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March 10, 2020

To: Chairman Michael Marcotte  
State of Vermont  
House Committee on Commerce and Economic Development

From: Kelly Massicotte, Partner, Biggam Fox Skinner, LLP

Re: Testimony in Support of H.631

Dear Chairman Marcotte and Committee Members:

Thank you for allowing me to provide testimony regarding my support of H.631, an act relating to miscellaneous workers' compensation amendments, sponsored by Rep. Hill.

I am a partner at the law firm of Biggam Fox & Skinner, LLP and have been representing injured workers in their workers' compensation ("WC") claims for close to fifteen years. During that time, I have also represented hundreds of applicants in their Social Security disability hearings before various Administrative Law Judges. This experience has allowed me to hear from dozens of Vocational Experts, vetted and hired by Social Security, regarding the boundaries of "employability" in today's job market. I also serve on the Board of Governors for the Vermont Association of Justice ("VTAJ").

My law partners and VTAJ colleagues and I strongly support passage of H.631, with only two minor adjustments.<sup>1</sup> The bill addresses a few

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<sup>1</sup> First, the word "suitable" should be replaced (found at page 2, lines 6 and 15) since "suitable work" has a specific definition pursuant to WC Rule 2.4300, and the term is not applicable here. The second change that should be made to H.631 is a revision to proposed §643d(b)(8), please see page 5 of this document for further info.

limited areas within Vermont's Workers' Compensation system to prevent the sometimes illogical, irrational, and/or unfair results that can occur under certain provisions of the current law. These outcomes can be corrected by passage of Rep. Hill's bill.

At the outset, I want to note that the proposed changes, while needed, would affect only a very small number of WC claims.

Moreover, the National Council on Compensation Insurance ("NCCI") recently issued an analysis of H.631 which concluded the bill, if enacted, would result in only a minimal impact on the overall WC system costs in Vermont (see 3-page "Analysis of Vermont House Bill 631" from NCCI dated January 31, 2020 included at the end of this document).

Overall, the bill is a win-win for injured workers and WC carriers. Here is why:

## **Under current Vermont WC law....**

### **Example #1: Being Penalized for Returning to Work**

**A Vermonter earning \$12.50/hr. (\$26,000/year)**

**Working → \$500/week gross wages**

**Workplace injury occurs and they are unable to work while recovering**

**Out of work → \$450/week in WC benefits ("90% compensation rate")**

**Still recovering from injury, also working part-time earning \$200/week**

**WC would pay an additional \$200.00 to supplement the wages**

**Working PT → \$400.00/week total (WC benefits & wages)**

**\$50.00 less per week than if they were not working at all!**

→ H.631 will ensure an injured worker, while recovering from the work injury, won't be paid more for being out of work than returning to work part-time.

## **Example #2: When Work Searches Don't Make Sense**

Jim, a plumber, gets hurt at work, injuring his back and shoulder. His WC claim is accepted. He is sent to physical therapy and out of work for several weeks. While still in treatment, his doctor releases him to full-time work, but he cannot do any lifting and he needs to be able to sit/stand/take breaks as needed. His employer cannot accommodate these restrictions.

→ Under current law, the WC carrier can require Jim to do 6 (more?) work searches each week, in order to maintain entitlement to wage replacement benefits

...But Jim's employer has kept Jim's job open and is ready to take him back after his recovery.

→ Jim still has to do 6 weekly work searches if required by WC carrier

...But Jim has always done heavy manual labor and this work release only allows him to do a sedentary (i.e. office) job. There's little chance any employer would even consider him.

→ Jim still has to do 6 weekly work searches if required by WC carrier

...But now Jim is scheduled for shoulder surgery in a month and his doctors tell him he will be unable to do any work for a minimum of 12 weeks after surgery.

→ Until surgery, Jim still has to do 6 weekly work searches if required by WC carrier

→ H.631 addresses the situations when requiring an injured worker do "work searches" does not make sense.

The proposed legislation seeks to correct the problems highlighted in these two examples. The bill addresses three areas:

## I. Work Search Requirement When an Injured Worker is Recovering from a Work Injury<sup>2</sup> (21 V.S.A. §643d)

- Defines when injured worker must do work searches in order to maintain entitlement to “temporary” benefits
  - Injured worker still recovering from work injury
  - Vocational Rehabilitation (i.e. job-retraining, education) is a separate benefit/issue from these work searches
  - Pay does not matter, even if only available jobs are temporary and pay 10% of pre-injury wage
  - Very RARE that these work searches ever result in paid work
  - Requiring work searches can “poison the well” with prospective employers
    - Employer less likely to hire someone in future (after medical recovery) if employer knows the person had significant medical issues previously
    - Requiring work searches also a burden for employers
- Clarifies how many work searches need to be done each week
  - 3/week (same as required for unemployment)
- Provides reasonable exemptions to the work search requirement
  - Employee already working or likely returning to their job
  - Treatment and/or current functional limitations make it unlikely employee will be hired for (and/or able to keep) a job at this time

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<sup>2</sup> The work search requirement can affect an injured worker’s entitlement to temporary (i.e. wage replacement) benefits. These benefits are paid while the injured worker is still recovering from the injury, and out of work or working less because of the injury.

- Too limited a work capacity
  - In general or when considering past work experience
- Too unreliable
  - Missed time from work (to attend medical appointments) would likely be unacceptable, esp. with a new employer
- Several exemptions consistent with the Voc. Expert testimony at SSDI hearings about unemployability
- Employee engaged in WC Vocational Rehabilitation, has plan to return to work, and plan doesn't require work searches
  - This does not go far enough!!

**→ H.631 proposed language for §643d(b)(8) should be amended**

- **Any injured worker found entitled to Vocational Rehabilitation benefits should not have to do work searches (unless specifically part of their Return To Work Plan)**

**II. Calculation of Temporary Partial Disability (“TPD”) Benefits Due When Employee is Working Part-time While Recovering from Work Injury (21 V.S.A. §646)**

- Makes sure someone recovering from their work injury will not receive more money being out of work completely than they would working part-time
- Ensures consistency between temporary partial disability benefits (“TPD”) and temporary total disability benefits (“TTD”)
  - Provides dependency benefits for TPD
    - \$10/child (same as TTD)
    - Not available to lowest income workers (same as TTD)

- Provides cost of living adjustments (“COLA”) for TPD
  - Already available under TTD
- Provides clarity and guidelines for obtaining documentation needed to calculate TPD
  - Employer gives to WC insurance carrier
    - Exception: Injured worker with new employer is responsible

### **III. Reimbursement of Costs Incurred by An Injured Worker When Their Claim is Successfully Appealed (21 V.S.A. §678)**

- Current language already allows for reimbursement of costs
- Proposed language clarifies the requirements for an award of costs
  - Costs were incurred to respond to a denial of a claim
  - Costs were necessary to successfully appeal the denial
  - Available at Informal level
- No substantive changes to attorney fee provisions



## ANALYSIS OF VERMONT HOUSE BILL 631 *As Introduced on January 10, 2020*

NCCI estimates that Vermont House Bill (H.) 631 would, if enacted, result in a minimal<sup>1</sup> impact on overall workers compensation (WC) system costs in Vermont. If enacted, any resulting impact due to H. 631 would be realized in future loss experience and reflected in subsequent NCCI loss costs filings in Vermont.

### Summary and Analysis of H. 631

#### Temporary Partial Disability Benefits (§646)

Currently in Vermont, an injured worker with a Temporary Partial Disability (TPD) is entitled to receive weekly wage replacement benefits equal to 66 2/3% of the difference between their pre-injury and post-injury average weekly wage (AWW). H. 631 would amend the TPD benefit calculation to equal the greater of either:

- A. 66 2/3% of the difference between the injured worker's pre-injury AWW and the AWW during the period of disability; or
- B. The difference between the injured worker's AWW during the period of disability and the calculated temporary total disability (TTD)<sup>2</sup> benefit amount pursuant to (§642), including any cost of living adjustment (COLA) or dependency benefits due.

This change would increase TPD benefits in some cases, as benefits could be higher under (B) if either the pre-injury AWW is less than 75% of the state average weekly wage (SAWW), or if the injured worker has dependent children. While this change could put upward pressure on system costs by increasing TPD indemnity benefits in certain cases, NCCI anticipates that this would impact a limited number of claims and would result in a relatively small increase in indemnity benefits, on average, for those affected claims.

In addition to the changes described in the above paragraph, H. 631 also increases weekly TPD indemnity benefits by \$10 per dependent child who is unmarried and under the age of 21. Thus if, hypothetically, injured workers with TPD injuries had an average of 2 dependent children, average weekly TPD indemnity benefits would increase by \$20 (= 2 x \$10). Thus, this change would impact WC system costs by increasing indemnity benefits to injured workers with dependent children and a TPD injury.

NCCI estimates that TPD indemnity benefit costs represent less than 10%<sup>3</sup> of all temporary disability (i.e. combined TPD and TTD) indemnity benefit costs in Vermont. Since temporary

<sup>1</sup> Minimal is defined in this context to be an impact on overall system costs of less than +/- 0.2%.

<sup>2</sup> In Vermont, TTD indemnity benefits are equal to 66 2/3% of the injured worker's pre-injury AWW, subject to a maximum of 130% of the SAWW and a minimum of 30% of the SAWW (if the AWW is less than the minimum, then 90% of the AWW will be paid), plus a \$10 weekly benefit per dependent child, and any applicable COLA.

<sup>3</sup> Based on NCCI Detailed Claim Information (DCI) data for Vermont from Accident Years 2010 to 2015.



## ANALYSIS OF VERMONT HOUSE BILL 631 *As Introduced on January 10, 2020*

disability indemnity benefits comprise approximately 24.8%<sup>4</sup> of total indemnity benefit costs, and total indemnity benefits are projected to comprise approximately 47%<sup>5</sup> of total WC benefit costs, TPD indemnity benefits represent less than 1.2% = (10% x 24.8% x 47%) of total WC benefit costs in Vermont. NCCI is not able to explicitly estimate the impact of this proposed change because sufficiently detailed information about the distribution of TPD injury durations and injured workers' dependents is not available. However, due to the limited share of overall WC benefits attributable to TPD indemnity benefits in the state, the potential increase on total WC system costs resulting from this bill, if enacted, is expected to be minimal.

### Guidelines for Searching for Work while receiving Temporary Partial Disability Benefits

H. 631 proposes to add a new section to the Vermont Statute titled "§643d. Work Search; Requirements, Exceptions" which specifies the conditions under which an employer may require an injured worker currently receiving TPD benefits to engage in a good faith search for suitable work. These guidelines appear to clarify that the worker needs to engage in a good faith work search only when: (i) released to return to work, (ii) written notification of such is provided by the employer, and (iii) the employer cannot accommodate their limitations. The bill also includes numerous exceptions to this requirement. NCCI is unable to explicitly quantify the impact of the proposed work search requirement on WC system costs because the number of claimants who would be affected, and the manner in which they would be affected, is uncertain.

### Additional Provisions

In addition to the provisions already discussed, H. 631 includes other proposed changes that are either administrative in nature or are clarifications of current statutory language. If enacted, any potential cost impacts resulting from these provisions would be realized in future claims experience and reflected in subsequent NCCI loss cost filings in Vermont.

### Other Considerations

NCCI's analysis of H. 631 is prospective only (i.e., for accidents occurring on or after July 1, 2020). If the proposed changes extend to accidents occurring prior to the proposed effective date, there may be retroactive cost impacts arising from the provisions of the bill. In addition, the rules necessary to implement the provisions of H. 631, if enacted, shall be adopted on or before July 1, 2021; this creates up to a one-year gap between enactment and implementation. It is unclear to what extent claims occurring between July 1, 2020 and July 1, 2021 would be subject to the changes proposed in H. 631.

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<sup>4</sup> Based on NCCI Workers Compensation Statistical Plan data for policies effective during the 36-month period ending 6/30/2017, for Vermont.

<sup>5</sup> Based on NCCI Financial Call data for Policy Years 2015, 2016, and 2017, projected to 7/1/2020.





**ANALYSIS OF VERMONT HOUSE BILL 631**  
*As Introduced on January 10, 2020*

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