of medical stability, and permanent residual loss and/or the examinee's fitness for return to work. A consultant is usually asked to act in an advisory capacity, but may sometimes take full responsibility for investigation and/or treatment of an examinee or patient.
- **Independent Medical Examination (IME):** To provide medicolegal documentation of fact, analysis, and well-reasoned opinion, sometimes including analysis of causality. An IME differs from consultation in that there is no doctor-patient relationship established and medical care is not provided. It may be a means of medical clarification or adjudication in which the physician draws conclusions regarding diagnosis, clinical status, causation, work-relatedness, testing and treatment efficacy and requirements, physical capacities, impairment, and prognosis based on available information. The evaluations must be independent, impartial, and without bias. The client often may be the employer, insurer, state authority, or attorney.

Accepted Purposes of Independent Medical Examinations (IMEs)

Independent medical examinations have at least four accepted purposes. To be most effective, IMEs must be complete, focused, rigorously and clearly

reasoned, impartial, and supply the information needed by the person who requested them. Independent medical examinations are discussed below primarily in the context of workers' compensation. However, not only workers' compensation systems rely upon IMEs; they are, at times, equally valuable for assessing non-work-related illnesses and injuries, and the work issues surrounding them.

First, IMEs are intended to provide specific, relevant, and impartial information to guide adjudication of a workers' compensation or other claim when required information has not been made available by other means, or when the existing information is believed to be inaccurate. Claims adjusters may use IMEs to provide guidance about entitlement issues such as the work-relatedness of a medical condition, the need for further medical or income benefits, and the nature and extent of permanent impairments.

Second, IMEs may be used to guide management of medical care, disability, and rehabilitation when the claims adjuster is concerned that the care may be inadequate, inappropriate, or that return to work is unreasonably delayed. Case managers and rehabilitation specialists may need clarification of the diagnosis, appropriateness of treatment, or need for work modifications or absence. IMEs also may be used to elicit hitherto unknown facts in a situation or to uncover the reasons for delayed functional recovery. While IMEs are not the preferred method for obtaining basic medical information, they can be an invaluable aid when a claims adjuster has questions and needs expert corroboration or guidance. This is particularly true when the health problem is unusual or the nature or need for the proposed treatment is controversial.

Third, IMEs may be used to provide technical data and written opinions in order to comply with requirements of the claims adjudications process, or to move even an uncontested claim to a next step. Statutes, regulations, organizational policies, or tradition often consider a signed doctor's report as a precondition to moving to the next step. Examples include work releases, closing exams, maximal medical improvement (MMI) findings, impairment ratings, and so forth. Independent medical examinations may provide these data if they are not provided by the treating physician.

Fourth, IMEs can be a source of expert medical opinions on issues of diagnosis, causality, treatment, or impairment for defense or claimants' attorneys and workers' compensation commissioners or judges. Attorneys, adjusters, and judges generally are seeking information to clarify a disputed point. In some jurisdictions, the IME report itself is not admissible evidence; the testimony of the examiner is considered the evidence, whereas the report is hearsay unless both parties agree to the contrary, or the administrative law judge accepts the report in evidence.

During the course of a workers' compensation claim, IMEs may be appropriately used to evaluate testing and treatment appropriateness or disability management. The best practice in protracted treatment is to obtain an IME promptly after the recommended care in evidence-based guidelines has been exceeded. Many payers obtain IMEs if there is prolonged or apparently ineffective treatment. The best practice in using IMEs to manage delayed recovery is contingent on the availability of information and the time in which it is available.

At case closure, IMEs are appropriate to obtain an opinion of MMI, an assessment of impairment rating, or prediction of future medical needs if the information is not available from the attending physician, is felt to be biased or inaccurate, or is needed to resolve a dispute. If the claimant appears to be at MMI, but the attending physician does not agree, an IME may be appropriate. Most states require an impairment assessment or rating at the conclusion of the claim if the attending physician states that the claimant has not recovered to his or her preinjury status. For workers' compensation, there is a treating physician presumption (official or unofficial) in most states, making the attending physician the preferred initial source of information. This presumption may be changed by the recent U.S. Supreme Court decision, *Black & Decker Disability Plan v. Nord.*

Legal and Regulatory Requirements for Independent Medical Examinations (IMEs)

Each state has legal and regulatory provisions governing the collection and use of medical information, the circumstances under which IMEs may be obtained, and the qualifications and selection process for examiners. Most states allow the workers' compensation board to order a physical examination of a claimant by a physician of its choice, and allow insurers or employers to order a physical examination of a claimant by a physician of their choice.

Some states allow IMEs at the discretion of the employer/insurer or "as needed." The majority of states allow IMEs to resolve disputes, especially regarding treatment, nature of injury, and disability. Some states use IMEs mostly for permanent partial disability ratings. Some states require a hearing before the Board can order an IME. Simply accreting more opinions on one side or the other, or creating a "tie-breaker," is not viewed as the best use of an IME, but the "dueling docs" phenomenon is the reason for many IMEs.

In summary, IMEs are used to provide information and opinions for the understanding and guidance of causality analysis, diagnosis, medical testing and therapy, and functional recovery programs. To be most effective in meeting these needs, IMEs must be complete, focused, rigorously and clearly reasoned, impartial, and supply the information requested.

Qualifications of a Consultant or an Independent Medical Examiner

Physicians obtaining external opinion from consultations or IMEs should refer examinees to other physicians who are independent of the practitioner managing the case, other physicians involved with the case, the payer, and any attorneys who may be involved, e.g., in workers' compensation or environmental liability cases.

Consultants and IME physicians have the same obligations as physicians in other contexts: to evaluate objectively the examinee's health or disability.

They should not be influenced by the preferences of the examinee, employer, or insurance company when making a diagnosis.

Consultants and IME physicians should:

- Be licensed and in good standing in the jurisdiction where the examination occurs. Physicians should list licensure such as MD, DO, etc., after their signature so that payers know who performed the IME and the physician's licensure.
- Be board certified, defined as successful completion of an American Board of Medical Specialties (ABMS) prescribed residency in an Accreditation Council for Graduate Medical Education (ACGME) accredited institution and subsequent certification by the applicable board in the area of inquiry or possible exposure. Comparable certification should be demonstrated for physicians in other countries.
- Demonstrate evidence of ongoing continuing medical education accredited by Accreditation Council for Continuing Medical Education (ACCME) and good standing with the professional specialty board or association.
- Return primary care to the practitioner managing the case following the examination and assessment.

In addition to the above, independent medical examiners should:

- Demonstrate experience in the performance of IMEs.
- Be able to rate impairment and differentiate impairment from disability.[1]
- Declare any financial or other interest they may have in the findings or outcome of the examination.
- Disclose any important health information or abnormalities discovered during the course of the examination.
- Be independent contractors providing medical examinations within the realm of their specialty, in contrast to industry-employed physicians (IEPs), whom businesses or insurance companies employ to conduct medical examinations.
- Be objective in performing and reporting IMEs as well as actively ascertaining potential conflicts of interest. Potential bias relevant to any evaluation should be documented to show that such bias exists.

[1]The official WHO (World Health Organization) definition of *Impairment* is "any loss or abnormality of psychological, physiological or anatomical structure or function." WHO's definition for *Disability* is: "any restriction or lack of ability to perform an activity in a manner or within the range considered normal for a human being." The term *disability* reflects the consequences of impairment in terms of functional performance and activity by the individual.

Examiner Skills and Abilities

Examiners should be trained and knowledgeable about the body systems and health problems that the examinee appears to have. The examiner should know how to elicit and interpret key symptoms and signs. For example, if the worker complains of low back pain, the examiner should be knowledgeable about the anatomy and physiology of both the musculoskeletal and nervous systems, and diagnosis of disorders of the low back.

If causation is an issue, the examiner should be able to assess work and home exposure to ergonomic factors, chemicals, and other sources of work-related health problems. He or she should also have a thorough knowledge of the high-grade scientific evidence linking exposures and adverse health effects if asked to assess health issues other than direct trauma.

Communication, and interpersonal and language skills are crucial elements of the independent medical examination skill set. Because the results of an IME may affect the ability to obtain financially desired or needed benefits, it can be a threatening experience to the examinee. Further, not all examinees are excellent historians without careful questioning and interpretation. One of the main complaints about independent medical examiners is failure to listen or to cover points that are important to the examinee.

The examiner should be cognizant of the evidence supporting efficacious and cost-effective care, whether physical, pharmacological, or surgical. The examiner also should be aware of the lack of evidence, or negative evidence, for many commonly used tests and treatments. Even effective treatments may lose their effectiveness for an individual after a period of time, or may have negative effects if prolonged too long. Pharmacological therapy and physical medicine in particular fall into this category.

A balanced health care perspective is important: First, placing precedence on medical or surgical therapy rather than other forms of therapy may prevent the examiner from considering the best treatment for the examinee's circumstances. Second, many of the factors that delay functional recovery and return to work are not purely physical.

The examiner must be skilled in applying medical logic to the data acquired in order to validate the diagnosis, suggest specific additional testing, affirm or recommend changes in treatment, and to reach reasonable conclusions about causation, impairment, and ability to work. Without this skill, and the ability to convey the steps in the analysis to the reader, the value of the data acquired will be largely unrealized. Knowledge and skill in answering the types of questions typically posed to independent medical examiners is also essential. Examiners rating permanent impairment must be familiar with the use of the often complex rating systems deployed in their particular jurisdiction.

An excellent examiner will maintain a neutral point of view as a medical expert. The examiner will render opinions consistent with the case and the evidence for causation, test and treatment effectiveness, and the reproducibility of impairment assessment. He or she should not issue "boilerplate" reports (that are generic rather than specific in nature), nor use a preconceived framework based on a pro-business or pro-labor philosophy rather than the objective facts of each case.

The examiner should be able to render an opinion that is "impartial, unbiased, and objective." The examiner should clearly differentiate between facts and opinions. Generally, it has been considered difficult for treating physicians to achieve

this level of objectivity, especially in circumstances where some sort of dispute concerning their examinee is involved.

As stated previously, in some jurisdictions, independent medical reports are not in themselves admissible in legal disputes. Therefore, another important skill of medical examiners is the ability to testify clearly, logically, and in an informed way in a deposition or hearing on the issues and facts in the case. When testifying, the examiner should be able to assimilate contradictory information and consider it reasonably, even if it changes his or her prior opinion.

Referral Issues and the Independent Medical Examination (IME) Process

A referral request should specify the concerns to be addressed in the independent or expert assessment, including the relevant medical and nonmedical issues, diagnosis, causal relationship, prognosis, temporary or permanent impairment, work capability, clinical management, and treatment options. The appendix that appears at the end of this chapter provides an added level of detail to the sections below regarding the process and content of IMEs.

A consultation report or IME may contain these elements:

- History and physical findings
- Interpretation of test results
- Diagnosis
- Expected natural history of the disease or injury
- Causation
- Maximal medical improvement (MMI)
- Impairment
- If indicated, apportionment of the impairment
- Work capacity and its evaluation, including a physical capacity estimate (PCE), based on best medical evidence and restrictions
- Appropriateness of current course, treatment, or medical management
- Expected future medical care because of the specified exposure or injury

A. History

A comprehensive history in a consultation or IME should contain the following:

1. HISTORY OF THE PRESENT INJURY OR ILLNESS, INCLUDING:

- Description of the incident resulting in injury, body part affected, and onset of symptoms, obtained from both the injured worker and employer

- Mechanism of injury or illness
- Investigation and accident reports
- Summary of exposure monitoring data to quantify exposure
- Examinee's preinjury health status, including preexisting conditions, previous injuries, and the examinee's perceived preinjury functional status, for comparison
- Chronology of symptoms and response to treatment

2. CURRENT STATUS OF THE EXAMINEE'S HEALTH PROBLEM(S), INCLUDING:

- Nature, location, pattern, and quality of current symptoms, identifying the body part(s) involved and the specific type and location of the symptoms
- Change in function or capacity during the course of the problem
- Examinee's current perceived functional status, including the ability to carry out daily living, recreational and work activities, with consistencies and inconsistencies noted
- Aggravating and relieving factors
- Physician-imposed work restrictions
- Treatment history and response to treatment, particularly if the questions posed relate to treatment effectiveness or recommendations
- Work and disability status since the onset of the problem
- Examinee's perceptions about causation, satisfaction with care, and expectations for recovery from the condition
- Associated symptoms such as anxiety, depression, and sleep disturbances
- Effects on social function

3. REVIEW OF OTHER MEDICAL AND DISABILITY HISTORY, INCLUDING:

- Other past illnesses, injuries, surgeries, allergies, medications, and family history of illness, injury, and disability
- The effects of previous injuries or preexisting conditions
- Nonoccupational exposures
- Review of organ systems
- Absence history prior to the current health problem
- Disability history

4. REVIEW OF PERTINENT MEDICAL AND OTHER RECORDS, WHICH MAY INCLUDE:

- Preexisting conditions and previous similar illnesses or injuries
- Health problems reported by other examiners
- Diagnostic test results and functional capacity assessments and the methodology used
- Summary of other physicians' opinions
- Direct review of past test data, and imaging studies or electrodiagnostic study data.

The reviewer should note any questions he or she might have, as well as inconsistencies among tests or between test interpretations, and the history and physical examination in the analysis section (see below).

5. EMPLOYMENT HISTORY MAY INCLUDE:

- Examinee's occupational history including current and prior jobs, noting work tasks, exposures, and protection such as engineering controls, personal protective equipment, and ergonomic practices
- Review of job descriptions preferably agreed to by the worker and the supervisor
- Viewing of videotapes of actual job tasks
- Review of ergonomic evaluations of the worker's workstation
- Specific essential functions of the examinee's job and workplace exposures at the time of injury, or prior to the appearance of symptoms of a work-related illness, as obtained from both examinee and employer
- Examinee's job satisfaction, relationships with supervisors and coworkers, and recent performance evaluations, job satisfaction, task satisfaction, level of monotony and control, and opportunities for advancement

6. PSYCHOSOCIAL HISTORY

- Education, prior work experiences, and future goals and plans
- Description of a typical day and time use
- Family situation, and changes in that situation since injury
- Recreation, including related nonoccupational exposures
- Tobacco, alcohol, and other drug use
- Other psychosocial factors

A focused history for circumstances that predispose examinees to symptom magnification or chronic pain syndrome is recommended when:

*Table 7-1. Risk Factors for Potential Symptom Magnification, Somatization, or Malingering**

◦ Childhood history/dysfunction	◦ Prior emotional or physical trauma
◦ School performance	◦ Emotional difficulties
◦ Ability to form lasting relationships	◦ Developmental transitions
◦ Family emotional issues	◦ Substance abuse
◦ Psychosomatic illness history	◦ Past medical problems, disability
◦ Litigation history	

* Derived from Aranoff, Feldman, and Campion, 2000; Brigham and Ensalada, 2000; Ensalada, 2000; Proctor, Gatchel, and Robinson, 2000.

- Pain symptoms are impeding functional recovery
- There are questions of symptom magnification
- There are questions about the need for future treatment or vocational rehabilitation

The elements of such a history are shown in Table 7-1.

B. Physical Assessment

1. A general physical examination should be completed, including the examiner's general observation of:
   - examinee behavior, appropriateness, and affect
   - station, gait, posture, and body movements
   - cardiopulmonary function

2. A detailed examination of the body system involved is important and may require referral for specialized evaluation. For instance:
   - In cases of neuromusculoskeletal complaints or presumed nerve or nerve root compression, a complete neurologic examination of the affected area and related areas is mandatory. Sole use of physical examination maneuvers to make these diagnoses is inadequate. A neurological examination also may be indicated when there is evidence of other neurosensory findings when examining other body systems.
   - In cases of visual system or periorbital complaints, a comprehensive ocular examination is appropriate with the addition of specific laboratory procedures, as indicated by the examination findings.
   - Nonphysiologic findings should be noted. Such findings might include back pain with axial loading, inappropriate responses to stimuli, and other findings that do not correspond to known anatomic or physiologic problems.
   - Behavioral assessment, including the examinee's responses during the physical assessment should be noted and, in some cases, a formal mental status examination may be indicated.

C. Inventories

Pain and functional status inventories may supplement the evaluation of behavioral and psychological factors and provide information on the perceived level of function and disability. These questionnaires also can provide an indication of behavioral overlay and psychological problems that might contribute to delayed recovery or dysfunction at work or at home. The examiner can judiciously choose applicable inventories, considering their intended use, appropriateness to the examinee, and ecological and intrinsic validity and reliability within a work setting.

D. Surveillance

Examining physicians should use surveillance material only to reach medical conclusions and only if the surveillance materials allow them to reach their conclusions. Surveillance recordings and reports may assist in determining which activities are safe for the examinee. Surveillance is most useful when an individual is observed engaging in activities that cannot be reconciled with the claimed injury. An examinee's maximum abilities cannot be extrapolated reliably from surveillance data unless continuous strenuous or demanding activities are observed. Brief exertion can occur during the "best" days representing maximal performance assisted by premedication or subsequently requiring medication. It is reasonable to state whether the documented activities are consistent or inconsistent with documented functional capacity evaluations.

E. Analysis

A careful analysis of past medical history, history of the present illness or injury, work history, test results, and the physical examination as a group of data should yield answers to the questions posed, or reveal the need for further consultation or testing. Analyzing the following elements should enable the examiner to make a full assessment of diagnostic accuracy, work-relatedness, testing and treatment appropriateness, level of function, physical or psychological impairment, and motivation to return to work:

- Diagnosis of the underlying conditions or disorders, based on a synthesis of all available information, and diagnosis guidelines (i.e., those in this book). An accurate diagnosis is needed to formulate the most efficient and effective treatment plan.
- Comparison of specific treatments and results to usual or best-practice treatments outcomes for the most efficient and effective future treatment plan. The examiner should analyze past records in chronological order for diagnostic accuracy, test appropriateness and findings, treatment appropriateness and effectiveness, the appropriateness of work restrictions or accommodations, and the timing of return to work.

- Validation of impairment ratings. These are often incorrectly calculated.
- Opinion about causation, based on the scientific literature, to a reasonable degree of medical probability (more probable than not). The relationship of the diagnosis to the work-related event should be defined as clearly as possible. Factors supporting correlation of the diagnosis to the work-related event should be specifically stated. The frequently used statement, "in the absence of other factors, the complaint is related to work," has no scientific basis and is therefore unacceptable.
- Opinion about apportionment of causation or disability among various factors, including prior impairment or concurrent medical conditions. Apportionment is state or jurisdiction specific. When a permanent impairment results from adding or combining a prior impairment with the existing impairment from the industrial accident, then the permanent impairment is apportioned between the current injury and the prior impairment condition(s).
- Determination of whether the current medical problem is an exacerbation (flare-up of symptoms) of a preexisting or comorbid condition or an aggravation (ongoing worsening) of such a condition, based on high-grade scientific evidence.
- Determination of achievement of MMI, and functional status. MMI, medical stability, or fixed state of recovery refers to a date when the period of healing has ended and the examinee's impairment rating is not expected to materially improve or deteriorate as a result of further medical treatment. MMI should not preclude the provision of necessary maintenance care. The date of medical stability and the date when the examinee qualifies for an impairment rating do not have to be the same. The definition and timing of MMI is often state or jurisdiction specific. Evaluators should be familiar with the definition of the jurisdiction in which they are working.
- Opinion about current work capability and, if requested, the current objective functional capacity of the examinee. The examiner is responsible for determining whether the impairment results in functional limitations and to inform the examinee and the employer about the examinee's abilities and limitations. The physician should state whether the work restrictions are based on limited capacity, risk of harm, or subjective examinee tolerance for the activity in question. The employer or claim administrator may request functional ability evaluations, also known as functional capacity evaluations, to further assess current work capability. These assessments also may be ordered by the treating or evaluating physician, if the physician feels the information from such testing is crucial. Though functional capacity evaluations (FCEs) are widely used and promoted, it is important for physicians and others to understand the limitations and pitfalls of these evaluations. Functional capacity evaluations may establish physical abilities, and

also facilitate the examinee/employer relationship for return to work. However, FCEs can be deliberately simplified evaluations based on multiple assumptions and subjective factors, which are not always apparent to their requesting physician. There is little scientific evidence confirming that FCEs predict an individual's actual capacity to perform in the workplace; an FCE reflects what an individual can do on a single day, at a particular time, under controlled circumstances, that provide an indication of that individual's abilities. As with any behavior, an individual's performance on an FCE is probably influenced by multiple nonmedical factors other than physical impairments. For these reasons, it is problematic to rely solely upon the FCE results for determination of current work capability and restrictions. It is the employer's responsibility to identify and determine whether reasonable accommodations are possible to allow the examinee to perform the essential job activities.

- Opinion about prognosis (i.e., the predicted time of recovery and likelihood of recovery to achieve specified physical or functional levels), comparing the examinee's condition and recovery to date with the natural history of the disorder and consideration of workplace and psychosocial factors that may influence recovery. The relative role of each influencing factor in determining the clinical prognosis should be addressed. Reference to statistics about the median recovery time and guidelines on the period of benefit from various therapies can provide input toward the formation of an opinion about further recovery.
- Calculation or rating of permanent impairment, based on jurisdictional requirements or a consensus system such as the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th (or latest available) edition, if called for in the state for which the examination is done. The examiner should show all calculations for later validation or replication.
- Identification, if requested, of specific effective medical treatment(s) that may be reasonably required in the future as a direct result of the industrial accident or illness.

The guidelines set forth in the bulleted paragraphs immediately above are deliberately reflective of high examination and documentation standards. It is of vital importance that the decision-making process that leads to recommendations for or against medical care be credible. Credibility requires not only that the evaluative process itself be fair, but also that in any given case the substance of the process was appropriate for that injured worker. Though a physician may believe that the attention given an injured worker in an independent medical examination was appropriate, those reviewing the report of the examination will not be able to reach the same conclusion without adequate documentation. The paragraphs above describe the documentation that reviewing tribunals frequently seek in their determination of the weight to give conflicting opinions. In a very real way, clear and complete documentation

by independent medical examiners can produce substantial efficiency in the workers' compensation decision-making process. Regrettably, the absence of such documentation can hinder or completely stop the forward motion of a workers' compensation claim.

References

Able W. A system of impartial medical testimony. *J Indiana State Med Assoc.* 1966;59(4):357-8.

Adams W. *Impairment Rating Trends in the Texas Workers' Compensation System.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 1999.

American Medical Association. *Guides to the Evaluation of Permanent Impairment.* 5th ed, revised. Chicago, Ill: AMA Press; 2001.

American Medical Association Council on Ethical and Judicial Affairs (CEJA) *Report: Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations.* Issued December 1999, adopted June, 1999.

American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders.* 4th ed. Washington, DC: APA; 1994.

Aranoff GM, Feldman JB, Campion TS. Management of chronic pain and control of long-term disability. *Occup Med.* 2000;15:755-70.

Babitsky S, Mangraviti JJ Jr. *Understanding the AMA Guides in Workers' Compensation.* Gaithersburg, Md: Aspen Publishers, Inc.; 1997.

Bagley HM, Kniffen DC, Blackmon JG Jr, Griffeth PC. Workers' compensation. *Mercer Law Review.* Fall 1996. 48 Mercer L. Rev. 583.

Ballantyne DS, Mazingo CJ. *Measuring Dispute Resolution Outcomes—A Literature Review with Implications for Workers' Compensation.* Cambridge, Mass: Workers' Compensation Research Institute; 1999:WC-99-1.

Ballantyne DS. *Dispute Prevention and Resolution in Workers' Compensation: A National Inventory, 1997-1998.* Cambridge, Mass: Workers' Compensation Research Institute; 1998:WC-98-3.

Barth, Peter S. *Resolving Occupational Disease Claims—The Use of Medical Panels.* Cambridge, Mass: Workers' Compensation Research Institute; 1985:WC-85-1X and WC-1-85.

Baslam A, Zabin AP. *Disability Handbook.* New York, NY: McGraw-Hill; 1990.

Benoit BG, Marshall TD, Ivan LP, Forcier P, Evans KG. Legal issues in the practice of neurology and neurosurgery. *Can J Neurol Sci.* 1990;17(4): 434-9.

Boden LI, Kern DE, Gardner JA. *Reducing Litigation—Using Disability Guidelines and State Evaluations in Oregon.* Cambridge, Mass: Workers' Compensation Research Institute; 1991:WC-91-3.

Boden LI. *Permanent Partial Disability in Tennessee: Similar Benefits for Similar Injuries?* Cambridge, Mass: Workers' Compensation Research Institute; 1997:WC-97-5.

Boden LI. *Use of Medical Evidence—Low-Back Permanent Partial Disability Claims in Maryland.* Cambridge, Mass: Workers' Compensation Research Institute; 1986:SP-86-1.

Boden LI. *Use of Medical Evidence—Low-Back Permanent Partial Disability Claims in New Jersey.* Cambridge, Mass: Workers' Compensation Research Institute; 1987:WC-87-2.

Boynton B. Independent medical examinations. Analyzing IME reports for workers compensation cases. *National Medico-legal J.* 1996;7:1,6-7.

Brigham CR, Ensalada LH. Perfecting the IME process: evaluation. *The Guides Newsletter.* March/April 2001:9-12.

Brigham CR. Perfecting the IME process. *The Guides Newsletter.* September/October 2000:6-7.

Brigham CR, Ensalada LH. Nonorganic findings. *The Guides Newsletter.* July/August 2000:4-8.

Brigham CR. Recommended reading list for impairment evaluation. *The Guides Newsletter,* May/June 2000;7-8.

Brigham CR, Babitsky S. Independent medical evaluations and impairment ratings. *Occup Med.* 1998;325-44.

Brigham CR. *The Comprehensive IME System.* Falmouth, Mass: SEAK, Inc; 1997.

Brigham CR, Babitsky S, Mangraviti JJ. *The Independent Medical Examination Report: A Step-by-Step Guide with Models.* Falmouth, Mass: SEAK, Inc; 1996.

Brigham CR. *How to Perform an Excellent Independent Medical Evaluation.* Falmouth, Mass: SEAK, Inc. Medical and Legal Information Systems; 1994.

Brigham CR, Boucher W, Engelberg AL. The independent medical evaluation. In: McCunney RJ, ed. *A Practical Approach to Occupational and Environmental Medicine.* 3rd ed. Philadelphia, Pa: Lippincott, Williams and Wilkins; 2003:86-96.

Brigham CR, Babitsky S. Independent medical evaluations and impairment ratings. *Occup Med STARS.* 1998;13(2):325-43.

Bunn WB, Johnson CL. Causation in workers' compensation. *Occup Med.* 1996; 11:113-20.

Campbell DC, Russell S. *The Texas Workers' Compensation Impairment Rating System: Variations and Features.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 2000.

Canadian Medical Association. *The Physician's Role in Helping Patients Return to Work after an Illness or Injury.* (www.cma.ca/inside/policybase1997/3-1.htm). Ottawa, Ont: Canadian Medical Association; 1997.

Carnathan ST. Due process and the independent medical examiner system in the Maine Workers' Compensation Act. *Maine Law Review.* Fall/Winter 1993.45 Me. L. Rev. 123.

Chibnall JT, Tait RC, Merys SC. Disability management of low back injuries by employer-retained physicians: ratings and costs. *Am J Ind Med.* 2000;38:529-38.

Clark WL, Haldeman S, Johnson P, et al. Back impairment and disability determination. *Spine.* 1988;13(3):332-41.
Clark W, Haldeman S. The development of guideline factors for the evaluation of disability in neck and back injuries. *Spine.* 1993;18(13): 1736-45.
Colledge AL, Holmes EB, Soo Hoo R, Johns RE Jr, Kuhnlein J, DeBerard, S. Motivation determination (sincerity of effort): the performance APGAR model. *Dis Med.* 2001;1(2).
Colledge AL, Sewell J, Holbrook B. Impairment ratings in Utah, reduction of variability and litigation within workers' compensation: *Dis Med.* 2001;1(1).
Colledge AL, Johns RE Jr, Thomas MH, et al. Functional ability assessment: guidelines for the workplace. *J Occup Environ Med.* 1999;41(3):172-80.
Colledge AL, Johns RE Jr. Unified fitness report for the workplace. *Occup Med.* 2000;15:723-37.
Cox RAF, Edwards FC, Palmer K. *Fitness for Work: The Medical Aspects.* 3rd ed. Oxford: Oxford University Press; 2000.
Cumming GR. The independent medical examination: cardiology assessment. *Can J Cardiol.* 1996;12(12):1245-52.
Demeter SL. Disability evaluation. *Occup Med.* 1998;13:315-24.
Demeter SL, Andersson GBJ, Smith GM. *Disability Evaluation.* St. Louis, Mo: Mosby; 1996.
Department of Labor and Industries. *Your Independent Medical Exam.* (www.wa.gov/lni/pub/i245-224-00.htm) Olympia, Wash: State of Washington, Department of Labor and Industries; 2000.
Department of Labor and Industries. *Independent Medical Examinations. Report to the Legislature in Accordance with RCW 51.32.116.* Olympia, Wash: State of Washington, Department of Labor and Industries; 1998.
Doege TC, ed. *Guide to the Evaluation of Permanent Impairment.* 4th ed. Chicago, Ill: American Medical Association Press, 1994.
Doyle RL. *Healthcare Management Guidelines: Volume 2: Return to Work Planning.* New York, NY: Milliman & Robertson; 1991.
Drury DL, Vasudevan SV. Denied worker's compensation claims: what physicians can and cannot do. *WMJ.* 1998;97(11):20-2.
Eccleston SE, Yeager CM. *Managed Care and Medical Cost Containment in Workers' Compensation—A National Inventory, 1997-1998.* Cambridge, Mass: Workers' Compensation Research Institute; 1997:WC-97-6.
Ellis T. Multistate analysis. *Occup Health Safety.* April 1, 1999. www.ohsonline.com.
Employer Consultants—Consultation Services. *Doctor's Desk Reference on Early Return to Work for Injured Workers.* Seattle, Wash: Department of Labor and Industries, Region 2; 1995.
Engelberg AL. Disability and workers compensation. *Primary Care.* 1994;21:275-89.
Ensalada LH. The importance of illness behavior in disability management. *Occup Med.* 2000;15:739-54.
Fraser TM. *Fitness for Work.* Washington, DC: Taylor & Francis; 1992.

Gardner JA, Telles CA, Moss GA. *The 1991 Réforms in Massachusetts: An Assessment of Impact.* Cambridge, Mass: Workers' Compensation Research Institute; 1996:WC-96-3.
Geiringer SR. Evaluation and reporting requirements of the disability examiner. *Physical Med Rehabil Clin N Am.* 2001;12(3):543-57.
Gold JA. The occupational physician as expert witness. *Occup Med.* 1996;11:145-52.
Grace T. *Independent Medical Evaluations.* Rosemont, Ill: American Academy of Orthopaedic Surgery; 2001.
Grant D. Independent medical examinations and the fuzzy politics of disclosure. *CMAJ.* 1997;156(1):73-5.
Greenwood JG. Low-back impairment-rating practices of orthopedic surgeons and neurosurgeons in West Virginia. *Spine.* 1985;10:773-6.
Guidotti TL. Evidence-based medical dispute resolution in workers' compensation. *Occup. Med.* 1998;13:289-302.
Guidotti TL. Applying epidemiology to adjudication. *Occup Med.* 1998; 13:303-14.
Hadler NM. Criteria for screening workers for the establishment of disability. *J Occup Med.* 1986;28(10):940-5.
Hadler NM, Bunn WB. *Occupational Problems in Medical Practice.* New York, NY: Medical Publications; 1990.
Hansen J. Scientific decision-making in workers' compensation: a long overdue reform. *Southern Calif Law Rev.* 1986;59 S. Cal. L. Rev. 911.
Hardberger P. Texas workers' compensation: a ten-year survey—strengths, weaknesses, and recommendations. *St. Mary's Law J.* 2000. 32 St. Mary's L. J. 1.
Harris JS. Development, use and evaluation of clinical practice guidelines. *J Occup Environ Med.* 1997;39(1):23-34.
Harte D, Smith DA. Workers' compensation appeals systems in Canada and the United States. *Occup Med.* 1998;13(2):423-7.
Hayman FE. Toward making IMEs independent: balancing the source of work. *Pain Res Manage.* 2001;6(1):13-4.
Himmelstein JS. Worker fitness and risk evaluations in context. In: Himmelstein JS, Pransky GS, eds. *Worker Fitness and Risk Evaluations. Occup Med State Art Rev.* 1988;3:169.
Isernhagen SJ. Contemporary issues in functional capacity evaluation. In: Isernhagen SJ, ed. *The Comprehensive Guide to Work Injury Management.* Gaithersburg, Md: Aspen; 1995.
Joseph GP. Less than "certain" medical testimony. *Med Trial Technol.* 1978:25;10-20.
Kizer D. *Amended QME Regulations as Approved by the Office of Administrative Law.* South San Francisco, Calif: Industrial Medical Council; 2000.
Kizer D. *Sanction Guidelines for Qualified Medical Evaluators.* South San Francisco, Calif: Industrial Medical Council; 2000.
Kizer D, Searcy A, Lum JB, eds. *Industrial Medical Council Physician's Guide: Medical Practice in the California Worker's Compensation System.* 2nd ed. South San Francisco, Calif: Industrial Medical Council; 1997.

Klein Z. Applying assessment skills to analyzing medical-related cases. *National Medico-legal J.* 1997;8:3.

Kraus J. The independent medical examination and the functional capacity evaluation. *Occup Med.* 1997;12(3):525-56.

Luck JV, Florence DW. A brief history and comparative analysis of disability systems and impairment rating guides. *Orthop Clin North Am.* 1988;19(4):839-44.

Mayer TG, Gatchel RJ, Polatin PB. *Occupational Musculoskeletal Disorders: Function, Outcome and Evidence.* Philadelphia, Pa: Lippincott, Williams and Wilkins; 2000.

McGraw R, Ranavaya MI. Editorial: Perils of being an independent medical examiner: *Dis Med.* 2002;2(2).

Miller TR. *Evaluating Orthopedic Disability—A Commonsense Approach.* 2nd ed. Oradell, NJ: Medical Economics Books; 1987.

Moon SD, Sauter SL. *Beyond Biomechanics: Psychosocial Aspects of Musculoskeletal Disorders in Office Work.* Bristol, Pa: Taylor and Francis; 1996.

National Council of State Legislatures. *State of Workers' Compensation.* www.ncsl.org/public/cataglog/3302IN.htm.

Neuhauser F. *Report on the Quality of Treating Physician Reports and Cost-Benefit of Presumption in Favor of the Treating Physician.* San Francisco, Calif: Commission on Health, Safety and Workers' Compensation; 2000.

Nordin M, Andersson GBH, Pope M. *Musculoskeletal Disorders in the Workplace: Principles and Practice.* St. Louis, Mo: Mosby; 1997.

North DA, Higdon KM. Landmark survey: best practices in integrated disability management. *J Workers Comp.* 1998;7(2):9-26.

Pease SR. *Performance Indicators for Permanent Disability—Low Back Injuries in Texas.* Cambridge, Mass: Workers' Compensation Research Institute; 1988:WC-88-4.

Pease SR. *Performance Indicators for Permanent Disability—Low Back Injuries in Wisconsin.* Cambridge, Mass: Workers' Compensation Research Institute; 1987:WC-87-4.

Pease SR. *Performance Indicators for Permanent Disability—Low-Back Injuries in New Jersey.* Cambridge, Mass: Workers' Compensation Research Institute; 1987:WC-87-5.

Petersen DD. General Mills case study: the critical steps in managing workers compensation costs. *J Workers Comp.* 1994;3(3):22-30.

Peterson KW. The Americans with Disabilities Act. In: McCunney RJ, ed. *A Practical Approach to Occupational and Environmental Medicine.* Boston, Mass: Little, Brown and Company, 1994.

Pierce AS. The IME: what's in an acronym? *J Workers Comp.* 1998;8(1):28-35.

Proctor T, Gatchel RJ, Robinson RC. Psychosocial factors and risk of pain and disability. *Occup Med.* 2000;15:803-12.

Pryor ES. Flawed promises: a critical evaluation of the American Medical Association's "guides to the evaluation of permanent impairment." *Harv Law Rev.* 1990;103:964.

Pye H, Orris P. Workers' compensation in the United States and the role of the primary care physician. *Prim Care.* 2000;27(4):831-44.
Ranavaya MI, Talmadge JB. AMA guides to the evaluation of permanent impairment: what's new in the 5th edition? *Disability Med.* 2001;1(1).
Ranavaya MI, Ambroz A, Ambroz, C. The independent medical examinations: are they really needed? *Disability Med.* 2001;1(1).
Ransford AO, Cairns D, Mooney V. The pain drawing as an aid to the psychologic evaluation of patients with low-back pain. *Spine.* 1978;1(2):127-34.
Reiso H, Nygard JF, Brage S, Gulbrandesen P, Tellnes G. Work ability assessed by patients and their GPs in new episodes of sickness certification. (Norway). *Fam Pract.* 2000;17(2):139-44.
Rogers R. *Clinical Assessment of Malingering and Deception.* New York, NY: Guilford Press; 1988.
Rondinelli RD, Katz RT. *Impairment Rating and Disability Evaluation.* Philadelphia, Pa: WB Saunders; 2000.
Sandler HM. Trends in occupational and environmental disease claims. *J Workers Comp.* 1993;2(2):21-6.
Schulman B, Schwartz S, Boyle P. *Workers' Compensation/Occupational Health National Trends Study.* Seattle, Wash: University of Washington Department of Health Services; 1997.
Simon RI. The credible forensic psychiatric evaluation in multiple chemical sensitivity litigation. *J Am Acad Psychiatry Law.* 1998;26(3):361-74.
Smith GL. *How to Write a Winning Workers' Compensation Report: A Programmed Text.* Beverly Farms, Mass: OEM Press; 1995.
Snyder JW, Maier JC, Love BD, et al. Injury and causation on trial: the phenomenon of "multiple chemical sensitivities." *Widener Law Symp J.* 1997:2.
Social Security Administration. *Disability Evaluation under Social Security.* Washington, DC: US Department of Health and Human Services; Social Security Administration; 1986.
Soderstrom E, Stewart J. Adjudicating claims. *Occup Med.* 1998;13:273-8.
Solomon DF. Medical expert testimony in administrative hearings. *J Natl Assoc Admin Law Judges.* 1997.
Spieler EA, Barth PS, Burton JF Jr, Himmelstein J, Rudolph L. Recommendations to guide revision of the AMA guides to the evaluation of permanent impairment. *JAMA.* 2000;283:532-3.
Talmadge JB. Assessment and management of upper and lower extremity impairment and disability. *Occup Med.* 2000;15:771-88.
Telles CA, Fox SE. *Revisiting Workers' Compensation in Washington—Administrative Inventory.* Cambridge, Mass: Workers' Compensation Research Institute; 1996:WC-96-10.
Telles CA, Fox SE. *Workers' Compensation in Colorado—Administrative Inventory.* Cambridge, Mass; Workers' Compensation Research Institute; 1996:WC-96-8.
Telles CA, Shiman L. *Revisiting Workers' Compensation in Minnesota—*

Administrative Inventory. Cambridge, Mass: Workers' Compensation Research Institute; 1997:WC-97-3.

Texas Workers' Compensation Commission and Research and Oversight Council on Workers' Compensation. *An Analysis of Texas Workers with Permanent Impairments.* Austin, Texas: Research and Oversight Council on Workers' Compensation; 1996.

Turk DC. Evaluation of pain and disability. *J Disability.* 1991;2:24-33.

Turk DC, Melzack R. *Handbook of Pain Assessment.* New York, NY: Guilford Press; 1992.

UC Data. *Evaluating the Reforms of the Medical-Legal Process Using the WCIRB Permanent Disability Survey.* San Francisco, Calif: California Commission on Health and Safety and Workers' Compensation; 1997.

US Chamber of Commerce. *Analysis of Workers' Compensation Laws.* Washington, DC: US Chamber of Commerce; 2000.

Vasudevan SV, Drury DL. The independent medical examination: purpose and process. *WMJ.* 1999;98(2):10-12.

Welch EM. Independent medical exams. In: *Materials for Michigan State Claims Adjuster Course.* East Lansing: Michigan State University; 2000.

Wise LM. Ethical considerations for the IME. *Chiropractic J.* 1999. www.worldchiropracticalliance.org/tcj/199/sep/sep1999viewpoint.htm

*Appendix: Review of the Use and Attributes of Excellent Independent Medical Examinations**

According to the literature reviewed, IMEs have at least four accepted purposes. To be most effective in accomplishing these, IMEs must be complete, focused, rigorously and clearly reasoned, and impartial and must supply the information needed by persons requesting them.

Provision of Information for Adjudication of Workers' Compensation Claims

First, IMEs are intended to provide specific, relevant, and impartial information to guide adjudication of workers' compensation claims when required information has not been made available by other means or when existing information is believed to be inaccurate. Claims adjusters may use IMEs to provide guidance on entitlement issues such as the work relatedness of a medical condition, the need for further medical or income benefits, and the nature and extent of permanent impairments.

Guidance in Managing Medical Care, Disability, and Rehabilitation

Second, IMEs may be used to guide management of medical care, disability, and rehabilitation when the claims adjuster is concerned that the care may be inadequate or inappropriate or that return to work is unreasonably delayed. Case managers and rehabilitation specialists may need clarification of the diagnosis, appropriateness of treatment, or need for work modifications or absence. IMEs may also be used to elicit hitherto unknown facts in particular situations or to uncover reasons for delayed functional recovery. While an IME is not the preferred method for obtaining basic medical information, it can be an invaluable aid when a claims adjuster has questions and needs expert corroboration or guidance. This is particularly true when the health problem is unusual or the nature of, or need for, the proposed treatment is controversial.

*Reprinted with permission from *The OEM Report*, April and May, 2003. Copyright © 2003 OEM Health Information, Beverly Farms, Massachusetts.

The authors of this study—part of the Project to Improve the Quality of Independent Medical Examinations produced in 2002 under contract with the Washington Department of Labor and Industries—surveyed the literature and state regulations; interviewed workers' compensation officials, insurance personnel, and recognized experts on independent medical examinations; and synthesized the results. They found substantial consensus about best practices in the conduct and content of independent medical examinations (IMEs). These findings are also applicable to many consultations for work-related health problems.

Provision of Information for Compliance with Requirements of the Claims Adjustment Adjudication Process

IMEs may also be used to provide technical data and written opinions in order to comply with requirements of the claims adjudication process or to move even an uncontested claim to the next step. Statutes, regulations, organizational policies, or tradition often consider obtaining a signed doctor's report a pre-condition to moving to the next step—for example, work release, closing examination, MMI findings, or impairment rating. IMEs may provide these data if they are not provided by the treating physician.

Serving as a Source of Expert Medical Opinions

IMEs can be a source of expert medical opinions on issues of diagnosis, causality, treatment, or impairment for defense or claimants' attorneys and workers' compensation commissioners or judges. Attorneys, adjusters, and judges are generally seeking information to clarify a disputed point. In many states, the IME itself is not admissible evidence in a court of law; rather, the testimony of the examiner is the admissible evidence. The written report is considered hearsay unless both parties agree to the contrary or the administrative law judge allows the report to be entered into evidence (for example, in Kentucky).

Legal and Regulatory Requirements

Each state has legal and regulatory provisions governing the collection and use of medical information, the circumstances under which IMEs may be obtained, and the qualifications and selection process for medical examiners. In most states, the workers' compensation board is allowed to order physical examination of a claimant by a physician of its choice, and the insurer or employer is also allowed to order a physical examination of a claimant by a physician of its choice.

Some states allow IMEs to be conducted at the discretion of the employer or insurer or "as needed" (for example, Alaska). The majority of states allow IMEs to resolve disputes, especially those regarding treatment, the nature of the injury, and disability (for example, Arizona). Some states use IMEs primarily for permanent partial disability ratings (for example, Iowa). In other states, a hearing is required before the workers' compensation board can order an IME (for example, Hawaii).

Appropriate IME Issues by Phase of Claim

The best practice for obtaining and using an IME is linked to the phase of the claim. At a claim's inception, appropriate issues to evaluate include causality

and diagnosis. In general, the study's interviewees felt that it is not necessary to obtain an IME to confirm a diagnosis in a new claim, unless fraud or malingering is suspected. An IME is sometimes obtained if the treating physician records an unusual or serious diagnosis. An accurate diagnosis is needed to correlate the existing injury or disease entity with studies linking it to occupational exposure.

During the course of the claim, an IME may be used to evaluate testing and treatment appropriateness or disability management. The best practice in cases of protracted treatment is to obtain an IME promptly after the recommended duration of care is declared if such duration exceeds that stated in the respective evidence-based guidelines or if the reasons that the case is different or unique are not available elsewhere. Many insurers obtain IMEs if there is prolonged or apparently ineffective treatment. The best practice in using IMEs to manage delayed recovery is contingent on the availability of information and the time at which it is available. If the necessary information is not available from the attending physician, the suggested best practice is to obtain an IME as soon as time-based benchmarks for return to function for the given diagnosis and treatment program are exceeded.

At closure of a claim, an IME is appropriate to obtain an opinion on maximal medical improvement (MMI), an assessment of impairment rating, and/or prediction of future medical needs if the information from the attending (AP) physician is not available, is felt to be biased or inaccurate, or is needed to resolve a dispute. If the claimant appears to be at maximal medical improvement, but the attending physician does not agree with this assessment, an IME may be appropriate.

Most states require an impairment assessment or rating at the conclusion of the claim if the AP states that the claimant has not recovered to a degree equivalent to his or her pre-injury status. In most states there is a treating physician presumption (official or unofficial), making the AP physician the preferred initial source of information. The best practice is to obtain an IME only if the AP declines to evaluate or rate the patient. Not all states require that the AP perform the rating calculations.

Requests for IMEs

Ideally, requests for IMEs include questions tailored to and addressing the specific issues or problems that are unclear or in dispute. Participants strongly recommend that the requestor include a detailed narrative summary of the case to date.

Choice of Examiner

The ideal method for selecting an examiner assures that the one chosen fits the needs of the evaluation. Different parties have different views of these needs, but a number of medical journal articles emphasize that the examiner

must not only have medical expertise but also knowledge of IME methodology and report-writing skills.

Qualifications of Examiner

The examiner should be well trained and knowledgeable about the body systems and health problems that the injured worker appears to have and should know how to elicit and interpret key symptoms and signs. For example, if the worker complains of low back pain, the examiner should be knowledgeable about the anatomy and physiology of both the musculoskeletal and nervous systems as well as the diagnosis of disorders of the low back.

If causation is an issue, the examiner should be able to assess work and home exposure to ergonomic factors, chemicals, and other sources of work-related health problems. In addition, if asked to assess health issues other than evident direct trauma, the examiner should have a thorough knowledge of the evidence linking exposures and adverse health effects.

Good communication—that is, interpersonal and language skills—is a crucial component of the required skill set for conducting IMEs. Because the results of an IME may affect the worker's ability to obtain financially desired or needed benefits, the examination may be a threatening experience to the examinee. Furthermore, not all examinees are good "historians" without careful questioning and interpretation. One of examinees' main complaints about IMEs is examiners' failure to listen or to cover points that are important to the examinee.

The examiner should be cognizant of the evidence supporting effective and efficient therapies and self-care of all kinds, whether physical, pharmacological, or surgical. The examiner should also be aware of the limitations as well as the efficacy of many commonly used tests and treatments. Even normally effective treatments lose their efficacy in treating an individual after a period of time or may have negative effects if unnecessarily prolonged. Pharmacological therapy and physical medicine, in particular, fall into this category.

Having a balanced health care perspective is important for medical examiners. Placing precedence on surgical therapy rather than other forms of therapy may prevent the examiner from considering the best treatment for the patient's circumstances. Many of the factors that delay functional recovery and return to work are not purely physical.

To rate permanent impairment, examiners must be familiar with the use of the often complex rating systems used in their particular jurisdiction.

The examiner must be skilled in applying medical logic to the data acquired in order to validate the diagnosis, suggest specific additional testing, affirm or recommend changes in treatment, and reach reasonable conclusions about causation, impairment, and ability of the examinee to work. Without this skill, and the ability to convey the steps in the analysis to the reader, the value of the data acquired will be largely unrealized. Knowledge and skill in answering the types of questions they are typically asked by insurers, employers' attorneys, judges, and regulators is also essential for independent medical examiners.

An experienced and skilled examiner will maintain a neutral point of view as a medical expert and will thus render opinions consistent with the case and the evidence for causation, test and treatment effectiveness, and the reproducibility of impairment assessment. A competent examiner will not issue "boilerplate" reports (that are generic rather than specific in nature) or use a preconceived framework based on a pro-business or pro-labor philosophy rather than the objective facts of each case. The examiner should be able to render an opinion that is "impartial, unbiased, and objective" and should be able to clearly differentiate between facts and opinions. Third parties often consider it difficult for treating physicians to achieve this level of objectivity, especially in circumstances in which some sort of dispute concerning the patient is involved.

As previously mentioned, in many jurisdictions written IME reports per se are not admissible in legal disputes. Therefore, another important skill required of medical examiners is the ability to testify clearly, logically, and in an informed manner on the issues and facts of the case in a deposition or hearing. When testifying, the examiner should be able to assimilate contradictory information and consider it reasonably, even if it changes his or her prior opinion.

One indication of an examiner's training and skill is board certification in the area of inquiry. Another is Board Certification in Independent Medical Examination by the American Board of Independent Medical Examiners. While these certifications represent assurance of competence in the two key areas previously discussed, they may not be specific enough as a quality control mechanism. Several states have regulatory qualifications for medical experts. In New Jersey, for example, a medical expert is one who performs 25 or more workers' compensation exams per year.

Process and Content of High-quality IMEs

There is a clear consensus among published sources about the process that should be followed and the content to be collected or analyzed in conducting a fair, impartial, responsive, and complete IME. There is a fairly uniform process for the sequence and conduct of the examination summarized in the texts and articles reviewed but no statutory or regulatory requirements for the process or content of the written IME report itself.

The American Board of Independent Medical Examiners, the American Academy of Disability Evaluating Physicians, and the California Industrial Medical Commission have published lists of the items that should be present in an independent medical examination report. These lists contain similar items to those subsequently discussed in this article.

The consensus view starts with the conduct of the examiner. It includes a specific list of explanations, disclosures, and consents that should be made, or obtained and then recorded as "done" in the examination report. It also includes recommended behaviors for the examiner. Failure to behave in the ways subsequently described in this discussion has resulted in substantial num-

bers of complaints to state regulatory authorities and funds, and has been raised as an issue in our survey of injured workers who underwent IMEs.

Provision of Records for Review

Best practice dictates that all pertinent and available prior medical records accompany a request for an IME. These should be arranged in chronological order, with duplicates removed. Before the IME appointment, careful selection, duplication, assembly, and preparation of the file is key so that the examiner does not waste time fumbling through paper and can efficiently develop a solid understanding of the background and facts in the case as a basis for opinion. It is most useful to put all records in a single file but group them by type, i.e., clinic records, imaging reports, operative reports, and so on.

The examiner's ability to formulate a fresh opinion is reduced if he/she must rely on others' interpretations of the primary data. For example, when an IME has been ordered to clarify a diagnosis or evaluate adequacy of treatment, the ready availability of certain primary source documents is key—that is, all test results, surgical notes, and radiographic films. Likewise, if the examiner is to consider causality, details of the accident from the employer's or insurer's injury investigation along with medical records from the initial medical visit and acute injury care period provide the best historical source of "clues" as to causality.

Conduct of the Examination

Explanation and Consent

At the beginning of the examination, the examiner should clearly establish his or her identity and explain the purpose, nature, and scope of the examination. The examiner should inform the examinee that he or she has no relationship with the current attending (treating) physician. The nature of the IME precludes establishing a doctor-patient relationship or doctor-patient privilege. It follows that the examiner will not provide treatment to the injured worker as part of the examination or subsequent to it, except if specifically permitted by state statute or regulation. The examiner should obtain specific consent for the examination, as well as authorization to release the report if required in that state. Completion of all of the above procedural steps should be documented in the IME report.

Examiner Communication

The available literature recommends that the examiner establish rapport with the examinee to help ensure obtaining a complete and accurate history of

exposures, the injury or illness, related issues, and factors that could affect functional recovery. One effective starting point is to have the examinee fill out a structured questionnaire before the examination, and then review it with the examinee.

Published sources also suggest that the examiner listen carefully, respectfully, and objectively to the examinee. They recommend that the examiner paraphrase the history back to the examinee to ensure that it is correct. In the most extensive, complex cases, several sources suggest that the examiner dictate at least the history and examination parts of the report in the presence of the examinee to ensure his/her agreement with the recorded history and physical findings.

The examiner should tell the examinee that the examination is not intended to be uncomfortable and ask to be informed immediately if a maneuver causes pain or discomfort. By extension, the examiner should perform maneuvers carefully and record limitations in the examination caused by the examinee's discomfort.

Historical Information

PAST RECORDS

The sources reviewed recommend reviewing past records of office visits, test results, physical medicine notes, surgical procedures, and scales and inventories in chronological order. It is important that the examiner have all pertinent records and that they be well arranged and easy to review.

The examiner should review primary records and not rely exclusively on summaries prepared by others. There are two views about when to do this. The predominant view is that it is preferable to review the materials prior to the examination in order to identify areas that require clarification during the history and allow the examiner to focus particular attention on key areas during the physical examination. Alternatively, to avoid creating any preconceptions during the history, the examiner can review the materials after the examinee leaves. The danger of this approach is that there may be no opportunity to clarify issues and inconsistencies directly with the examinee.

The examiner should also review past test reports and results such as radiographic or EMG findings directly. In workers' compensation cases, relevant tests in workers' compensation might include plain-film radiography, other imaging studies, electrophysiologic tests, laboratory tests, symptom inventories, functional capacity evaluations, and neuropsychological testing. The reviewer should note any questions he or she might have, as well as inconsistencies between or among tests or test interpretations and the history and physical examination.

The output of this review should be a summary of diagnoses, treatment to date, and progress toward functional recovery. It should also lead to an analysis of prior causal attribution, exposures or mechanism of injury, and the appropriateness and effectiveness of prior testing, treatment, and disability management, including time off work.

MEDICAL AND OCCUPATIONAL HISTORY

The first task in taking a history for an IME is to identify the examinee's current primary concern as well as other issues of concern to the examinee. These issues may or may not include the chief complaint, which also should be elicited.

The examiner should then explore the examinee's pre-injury status, including pre-existing conditions, previous injuries, and the examinee's pre-injury perceived functional status (the effects of pre-existing or previous injuries or conditions, which may be asymptomatic). The examinee's history of work absence prior to the current health problem should also be explored.

Particularly when the issue in question is causality, the examiner should review the examinee's occupational history for all jobs prior to the current complaint. The review should include work tasks, exposures, and protection such as engineering controls, personal protective equipment, and ergonomic practices. Nonoccupational exposures should be sought as well. It is often helpful to review mutually derived job descriptions agreed to by the worker and the supervisor, view videotapes of actual job tasks, review ergonomic evaluations of the worker's workstation or review, and summarize exposure monitoring data to quantify exposure.

In cases in which there is delayed return to work or persistent complaints out of proportion to the apparent illness or injury, the examiner should explore the examinee's task and job satisfaction as well as work relationships with coworkers and supervisors.

HISTORY OF PRESENT ILLNESS

Next, the examiner should elicit information about the mechanism of injury or illness. It is also helpful, particularly in cases of delayed return to work, to explore the worker's perceptions about the causation of the health problem and fault for the causative factor.

After ascertaining the mechanism of injury, the examiner should obtain information about the examinee's symptoms at the time of the injury or illness as well as progression of symptoms to date. This line of questioning should culminate with inquiry into the worker's current symptoms and functional limitations.

Part of the history to be assembled and assessed by the examiner is the treatment history and response to treatment, particularly if the questions posed in the IME request relate to treatment effectiveness or recommendations. Other key elements are the worker's disability history, functional and physician-imposed work restrictions, and effects on social function. The disability history reflects a combination of treatment effectiveness, health beliefs, and psychosocial factors.

PAIN AND SYMPTOM INVENTORIES

The review showed that medical experts emphasize the need to uncover psychological and behavioral components of an illness or injury episode be-

cause they believe that these problems must be acknowledged and addressed in order to facilitate functional recovery and return to work. (Employer and insurer materials were silent in this arena, presumably out of a presumed concern for possible complications of claim management.) Many jurisdictions no longer allow the question of pain to enter into rating systems, because of its subjectivity and susceptibility to distortion in response to system incentives.

Symptom inventories and drawings can provide a semi-quantitative measurement that can be scored against population norms. They are often useful to provide another view of the patient's level of symptoms and his or her perceived impairment. For states such as California that rate impairment caused by pain, pain scales, maps, and descriptions are also useful as direct sources of pain levels, locations, character, and frequency. Instruments for rating pain impairment include pain drawings, analog pain scales, and pain inventories. Personality inventories may be useful to understand some symptoms, the intensity and chronicity of symptoms, and absence from work. Depression scales are an effective way to identify and quantify depression, which may be the cause of delayed return to work or may be a result of loss of function or work status. When using inventories and scales, it is important to ensure accurate grading and interpretation.

SPECIAL DETAILED HISTORY FOR CASES WITH SEVERE PAIN COMPLAINTS IN EXCESS OF OBJECTIVE FINDINGS

For cases in which pain symptoms are impeding functional recovery, there is the possibility of symptom magnification, or there are questions about the need for future treatment or vocational rehabilitation, a focused history to identify circumstances that predispose patients to symptom magnification or the development of chronic pain syndromes may prove useful in answering these questions or guiding effective future treatment. A number of jurisdictions do not rate impairments attributed to pain. This discussion was directed at clarifying symptom "drivers," maximal medical improvement, and appropriate therapy.

Physical Examination

After collection of historical data that supports the focused inquiry called for by the person requesting the examination, which generally includes much or most of the information discussed above, the examiner should carefully perform a similarly focused physical examination, taking care not to cause discomfort for the examinee. If necessary, the examiner should note whenever a maneuver is terminated because of complaints of pain or discomfort.

The examination should focus on the area of injury, including related areas (e.g., the cervical spine in cases involving some upper extremity neurological complaints or the contralateral side in cases involving atrophy, deformity, or joint motion). The examination should be complete but focused and relevant. In the general assessment, the examiner should note habitus, gait, station,

appearance, and affect, as well as the presence of assistive devices, stimulators, braces, and so on. In cases involving presumed nerve or nerve root compression, a complete neurological examination of the affected area and related areas is mandatory. Use of physical maneuvers alone to make these diagnoses is inadequate.

The IME report should include relevant measurements, bilaterally if possible. It should include all pertinent positives and negatives as well as the examinee's response to the examination and nonphysiologic findings such as Waddell's signs. Any symptom magnification should be noted. More specifics on the examination of various body areas can be found in the ACOEM *Occupational Medicine Practice Guidelines*, the AMA *Guides to the Evaluation of Permanent Impairment*, and medical texts.

Further Data

If clarification of the situation is necessary, which generally occurs in cases in which appropriate specialty evaluation or tests have not yet been obtained, the examiner may order or request specialty consultations or testing. Needed tests might include imaging, electrophysiological tests, inventories, functional capacity evaluations or neuropsychological testing, depending on the circumstances, the issue at hand, and the appropriateness and quality of previous tests.

Analysis and Report Content

A careful analysis of the past history, the history of the present illness or injury, the work history, tests results, and the physical examination (as a group of data) should yield answers to the questions posed or reveal the need for further consultation or testing. First, the examiner should analyze past records from all treaters and testers, in chronological order, for diagnostic accuracy, test appropriateness and findings, treatment appropriateness and effectiveness, the appropriateness of work restrictions or accommodations, and the timing of return to work. The examiner should also validate impairment ratings—they are often incorrectly calculated.

Next, the examiner should analyze the interpretation of past test results if qualified to do so. Again, at times, these are subject to misinterpretation. There are studies of the accuracy of test interpretation in various practice guidelines but none directly related to IMEs.

An important piece of data for accurate interpretation of the history obtained from the examinee is the examiner's assessment of his or her reliability and consistency as a historian. The examinee's cooperativeness with the examination, or lack thereof, should also be noted.

The examiner should then describe the logic, methods, and rationale for diagnoses and causality conclusions. Again, if there is evidence in the literature to support diagnosis or causality, other than obvious trauma, it should be

Speakers

Senate Commerce, Labor and Consumer Protection Committee: Sign-In Sheet

Date: May 4, 2010 Time: 9:15 a.m. Public Hearing on HB 1370

HB 1370 requiring independent medical examination practitioners to file a report with the insurance department.

Name	Representing	Support	Oppose	Speaking?	Yes	No
Barbara O'Dea MD	self	☐	☑		☑	☐
STUART T. GLASSMAN MD	NEW HAMPSHIRE MEDICAL SOCIETY	☐	☑		☑	☐
DAVIS CLARK MD	SELF	☐	☑		☑	☐
DAVE JUVET	BIA	☐	☑		☐	☑
Maureen Manning	Self	☒	☐		☒	☐
PETER MCARDLE	NH ASSOC. OF DOMESTIC INS COS	☐	☒		☒	☐
Tom Gilhooley	NH WC ADV. Council	☐	☐		☒	☐
Dan Bennett	NH Auto Dealers Workers Comp Trust	☐	☒		☐	☒
Gary Woods	NH Med Soc	☐	☒		☒	☐
BOB HARSH	INSURANCE AGENTS ASSOCIATION MEMBER	☐	☒		☐	☒
CURTIS J. BERRY	W.C. TRUST	☐	☒		☐	☒
Mike McLaughlin	PCIHA	☐	☑		☐	☑
SHERRY FOWLER	SELF	☐	☑		☐	☑
Eleanor P. Jones	NHMS	☐	☑		☑	☐
Chris Gruel	SCH	☒	☐		☐	☐
Bob Clegg		☐	☐		☐	☐
		☐	☐		☐	☐
		☐	☐		☐	☐
		☐	☐		☐	☐

Senate Commerce, Labor and Consumer Protection Committee: Sign-In Sheet

Date: May 4, 2010 Time: 9:30 a.m. Public Hearing on HB 1371

HB 1371 allowing recording of an examination by health care providers performing independent medical examinations.

need to call

Name	Representing	Support	Oppose	Speaking?	Yes	No
PETER WEBB	Self	☑	☐		☑	☐
Barbara O'Dea MD	self	☐	☑		☑	☐
STUART F. GLASSMAN MD	NORTHEASTERN ORTHOPAEDIC SOCIETY	☐	☑		☑	☐
DAVID CLARK	SELF	☐	☒		☒	☐
DAVE JUVET	BIA	☐	☑		☐	☑
Mary Robidoux	self	☒	☐		☒	☐
Maureen Manning	self	☒	☐		☒	☐
PETER RICARDI	NH ASSOC OF DOMESTIC INS COS	☐	☒		☒	☐
Tom Clifford	NH WC ADV. COUNCIL	☐	☐		☐	☐
EDWARD MICHALOSKY	CAI NEW HAMPSHIRE	☒	☐		☐	☒
Dan Bennett	NH Auto Dealers Workers Comp Trust	☐	☒		☐	☒
Gary Woods	NH Med Soc	☐	☒		☒	☐
BOB NASH	INSURANCE AGENTS	☐	☒		☐	☒
CURTIS J. BARRY	ASSOCIATION MEMBERS W.C. TRUST	☐	☒		☐	☒
MIKE MCLAUGHLIN	NCIAA	☐	☒		☐	☒
ANDREW FORREST	SELF	☐	☑		☐	☑
PALMER P. JONES	NHMS	☐	☑		☑	☐
		☐	☐		☐	☐
		☐	☐		☐	☐

Testimony

SUBMISSION A

Independent Medical Examinations

1. 222 IME type examinations during 2009. 56% requested by the defendants and 44% by the claimant. Includes attorneys, vendors on behalf of insurance companies and insurance companies directly and insurance companies on behalf of claimants.
2. All PIRs are done to determine the maximum impairment rating for the claimant in accordance with the Guides to Evaluation of Permanent Impairment.
3. IMEs requested by the insurance company may or may not support the carrier. Often there are multiple issues and the opinions may favor the carrier on some issues and the claimant on others.
4. The above is supported by statistics which can be made available.

The following are my personal opinions which are based on seven years of doing IMEs and similar reviews.

Comments on HB1370

1. Reporting will be burdensome. Usually the insurance company is not known. With multiple causation and treatment issues it will usually be impossible to assign an opinion solely to either the the claimant or the insurance company.
2. While fee schedules should be available annual income reporting is inappropriate.
3. HIPPA issues .
4. There are other mechanisms available to deal with the suspected problems of bias such as the New Hampshire Worker's Compensation Advisory Council.
5. I fear that this information will be routinely used in the court room to discredit expert witness testimony.

Comments on HB1371

1. I have never objected to a family member /significant other being present at the examination if that is the desire of the examinee and if it is appropriate. This requires the observer to not become involved in the process.
2. The presence of a member of the legal community changes the examination from being medical to being legal.
3. Timely copy of report to claimant.
4. Audio recording will be moderately burdensome if it is the responsibility of the IME doctor.
5. Video recording is almost an impossibility in an orthopaedic office.
6. Both recording requirements if enacted will raise the cost of the examination process and may discourage those doctors presently doing IME's from continuing to do so.
7. By whom and how are the recordings to be maintained?

SUBMISSION B

SENATE HEARINGS

May 4, 2010

HB 1370 and HB 1371

Gary L. Woods, M.D.

HB 1370 -- opposed

1. The legislature has previously passed a similar law which failed to accomplish its goal: physicians were required to notify patients in writing of any affiliation with an entity to which the patient was being referred. DHS was to collect the information by had no staff/money/space to accomplish this.
2. Will attorneys and insurance companies have similar requires as to their practices in selecting examiners?
3. Many times there is no information as to who has requested/payed for the examination.
4. These requirements would have a significant chilling effect on the number of examiners who would make themselves available. A significant number of high quality physicians would elect to drop this activity.

HB 1371 -- opposed

1. Although the wording implies a right to choose. If allowed, attorneys would rapidly view this as a requirement.

2. Recording although not designated as to type, would have to be video otherwise the quality of the actual physical examination could not be evaluated.
3. If one party records, does this imply the other could as well?
4. Privacy and respect for the doctor/patient relationship is severely compromised which could well materially alter the content of the patient's presentation.
5. How will authenticity be verified and costs underwritten?
6. A serious secondary effect is the generation of further legal inquiry for amplification and/or clarification. "Why did/didn't you perform test/maneuver during your physical examination?" "I feel my client responded differently to test/maneuver than what appears in your written report." More expense, more hassle and fewer examiners willing to participate.

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)

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

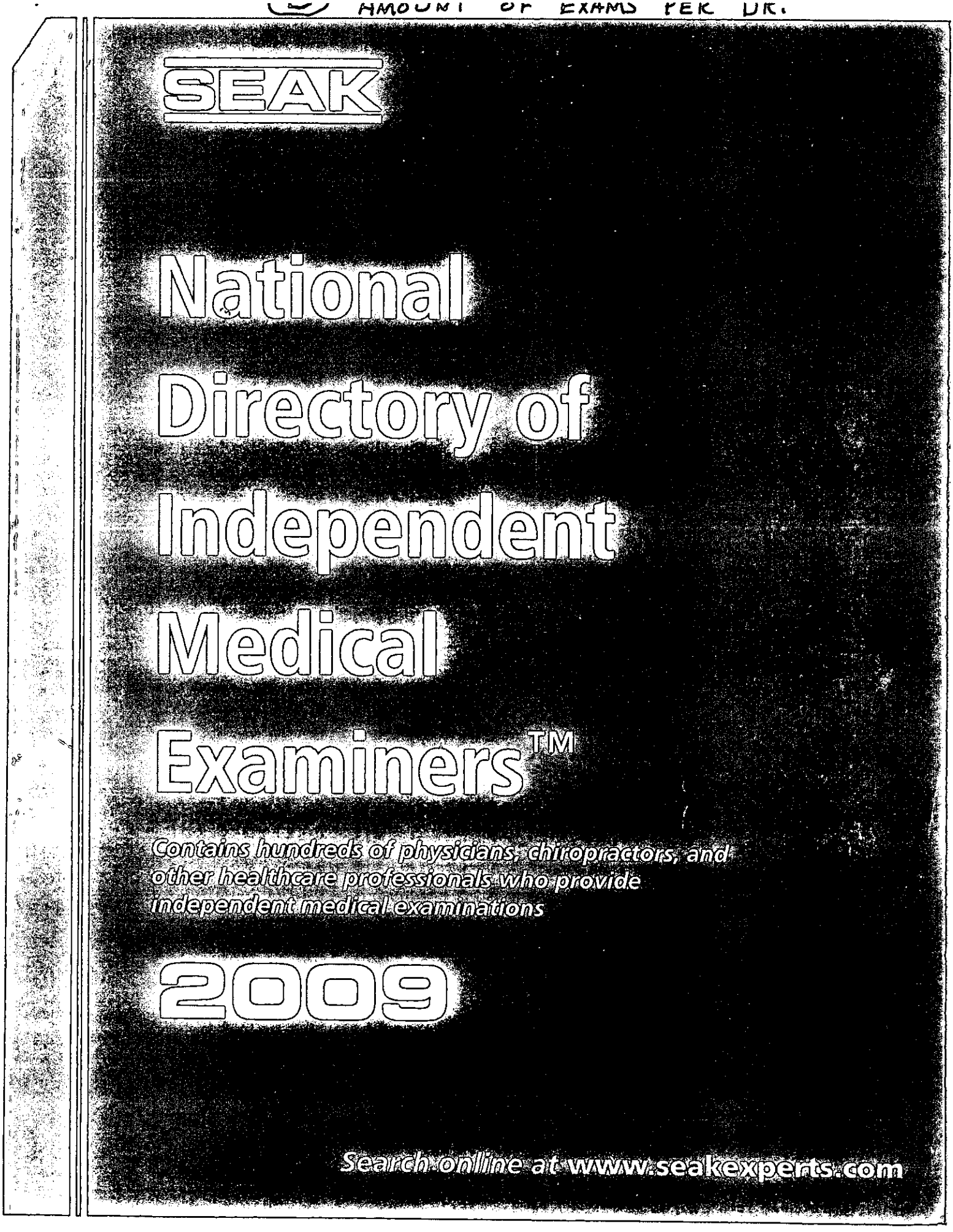
ruling to the trial judge.

So ordered.

Dated: November 25, 1997

GILLIAN L. ABRAMSON
Presiding Justice

AMOUNT OF EXAMS PER DR.



Roger A. Russell, DC, MS, FACO
Advanced Spine & Rehabilitation
Henderson, NV
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 Deposed: 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 Deposed: 100+
IME Training: SEAK
IME Certification: CIME, ABOS

NEW HAMPSHIRE

Davis W. Clark, MD
Concord, NH
Phone: (603) 224-0380
Fax: (603) 746-3360
daviswclarkmd@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 Deposed: 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 Deposed: 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.nhpaindocs.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 Deposed: 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
Fax: (732) 249-9500
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
Metuchen, 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 Deposed: 2

Steven Berkowitz, MD
Seaview Orthopedic and Medical Assoc.
Ocean, NJ
Phone: (732) 660-6200
Fax: (732) 660-6201
sberkowitz@seavieworthо.com
www.seavieworthо.com
Other Locations: Brick, Freehold
Specialty: Orthopedic Surgery-Orthopedic Medicine.
Years in Practice: 26
Years Performed IME: 13
IMEs Performed: 400
Number of Times Deposed: 60
IME Training: SEAK
IME Certification: CIME

Melvyn A. Blake, DDS, JD
Oral & Maxillofacial Surgeon Legal Advisor & Expert
Marlton, NJ
Phone: (856) 596-1460
Fax: (856) 596-1085
ddsjd@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 Deposed: 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 Deposed: 200
IME Training: SEAK
IME Certification: AB PM&R

Daniel J. Cardellichio, DC
Perth Amboy, NJ
Phone: (732) 826-6008
Fax: (732) 826-6009
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.
Wayne, NJ
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 Deposed: 2
IME Training: ABIME

Joseph Corona, MD, ABOS
Summit Medical Group
Berkeley Heights, NJ
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 Deposed: 40

Edward M. Decter, MD, FACS
CFO Medical Services, PA
West Orange, NJ
Phone: (973) 669-5533
Fax: (973) 669-2968
doc4soccer@aol.com
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 Deposed: Numerous

(C) IME DR. FEE

Granite Physiatry, PLLC
Physical Medicine . Rehabilitation . Occupational Health
60 Commercial Street, Suite 303
Concord, NH 03301
603-223-8145 / Fax: 603-223-8146

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.)

**Payment in full is required 14 days in advance (non-refundable).*

Tax ID: 01-0599211

Diplomat American Board of Physical Medicine & Rehabilitation

Fellow, American Academy of Physical Medicine and Rehabilitation

Diplomat, National Board of Medical Examiners

(D) PLANTIFF AUDIO - NO WITNESS
PRACTITIONER AUDIO AND WITNESS

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
(603) 431-9973
Firm Website: www.nhlawfirm.com

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

Boynton Waldron
82 Court Street, P.O. Box 418
Portsmouth, NH 03802-0418
(603) 436-4010
(603) 431-9973
Firm Website: www.nhlawfirm.com

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

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) the 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

Leigh S. Willey
Devine, Millimet & Branch, PA
111 Amherst St. - PO Box 719
Manchester, NH 03105-0719
(603) 695-8651
lwilley@devinemillimet.com

dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited. If you believe you have received this e-mail in error, please immediately notify the sender by return e-mail message. Thank you for your cooperation.

(E) Video Allowed

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

¶0 The petitioners, Cody and Cheryl Boswell, filed a lawsuit against the respondent Kandee 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:

¶1 The issue presented is whether a party to a lawsuit who is required to undergo a medical examination pursuant to 12 O.S. 2001 §3235[1] 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

¶2 On July 28, 2006, the petitioners, Cody and Cheryl Boswell, filed a lawsuit against the respondent, Kandee 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]

¶3 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 interferance 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 §3235[3] 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 §3235[6] 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 McCollough, 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 statute[17] 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 privilege[27] 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 §3235[28] 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 §3235[29] 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 §3235[31] 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

WestlawNext

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 93 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, Kweller, 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, 2006. 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.

2

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.**

End of Document

(G) ALLOWED VIDEO + WITNESS

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

Code	Body Part	FY 2006	FY 2007	FY 2008	FY 2009
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

Code	Outcome Desc.	2006	2007	2008	2009
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. AWARD	#	AVG. AWARD	#	AVG. AWARD	#	AVG AWARD	#	AVG 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

	FY2006	FY2007	FY2008	FY2009
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
TOTAL	83,672	86,328	84,633	89,918
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
TOTAL	26,963	28,886	27,096	26,124

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
GRAND TOTAL	$686,646	$844,465	$2,379,624	$1,600,817

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

Honorable Russell Bridle
New Hampshire House of Representatives
225 Towle Farm Road
Hampton, NH 03842-1719
russell.bridle@leg.state.nh.us
Home: 926-8694

Honorable Jeffrey Goley
New Hampshire House of Representatives
1683 River Road
Manchester, NH 03104-1645
jgoley03104@yahoo.com
Home: 626-6659

Honorable Bette R. Lasky
New Hampshire Senate
15 Masefield Road
Nashua, NH 03062
bette.lasky@leg.state.nh.us
Home: 888-5557
Office: 271-2735

Honorable Patrick Long
New Hampshire House of Representatives
112 Hollis Street
Manchester, NH 03101-1234
long55@comcast.net
Home: 668-1037

Voting Sheets

Senate Commerce, Labor & Consumer Protection Committee

EXECUTIVE SESSION

Bill # HB 1371

Hearing date: 5/4/10

Executive session date: 5/11/10

Motion of: OTP **VOTE:**

Made by Senator:	Hassan	☐	**Seconded by Senator:**	Hassan	☒	**Reported by Senator:**	Hassan	☐
	DeVries	☒		DeVries	☐		DeVries	☐
	Reynolds	☐		Reynolds	☐		Reynolds	☐
	Cilley	☐		Cilley	☐		Cilley	☐
	Bragdon	☐		Bragdon	☐		Bragdon	☐
	Roberge	☐		Roberge	☐		Roberge	☐

Motion of: OTP/A **VOTE:** 6-0

Made by Senator:	Hassan	☒	**Seconded by Senator:**	Hassan	☐	**Reported by Senator:**	Hassan	☐
	DeVries	☐		DeVries	☒		DeVries	☐
	Reynolds	☐		Reynolds	☐		Reynolds	☐
	Cilley	☐		Cilley	☐		Cilley	☐
	Bragdon	☐		Bragdon	☐		Bragdon	☐
	Roberge	☐		Roberge	☐		Roberge	☐

Committee Member	*Present*	Yes	No	*Reported out by*
Senator Hassan, Chairman	☒	☒	☐	☐
Senator DeVries, Vice-Chair	☒	☒	☐	☒
Senator Reynolds	☒	☒	☐	☐
Senator Cilley	☒	☒	☐	☐
Senator Bragdon	☒	☒	☐	☐
Senator Roberge	☒	☒	☐	☐

***Amendments:** 2011s

Notes:

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: May 11, 2010

THE COMMITTEE ON Commerce, Labor and Consumer Protection

to which was referred House Bill 1371

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

Having considered the same, the committee recommends that the Bill:

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 6-0

AMENDMENT # 2011s

Senator Betsi DeVries
For the Committee

Danielle Barker 271-3093

New Hampshire General Court - Bill Status System

Docket of HB1371

Docket Abbreviations

Bill Title: (New Title) allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

Official Docket of **HB1371**:

Date	Body	Description
12/10/2009	H	Introduced 1/6/2010 and Referred to Labor, Industrial and Rehabilitative Services; **HJ 6**, PG.237
01/07/2010	H	Public Hearing: 1/21/2010 1:00 PM LOB 307
01/25/2010	H	Full Committee Work Session: 2/2/2010 11:00 AM LOB 307
02/10/2010	H	Executive Session: 2/18/2010 9:30 AM LOB 307
02/18/2010	H	Committee Report: Ought to Pass with Amendment #0804h for Mar 10 (Vote 10-1; RC); **HC 19**, PG.1034
02/18/2010	H	Proposed Committee Amendment #0804h; **HC 19**, PG.1049
03/10/2010	H	Special Ordered to Regular Place on Mar 11 Calendar, Without Objection; **HJ 23**, PG.1294
03/11/2010	H	Amendment #0804h Failed, VV; **HJ 24**, PG.1349
03/11/2010	H	Floor Amendment #0942h (Rep Goley) Adopted, VV; **HJ 24**, PG.1349
03/11/2010	H	Ought to Pass with Amendment #0942h: MA DIV 241-32; **HJ 24**, PG.1349
03/24/2010	S	Introduced and Referred to Commerce, Labor and Consumer Protection; **SJ 11**, Pg.262
04/06/2010	S	Hearing: May 4, 2010, Room 102, LOB, 9:15 a.m.; **SC15**
04/09/2010	S	Hearing: === TIME CHANGE === May 4, 2010, Room 102, LOB, 9:30 a.m.; **SC16**
05/11/2010	S	Committee Report: Ought to Pass with Amendment 2011s, NT, 5/12/10; **SC19A**
05/12/2010	S	Committee Amendment 2011s, NT, AA, VV; **SJ 18**, Pg.421
05/12/2010	S	Ought to Pass with Amendment 2011s, NT, MA, VV; OT3rdg; **SJ 18**, Pg.421
05/12/2010	S	Passed by Third Reading Resolution; **SJ 18**, Pg.497
05/19/2010	H	House Concurs with Senate AM #2011s(NT) (Rep Goley): MA VV; **HJ 46**, PG.2227
06/02/2010	H	Enrolled; **HJ 51**, PG.2321
06/02/2010	S	Enrolled; **SJ 21**, Pg.777
06/29/2010	H	Signed by the Governor 06/28/2010; Chapter 0227
06/29/2010	H	I. Section 1 Effective 01/01/2011
06/29/2010	H	II. Remainder Effective 06/28/2010

Other Referrals

COMMITTEE REPORT FILE INVENTORY

HB1371 ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

✓ **DOCKET (Submit only the latest docket found in Bill Status)**

✓ **COMMITTEE REPORT**

✓ **CALENDAR NOTICE on which you have taken attendance**

✓ **HEARING REPORT (written summary of hearing testimony)**

✓ **HEARING TRANSCRIPT (verbatim transcript of hearing)**
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: 1 THRU 3

✓ **SIGN-UP SHEET**

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

✓ - AMENDMENT # 1978s ____ - AMENDMENT # _____
✓ - AMENDMENT # 2011s ____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

✓ AS INTRODUCED ✓ AS AMENDED BY THE HOUSE
✓ FINAL VERSION ____ AS AMENDED BY THE SENATE

✓ **PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)**
List by letter [a thru g or a, b, c, d] here: A,B

✓ **EXECUTIVE SESSION REPORT**

____ **OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):**

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 10/5/10

COMMITTEE SECRETARY