Concerns regarding existing statutes and application problems

21 V.S.A. Sec. 655 currently provides:

> After an injury and during the period of disability, if so requested by his or her employer, or ordered by the Commissioner, the employee shall submit to examination, at reasonable times and within a two-hour driving radius of the residence of the injured employee, by a duly licensed physician or surgeon designated and paid by the employer. The Commissioner may in his or her discretion permit an examination outside the two-hour driving radius if it 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 employee may make a video or audio recording of any examination performed by the insurer's physician or surgeon or have a licensed health care provider designated and paid by the employee present at the examination. The employer may make an audio recording of the examination.

While the 2 hour drive limit at first blush seems to be a simple change, the practical implications are huge and create an unequal playing field to the point that defense counsel cannot effectively defend their cases. The process has become decidedly unbalanced in its application. The problem with the 2 hour limitation, is that Vermont has very few IME providers that the carriers can use, with even fewer physicians that have specialties. While the legislature has added a discretionary provision by the Commissioner, this is not being applied. In fact, to date, after speaking to other defense firms, I have not seen one case where this discretion was used at the informal level. I had one case with a pulmonary inhalation exposure that resulted in the hearing officer informally ordering a claimant to attend an IME with no written decision.

Carriers/defense attorneys are being forced to call every medical provider to show that there is no one else out there that will perform IMEs in that field. Even then the discretionary provision does not appear to be used by the Department at least not up to this point.

The *Dora Brodeur v. Energizer Battery*, Opinion No. 06-14WC (attached) creates even more of a limitation. This case boils down to the fact that a neurosurgeon's opinion was rejected because she "lacked the specific training and expertise " which the other surgeon had, diagnosing this specific problem. Practically, this means that in order to have experts that are judged on a level playing field, we have to have equivalent credentials, which is simply impossible to do within a 2 hour driving limitation in a lot of circumstances because there are so few IME providers in this state. The Department is going to take the opinion of a more specialized treating doctor over a generalist every time unless there are problems with the specialist's lack of records or other defects in the specialist's knowledge.

What this provision results in, is that claimant's counsel can block our use of qualified experts and force us into a choice of providers that are not in the best interest of our clients. It undermines our ethical responsibility to our clients. There has to be a change to level the

playing field in the language. We either need to inject a reasonableness standard into the 2 hour limitation, or to add that these requests outside of the 2 hour limitation should be liberally granted by the Department. What this provision has created in many cases is the employer no longer having a choice to send a claimant to a qualified IME physician with equal credentials to the treating doctor effectively denying us due process and equal access to courts.

The problem is that most medical providers do not perform IMEs and have no training in IMEs and don't want to do IMEs. They have to be familiar not only with the AMA 5th Guides, but also the standards under Vermont Workers Compensation laws on top of having the credentials to match any treating doctors involved in the claim.

As an added complication, the statute allows for videotaping the IME. Not many physicians will allow this practice especially if you have to cross state lines to find an expert. The videotaping for psychological testing creates another layer of complexity. Many psychologists/psychiatrists fear that videotaping the testing portion of the evaluation undermines the test results potentially even invalidating the results. Moreover, these tests need to be protected so that they retain their scientific integrity. Video taping the actual testing would give claimant's counsel a tool to coach their clients on how to respond and what to expect. What is happening is that psychologists that will not allow the testing to be filmed, cannot be used because claimant's attorneys are automatically objecting to the provider because they know that the providers do not want the testing portion filmed. Even though there is a legitimate scientific reason for the concerns regarding filming.

No treating doctor or claimant's choice for an IME has that limitation. As defense, we have no rights at all to videotape an IME being done for the claimant. I am sure there will be a case coming up that will argue that neuropsych testing performed by an IME doctor is invalid because of the videotaping affecting the end result and therefore a claimant's treating neuropsych testing is more valid. A significant amount of control regarding evaluations has been handed to claimant's counsel effectively undermining our ability to challenge a treating doctor's opinion.

Concerns regarding HR 799.

21 VSA 640 proposed amendment to subsection (c)

1st problem. How would the carrier determine wages for medical appointments?

Definition of wages is according to 21 V.S.A. 601 (13) "Wages" includes bonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration; but does not include any sum paid by the employer to his or her employee to cover any special expenses entailed on the employee by the nature of his or her employment.

Rather than the term wages, using the term lost time and giving a claimant 2/3rds of their comp rate for the hours lost would be easier to handle administratively.

2nd problem, this statutory change could easily be abused by claimants. Needs some sort of limitation in place.

If you are going to change that language to place the responsibility on the carrier, then there has to be something to also mandate that the employee has to make every effort to make appointments outside of the normal work scheduled to avoid "wage" replacement.

**21 V.S.A. Sec. 641 (3) proposed change to eliminate screening process and reducing the time frame to 60 days as well as concerns regarding existing provision.**

This statute hinges on claimant's request for services and this creates several issues:

A claimant right now is entitled to a screening even if the claimant is back to work full time, just because s/he requests services. The request for services should be allowed when the claimant has not in fact returned to full duty work, not just because they had a work injury at one point. The purpose of the act is to get claimant's back to work, if they are back, they should not be entitled to a screening just because they ask. If they are in suitable employment, the VR obligation by the carrier should come to an end. The statute should be clarified to that effect.

Eliminating the screening requirement is going to streamline the process and make it more effective.

The 90 day out of work language needs to be clarified.

Adding that the requirement for the VR 1 gets triggered after consecutive days of TTD is a very good idea, it provides a clear demarcation which we have not had. If you remove the screening process, a memorandum as outlined in the revision may not be necessary. Filing a VR1 after the 90 or 60 days should be sufficient as this would need to be copied to the Department

and claimant. Removing the requirement for a Memorandum and simply requiring the filing of a VR 1 would streamline the process.

(Page 4) Changes to subsection (C) - Many claimants with serious injuries will not have a work capacity within 60 days. Performing a reevaluation every 30 days is not only extremely expensive but in most cases, not reasonable. The reevaluation process should be linked to work capacity. Once a work capacity is determined then have the trigger for a reevaluation. Or if no work capacity then a reevaluation every 90 days. Right now you have 1 WV Specialist at the Department, they are understaffed. Imposing an evidentiary requirement to make a determination as to whether a longer interval is needed will cause more backlog.

Change to subsection (D)(i) again having a requirement of a memorandum and a referral seems superfluous.

Change to (D)(i)(E) regarding all work shall be performed by a Vermont certified vocational rehabilitation counselor, should take into account that many claimants live out of state. The out of state counselors have a better understanding of the job markets in their states so exceptions to this rule should be considered.