

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Sue Ann Goodrich

Opinion No. 07-17WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Fletcher Allen Health Care

For: Lindsay H. Kurrle
Commissioner

State File No. DD-60132

RULING ON DEFENDANT'S MOTION TO RECONSIDER

Hearing held in Montpelier on December 8, 2016 and December 14, 2016
Record closed on February 3, 2017

APPEARANCES:

Frank Talbott, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant entitled to a protective order barring Claimant from making a video recording of a neuropsychological evaluation to be performed by Defendant's designated physician?

EXHIBITS:

- Joint Exhibit I: Dr. Hebben report of Joanne Peake neuropsychological evaluation, December 17, 2014
- Joint Exhibit II: Independent neuropsychological evaluation survey, November 10, 2014
- Joint Exhibit III: Recording of Peake interview with Dr. Hebben, November 10, 2014
- Joint Exhibit IV: Otto, R., and Krauss, D., *Contemplating the Presence of Third Party Observers and Facilitators in Psychological Evaluations*, Assessment, December 2009; Vol. 16 No. 4: 362-372
- Joint Exhibit V: Howe, L. and McCaffrey, R., *Third Party Observation During Neuropsychological Evaluation: An Update on the Literature, Practical Advice for Practitioners, and Future Directions*, The Clinical Neuropsychologist 2010; 24: 518-537
- Joint Exhibit VI: Eastvold, A., Belanger, H. and Vanderploeg, R., *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, The Clinical Neuropsychologist 2012; 1-22

- Claimantø Exhibit 1: *Curriculum vitae*, Robert DeWors, Ph.D.
- Claimantø Exhibit 2: Hebben, N. and Milberg, W., *Essentials of Neuropsychological Assessment* (2nd Ed.), pp. 58-63, 69-86, 152-155, 200-203
- Claimantø Exhibit 3: Blase, J., *Trained Third Party Presence During Forensic Neuropsychological Evaluations* (publication source/date unknown)
- Defendantø Exhibit A: *Curriculum vitae*, Nancy Hebben, Ph.D.
- Defendantø Exhibit B: *Presence of Third Party Observers During Neuropsychological Testing; Official Statement of the National Academy of Neuropsychology* (approved 5/15/99), Archives of Clinical Neuropsychology 2000; Vol 15, No. 5: 379-380
- Defendantø Exhibit C: American Academy of Clinical Neuropsychology, *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, The Clinical Neuropsychologist 2001, Vol 15, No. 4: 433-439
- Defendantø Exhibit D: Lewandowski, W., *et al.*, *Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations*, Applied Neuropsychology: Adult 2016, Vol 23, No. 6: 391-398
- Defendantø Exhibit E: McCaffrey, R., Lynch, J. and Yantz, C., *Third Party Observers: Why All the Fuss?*, Journal of Forensic Neuropsychology 2005, Vol. 4, No. 2: 1-15
- Defendantø Exhibit F: American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, adopted August 21, 2002 (effective June 1, 2003), with amendments adopted February 20, 2010 (effective June 1, 2010)
- Defendantø Exhibit G: Pearson legal policies, effective January 1, 2014
- Defendantø Exhibit H: *Test Security; Official Position Statement of the National Academy of Neuropsychology* (approved 10/5/99), Archives of Clinical Neuropsychology 2000, Vol 15, No. 5: 383-386
- Defendantø Exhibit I: Reports of the INS-Division 40 Task Force on Education, Accreditation, and Credentialing, *Guidelines for Doctoral Training Programs in Clinical Neuropsychology*, The Clinical Neuropsychologist 1987, Vol. 1., nr. 1: 29-34
- Defendantø Exhibit J: Barth, R., *Observation Compromises the Credibility of an Evaluation*, The Guides Newsletter July/August 2007: 1-9
- Defendantø Exhibit K: *Statement Opposing the Presence of Third Party Observers in Forensic Neuropsychological and Psychological Assessments Performed in the State of Oregon*
- Defendantø Exhibit L: *Policy Statement on the Presence of Third Party Observers in Forensic Neuropsychological Assessments Performed in the Commonwealth of Virginia*
- Defendantø Exhibit M: Affidavit of Sarah L. Spicer (with attachments), December 12, 2016

Defendant's Exhibit N: Constantinou, M, Ashendorf, L. and McCaffrey, R., *Effects of Third Party Observer During Neuropsychological Assessment: When the Observer is a Video Camera*, Journal of Forensic Neuropsychology 2005, Vol. 4(2): 39-47

Factual Background and Procedural History

On February 12, 2012 Claimant suffered a low back injury while lifting a heavy trash bag in the course of her employment for Defendant. Defendant accepted the injury as compensable and paid benefits accordingly.

In December 2014 Claimant asserted a claim for permanent total disability benefits. She now claims that when combined with her preexisting learning disability, the functional restrictions resulting from her work injury preclude her from acquiring the skills necessary to return to suitable alternative employment.

To evaluate the impact of Claimant's claimed learning disability on her prospects for reemployment, in December 2015 Defendant scheduled her to undergo an independent neuropsychological examination, as was its right under 21 V.S.A. §655. In response, Claimant notified Defendant of her intent to make a video recording of the examination, as was her right as well under §655.

Upon learning that Claimant intended to videotape the examination, Defendant's chosen neuropsychologist, Karen Postal, Ph.D., informed Defendant that while Claimant was free to videotape the interview portion of her evaluation, the ethical standards to which she was bound precluded her from allowing the testing portion of the evaluation to be videotaped.

According to Dr. Postal, two concerns justified this ethical prohibition. The first pertained to the extent to which the act of videotaping an exam might affect an examinee's performance, thus rendering the results invalid. The second pertained to the risk that proprietary test materials might be disseminated inappropriately, thus compromising their integrity and jeopardizing their future use. Dr. Postal considered these concerns of such magnitude that she would not proceed with the evaluation unless Claimant agreed to limit her videotaping to the interview portion only, not the testing itself.

Claimant refused to accede to the videotaping limitations Dr. Postal sought to impose, whereupon Defendant sought relief from the Commissioner. By motion filed on January 26, 2016 it requested that the Commissioner either require Claimant to submit to the evaluation in accordance with Dr. Postal's terms or face sanctions, including suspension of her benefits, for her refusal to attend the exam.

The Commissioner denied Defendant's motion. *Goodrich v. Fletcher Allen Health Care*, Opinion No. 06-16WC (April 11, 2016). Instead, she imposed various safeguards that she believed adequately addressed the concerns Dr. Postal had raised. These included a suggestion that the videotaping occur via a one-way mirror, to minimize its intrusive effect, and a requirement that the recording be disclosed only to another qualified expert neurologist, to protect it from unauthorized distribution.

Despite these safeguards, the Commissioner acknowledged the "very real possibility" that Dr. Postal would refuse to conduct the evaluation if Claimant were permitted to videotape both the interview and the testing portions. Nevertheless, she expressed "reasonable confidence" that Defendant would be able to identify another equally competent neuropsychologist who would be willing to proceed even if Dr. Postal was not.

Defendant filed the pending Motion to Reconsider the Commissioner's ruling on April 27, 2016. Thereafter, an evidentiary hearing was convened, during which both parties were afforded the opportunity to present witnesses and offer exhibits. Defendant offered testimony from Nancy Hebben, Ph.D., the neuropsychologist it has now retained to conduct Claimant's independent medical examination.¹ In rebuttal, Claimant offered testimony from a fact witness, Joanne Peake, a former client of Claimant's attorney who previously had undergone an independent evaluation with Dr. Hebben, and an expert witness, Robert DuWors, Ph.D., a neuropsychologist.

DISCUSSION:

1. My analysis begins with the statute that governs workers' compensation-related independent medical examinations, 21 V.S.A. §655. After first guaranteeing the employer's right to require an injured worker "to submit to examination, at reasonable times . . . by a duly licensed physician or surgeon" of its choosing, the statute delineates the parties' respective rights and responsibilities with respect to audio and video recordings, as follows:

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. The right of the employee to record the examination shall not be construed to deny to the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability. If an employee refuses to submit to or in any way obstructs the examination, the employee's right to prosecute any proceeding under the provisions of this chapter shall be suspended until the refusal or obstruction ceases, and compensation shall not be payable for the period [for] which the refusal or obstruction continues.

¹ After the pending motion was filed but before the evidentiary hearing was held, Dr. Postal became unavailable, either to testify or to evaluate Claimant on Defendant's behalf. In her place, Defendant retained Dr. Hebben, who has imposed the same videotaping conditions on her examination that Dr. Postal sought, based on the same ethical concerns.

2. The statute thus guarantees both the employer's right to obtain an independent medical examination and the employee's right to videotape it. The question presented by Defendant's motion is what happens when the two rights collide, as is the case here? Claimant asserts an absolute right to videotape the testing portion of Dr. Hebben's examination so that she can document whether the testing environment (including not only the physical setting but also the examiner's behavior) conforms to professional standards, such that it will yield valid results. Ironically, Dr. Hebben asserts that the mere presence of a videotaping device will itself cause the very circumstance Claimant seeks to avoid – an impermissibly altered testing environment that will automatically invalidate her results. According to Dr. Hebben, ethical considerations preclude her from even conducting an examination under these conditions.

3. Dr. Hebben testified to, and Defendant submitted evidence of, policy statements from three professional associations, all to the same effect – that the presence of a third-party observer (including an unattended video recording device) in a neuropsychological evaluation contaminates the testing environment to such an extent as to invalidate the results. *See Presence of Third Party Observers During Neuropsychological Testing; Official Statement of the National Academy of Neuropsychology* (approved 5/15/99), *Archives of Clinical Neuropsychology* 2000; Vol 15, No. 5: 379-380 (the “NAN policy statement”), *Defendant's Exhibit B*; American Academy of Clinical Neuropsychology, *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, *The Clinical Neuropsychologist* 2001, Vol 15, No. 4: 433-439 (the “AACN policy statement”), *Defendant's Exhibit C*; Lewandowski, W., et al., *Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations*, *Applied Neuropsychology: Adult* 2016, Vol 23, No. 6: 391-398 (the “ABPN policy statement”), *Defendant's Exhibit D*.

4. The scientific basis underlying these policy positions comes from research on the phenomenon known as “social facilitation.” The term, which derives from classical social psychology literature, is used “to describe a situation in which the mere presence of another alters one's behavior, either positively or negatively.” Eastvold, A., Belanger, H. and Vanderploeg, R., *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, *The Clinical Neuropsychologist* 2012; 1-22 at p.1 (“Eastvold”), *Joint Exhibit VI*.

5. Generally stated, social facilitation research has documented that the presence of others may facilitate performance on simple or well-learned tasks, but can impair performance on complex or novel tasks. *Id.* The overall effect is small, and may be moderated by the observer's level of attentiveness, relationship to the participant and other characteristics. *Id.* at p.2, *Joint Exhibit VI*.

6. Notably, many of the experimental investigations upon which social facilitation literature is based involve comparisons between self-administered tasks and those occurring in the presence of a second person, typically the experimenter him- or herself. *Id.* at p.1, *Joint Exhibit VI*; Blase, J., *Trained Third Party Presence During Forensic Neuropsychological Evaluations* (publication source/date unknown) (“Blase”), *Claimant’s Exhibit 3*. In contrast, neuropsychological testing *always* takes place in the presence of an examiner, whose job it is to optimize the examinee’s test performance by gaining his or her cooperation and trust. Hebben, N. and Milberg, W., *Essentials of Neuropsychological Assessment* (2nd Ed.) at p.71 (“Hebben/Milberg”), *Claimant’s Exhibit 2*.
7. Most neuropsychological test batteries are comprised in part of tasks in which the examiner is called on to present a test item ó an open-ended question, for example, or a picture ó to which the examinee must respond in some way. The examiner must be able to listen effectively, observe non-verbal behaviors, recognize when to seek clarification or give non-specific encouragement and accurately record and score responses as they occur. *Id.* at p.85, *Claimant’s Exhibit 2*. Unlike the experimental settings in which traditional social facilitation research has occurred, where the second person in the room is superfluous, in neuropsychological testing the second person is an active, integral and intentional participant. To infer the effect of a third-party observer in the latter context based primarily on research conducted in the former context may be inappropriate, therefore. *Eastvold, supra* at p.2, *Joint Exhibit VI*.
8. Nevertheless, neither the National Academy of Neuropsychology (NAN), nor the American Academy of Clinical Neuropsychology (AACN), nor the American Board of Professional Neuropsychology (ABPN) discuss this distinction in their respective policy statements, *see Defendant’s Exhibits B, C and D*. All three organizations advocate so strongly against the presence of a third-party observer during testing in a forensic setting as to suggest that a neuropsychologist who allows it violates professional ethics.
9. The NAN, AACN and ABPN policy statements cite two primary concerns underlying what is in effect their call for a ban on third-party observers in non-criminal forensic settings² ó one involving the validity of any results obtained, the other involving the security of test materials themselves. As to validity, the policy statements are grounded in the following assertions:
 - Neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that do not include the presence of third-party observers. Allowing a third-party observer introduces an unknown variable into the testing environment, effectively negating any comparison to established norms and thus precluding valid interpretation of test results. *See, e.g., NAN policy statement, supra* at p.379, *Defendant’s Exhibit B*.

² Even proponents of the ban acknowledge that the presence of a third-party observer in a criminal forensic examination may be unavoidable. *See, e.g., AACN policy statement* at p. 434, *Defendant’s Exhibit C*.

- The presence of a third-party observer may distract the examinee or distort his or her motivation in a manner that could adversely affect test performance. Distractions can be either external ó triggered by the observer's movements or facial expressions, for example ó or internal to the examinee, based on the perceptions, attitude and social expectations he or she ascribes to the observer. *See, e.g., AACN policy statement, supra* at p.435, *Defendant's Exhibit C*.
 - The existence of a third-party observer is equally troublesome when it involves a "stealthy presence," using mechanisms such as one-way mirrors, audio recording or videotaping. *See, e.g., AACN policy statement, supra* at p.434, *Defendant's Exhibit C*. In fact, some research evidence indicates that perhaps because of its potential permanency, an audio or video recording may affect the examinee to an even greater extent than in-person observation. *See, e.g., Eastvold, supra* at p.15, *Joint Exhibit VI*; *see also, Barth, R., Observation Compromises the Credibility of an Evaluation, The Guides Newsletter July/August 2007: 1-9* at p.3 ("Barth"), *Defendant's Exhibit J*; Constantinou, M, Ashendorf, L. and McCaffrey, R., *Effects of Third Party Observer During Neuropsychological Assessment: When the Observer is a Video Camera, Journal of Forensic Neuropsychology 2005, Vol. 4(2): 39-47, Defendant's Exhibit N*.
 - Given the significant body of research indicating that the presence of a third-party observer compromises test standardization and affects the data subsequently obtained, any findings from an observed examination likely lack interpretive significance. For a neuropsychologist nevertheless to use them to support a professional diagnosis or opinion violates ethical standards governing integrity, justice, competence and responsibility "to the profession, community and society in general." *See, e.g., ABPN policy statement, supra* at pp.392-395, *Defendant's Exhibit D*, citing American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, adopted August 21, 2002 (effective June 1, 2003), with amendments adopted February 20, 2010 (effective June 1, 2010) (the "APA Ethics Code"), *Defendant's Exhibit F*.
10. As for test security, the NAN, AACN and ABPN position statements cite ethical, legal and monetary concerns. To develop and standardize a test is a lengthy and expensive process. Inappropriate disclosure increases the potential for public access to test items, which may jeopardize their future efficacy. Test materials are copyrighted, and thus subject to strict rules prohibiting their release to "non-qualified" individuals. Without proper safeguards against misuse or misappropriation, for a neuropsychologist to disclose test materials violates professional ethics. *AACN policy statement, supra* at pp.437-438, *Defendant's Exhibit C*; *Test Security; Official Position Statement of the National Academy of Neuropsychology* (approved 10/5/99), *Archives of Clinical Neuropsychology 2000, Vol 15, No. 5: 383-386* (the "NAN test security statement"), *Defendant's Exhibit H*; *see also, Pearson legal policies, effective January 1, 2014, Defendant's Exhibit G*.

11. At least with respect to test security, the NAN, AACN and ABPN policy statements acknowledge that their concerns do not justify a total ban on the presence of third-party observers in forensic settings. For example, sending the videotape of a recorded examination to another qualified neuropsychologist who gives assurances that it will be properly protected against further disclosure, appears to satisfy both legal and ethical concerns. *See, e.g., NAN test security statement, supra at p.384, Defendant's Exhibit H.*
12. As to validity concerns, however, proponents of the NAN, AACN and ABPN ban on third-party observers advocate for a two-prong strategy of education and, if necessary, recusal. The ABPN policy statement instructs as follows:

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO [third-party observation] if requested by opposing counsel, retaining counsel or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

ABPN policy statement, supra at p.396, Defendant's Exhibit D; see also, Howe, L. and McCaffrey, R., Third Party Observation During Neuropsychological Evaluation: An Update on the Literature, Practical Advice for Practitioners, and Future Directions, The Clinical Neuropsychologist 2010; 24: 518-537 at p.524 ("Howe/McCaffrey"), Joint Exhibit V.

13. Many within the neuropsychological community appear to have accepted the NAN, AACN and ABPN policy statements as persuasive, and have conformed their behavior accordingly. *See, e.g., Statement Opposing the Presence of Third Party Observers in Forensic Neuropsychological and Psychological Assessments Performed in the State of Oregon, Defendant's Exhibit K; Policy Statement on the Presence of Third Party Observers in Forensic Neuropsychological Assessments Performed in the Commonwealth of Virginia, Defendant's Exhibit L; Affidavit of Sarah L. Spicer (with attachments), December 12, 2016, Defendant's Exhibit M.*
14. There are opponents as well, however. Critics argue that while the concerns underlying the NAN, AACN and ABPN policy statements are legitimate, they do not necessarily outweigh the legal, practical and clinical reasons for allowing a third-party observer, particularly in a forensic setting, and therefore do not justify a general prohibition. Otto, R., and Krauss, D., *Contemplating the Presence of Third Party Observers and Facilitators in Psychological Evaluations*, Assessment, December 2009; Vol. 16 No. 4: 362-372 at pp.366-367 ("*Otto/Krauss*"), *Joint Exhibit IV; see also, Blase, supra, Claimant's Exhibit 3.* Specifically, these researchers make the following observations:

- Besides the presence of a third-party observer, there are myriad other factors that likely influence the neuropsychological testing process, including examiner and examinee demographic variables (for example, race, sex, socioeconomic status), the examiner's style (for example, warm versus aloof), the examinee's anxiety level and what is likely the most significant variable according to one research source is the nature and purpose of the evaluation. *Otto/Krauss, supra* at p.367, *Joint Exhibit IV*. While more research is needed, it seems odd to single out third party presence as a prohibitive threat to psychological assessment when more serious threats to the examinee's responses are tolerated. *Id.*
 - The possibility that a third-party observer might distract the examinee or interrupt the process is easily mitigated by establishing ground rules before the evaluation begins, or by agreeing to a less intrusive form of observation, such as audio- or videotaping.³ *Otto/Krauss, supra* at 367, *Joint Exhibit IV*.
 - Given that almost all neuropsychological test batteries have been normed on individuals who are *not* involved in legal proceedings, threats to the validity of a forensic examiner's conclusions stemming from the presence of a third-party observer are likely overblown. Not surprisingly, research has shown that individuals undergoing forensic neuropsychological evaluations are much more likely to adopt a "less than candid and forthcoming" response style than those who are evaluated either for test norming or treatment purposes. Yet examiners routinely use test batteries that were not normed in a forensic context when they conduct forensic evaluations. It is therefore "puzzling" to presume that a neuropsychologist can somehow account for the impact of the evaluation context (forensic as opposed to treatment), but cannot do so in the case of a third-party observer's presence. *Otto/Krauss, supra* at p.368, *Joint Exhibit IV*; see also, *Blase, supra* at p.2, *Claimant's Exhibit 3*.
15. For proponents of the NAN, AACN and ABPN prohibition against third-party observers, including Dr. Hebben, who testified at hearing, the criticisms noted above do not merit any alteration in policy. Prudent psychological practice is to minimize testing variables that are likely to impact an examinee's performance; to "control what you can," in other words. See, e.g., *Howe/McCaffrey, supra* at pp.526-527, *Joint Exhibit V*; *NAN policy statement, supra* at p.379, *Defendant's Exhibit B*. This is particularly important where, as here, the confounding variable's effect is both inconsistent and unpredictable. *Eastvold, supra* at p.16, *Joint Exhibit VI*. An examiner who deviates from standardized test procedures should do so only if he or she can accurately estimate what the resulting impact on the examinee's performance will be. *Hebben/Milberg, supra* at p.83, *Claimant's Exhibit 2*. This, proponents argue, is impossible in a third-party observer situation. *Barth, supra* at p.2, *Defendant's Exhibit J*.

³ The latter suggestion runs directly counter to research positing that the potential permanency of an audio or video recording in fact *increases* the third-party observer effect, see Discussion at ¶9, *supra*.

16. As for the complaint that neuropsychological test batteries are not normed for individuals engaged in litigation, embedded performance and symptom validity tests provide a means by which an examiner can ferret out either decreased task engagement and/or feigned or embellished symptoms. These tests allow the examiner to determine whether the data obtained reflect the examinee's true level of cognitive functioning, thus either validating the overall test results or not. *Howe/McCaffrey, supra* at p.527, *Joint Exhibit V*; *Hebben/Milberg, supra* at p.75, *Claimant's Exhibit 2*.
17. It is not for me to resolve the debate between those who advocate for and against banning third-party observers from neuropsychological evaluations. Nevertheless, it is frustrating that proponents of the prohibition have failed to address what may be the central issue in a forensic setting – how to create a transparent, reviewable record of the data upon which a neuropsychologist's expert opinion is based. As the *Otto/Krauss* article noted:
- At least some support for attorneys' beliefs that forensic psychological evaluations need to be observed or otherwise memorialized via audio recording or video recording is suggested by a growing body of research, indicating the inaccuracy of examiners' notes and failure of examiners to recount accurately leading questions they employ.
- Otto/Krauss, supra* at p.364, *Joint Exhibit IV* (citations omitted). For proponents to assert that "[e]very departure from standardized conditions has the potential . . . to decrease the validity of the test measures employed in a neuropsychological exam, *Howe/McCaffrey, supra* at p.520, *Joint Exhibit V*, at the same time that they dismiss the need for independent verification as both unwarranted and unethical seems self-serving.
18. Claimant's fact witness, Joanne Peake, framed this issue in stark detail, albeit to unanticipated effect. A former client of Claimant's attorney, in the context of her own workers' compensation claim Ms. Peake underwent an independent neuropsychological evaluation with Defendant's expert, Dr. Hebben, in 2014. Consistent with her position in the current case, Dr. Hebben allowed Ms. Peake's husband to observe and videotape the interview portion of the evaluation, but not the tests themselves.
19. On direct examination, Ms. Peake made numerous allegations about Dr. Hebben's behavior that, if true, would have violated important aspects of the standardized test administration protocol. She described Dr. Hebben's demeanor as "snooty," "uptight" and "rigid," which caused her to be uncomfortable and ill at ease. She interpreted Dr. Hebben's questions as "badgering," "belittling" and "bullying." She asserted that at one point Dr. Hebben attacked her trustworthiness, accusing her of "faking it" because she was "looking for a big amount of money in this case." At another point, she asserted, Dr. Hebben refused to allow her a much-needed bathroom break, which added to her fatigue, discomfort and anxiety. Most distressing of all, Ms. Peake testified, after the interview portion of the evaluation concluded (and her husband had turned off the video recorder), Dr. Hebben became incensed at a "constructive comment" she had written in her exit survey, "got physically in my face," "started screaming and yelling" and "totally lost it" in anger.

20. Ms. Peake thus described an evaluation in which the examiner failed to use “effective listening” techniques or to recognize signs that the examinee was fatigued, established a “negative or hostile environment,” employed “sarcasm” and “flippant remarks,” and generally did nothing to “optimize the examinee’s test performance by gaining his or her cooperation and trust.” If credibly established, these behaviors would have been directly contrary to the “essentials” of a proper neuropsychological assessment as described in Dr. Hebben’s own treatise on the subject. *Hebben/Milberg, supra, Claimant’s Exhibit 2.*
21. Ms. Peake’s testimony did not survive attack on cross-examination, and in fact I find it incredible in all respects. To be clear, I do not attribute this to dishonesty, but rather to a combination of faulty recollection and misinterpreted behaviors. Nevertheless, videotaping in this instance likely would have added weight to Dr. Hebben’s opinions rather than detracting from them. The more salient point is that a more credible witness – or perhaps one with a motive to distort the truth – might have convinced me otherwise. Videotaping in that instance would have thwarted such deception.
22. As Dr. Hebben acknowledged in her hearing testimony, there is no ideal solution to the third-party observer conundrum in the forensic context. Observation offers the most effective way of documenting whether a neuropsychological test battery has been administered appropriately, but the presence of an observer itself renders the test protocol inappropriate, at least in the eyes of most who practice in the profession.⁴
23. I do not consider that the compromise Dr. Hebben offered – videotaping just the interview portion of the exam, but not the cognitive testing itself – fully addresses the problem. The alternative that the NAN, AACN and ABPN policy statements advocate – for the neuropsychologist faced with a demand for third-party observation to simply recuse him- or herself from further involvement – is equally unsatisfactory, however. As one commentator has noted, doing so may represent a “superficially noble stance,” but in fact it creates its own ethical dilemma:

If evaluators refuse to become involved in cases where an evaluation must be observed, then the referring parties will be unfairly denied consultation to which they are entitled . . . Further, if ethical evaluators refuse to become involved in such matters, then those matters would become dominated by unethical evaluators. Subsequently, it would appear that a truly ethical posture would involve the evaluator finding a way to stay in the case, and provide consultation to the referring party, without basing conclusions on an observed evaluation.

Barth, supra at p.8, Defendant’s Exhibit J.

⁴ Ironically, the litigant who demands that a third-party observer be present at a forensic neuropsychological evaluation may thereby be afforded an “irrefutable impeachment tool,” on the grounds that the results obtained are invalid. *Shearer v. Hafer*, 135 A.3d 637, 644 (Pa.Super. 2016).

24. Besides allowing the interview portion of a forensic evaluation to be videotaped, as Dr. Hebben has proposed, another alternative to an evaluator's outright refusal to conduct an observed forensic evaluation might be to confine the test battery to assessment measures that are less affected by a third party's presence, as the American Psychological Association's Committee on Psychological Tests and Assessment has suggested. *See Otto/Krauss, supra* at p.365, *Joint Exhibit IV*. Even the Committee acknowledges that while observation of such alternative instruments may be "less intrusive to examinees," they may not provide the same data quality as more widely utilized assessment tools, however.⁵
25. In the end, neither of these alternatives offers a completely effective solution. Allowing an examinee to videotape just the interview portion of the evaluation does not provide the evidence necessary to establish whether the examiner appropriately administered a test battery that has been strictly standardized. But requiring the examiner to use less sensitive assessment tools will unjustifiably weaken his or her opinions, particularly as compared to those of a treating evaluator who is not so restricted in conducting his or her evaluation.
26. Perhaps at some point in the future the profession itself will devise a third, better alternative. For example, some commentators have expressed the need for further research on how the social facilitation phenomenon impacts an examinee's performance in a forensic setting so that its impact on test scores can be adequately estimated and accounted for. *See, e.g., Blase, supra* at p.5, *Claimant's Exhibit 3*; *Eastvold, supra* at p. 16, *Joint Exhibit VI*. Or perhaps the various associations to which most practitioners look for guidance will amend their policies to reflect a different balancing of professional responsibilities in a forensic as opposed to a therapeutic setting. *See, e.g., American Psychological Association Specialty Guidelines for Forensic Psychology*, <http://www.apa.org/practice/guidelines/forensic-psychology.aspx>.
27. While these suggestions may guide participants in future forensic evaluations, they offer no redress in the current claim. For now at least, I cannot escape the fact that not a single qualified neuropsychologist has been identified who is willing to allow Claimant to videotape the testing portion of her evaluation. All ten of the board-certified neuropsychologists licensed to practice in the New England area who responded to defense counsel's inquiry to that effect stated that doing so would violate their professional ethics. Affidavit of Sarah L. Spicer (with attachments), December 12, 2016, *Defendant's Exhibit M*. Upon learning that violating the APA Ethics Code would jeopardize his Vermont licensure,⁶ even Claimant's expert, Dr. DuWors, admitted on cross-examination that he would not allow his exam to be observed or videotaped.

⁵ American Psychological Association Committee on Psychological Tests and Assessment, *Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision Making*, 2007 at p.4. Although not identified as an exhibit in the context of the hearing on Defendant's Motion for Reconsideration, this article was appended to Claimant's initial Reply in Opposition to Defendant's Motion to Enforce Claimant's Statutory Obligation to Submit to Neuropsychological Testing, and is therefore a part of the record in this claim.

⁶ As applied to psychologists, Vermont's professional licensing statute, 26 V.S.A. §§3001 *et seq.*, allows for disciplinary action, including license suspension and/or revocation, to be taken against a practitioner who engages in

28. Claimant and Defendant both cite to Vermont's workers' compensation statute, 21 V.S.A. §655, in support of their respective positions, whether for or against allowing Claimant to videotape Dr. Hebben's independent neuropsychological examination. See Discussion at ¶1, *supra*. Case law from other jurisdictions reflects varying approaches to the question.
29. A clear majority of federal courts have refused to permit a civil litigant to have a third-party observer present at a forensic physical or mental examination. See, e.g., *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass. 2001) and cases cited therein. State courts are split. Some have ruled that because a forensic examination is a continuation of the legal process, the litigant-examinee has an absolute right to have a third person present. See, e.g., *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144 (Alaska 1989) (allowing plaintiff's counsel to attend and record, "as a matter of course," court-ordered physical examination); *Rochen v. Huang*, 558 A.2d 1108 (Del. Super. Ct. 1988) (allowing plaintiffs to record defense expert's psychiatric exam and to have health care provider of their choosing present). Others have adopted a more nuanced approach. See, e.g., *Marion v. Lukaitis*, 32 Pa. D. & C. 5th 287 (Pa. Ct. Com. Pl. 2013) (construing rule permitting litigant to have counsel present and to audio record psychological evaluation as allowing exception where doing so will preclude opposing party from conducting adequate discovery); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31 (Ky. 2003) (acknowledging dual purpose of forensic exam as both a scientifically objective exercise and an adversarial one, and thus applying case-by-case approach).
30. The court's analysis in *Marion* is instructive. The plaintiff there brought a tort action for injuries she suffered in a motor vehicle accident. After her treating neuropsychologist diagnosed her with post-concussive disorder, the defendant sought to schedule its own evaluation. The plaintiff requested that her attorney be present, as permitted by Pa.R.C.P. 4010(a)(4)(i), and gave notice of her intent to audio record the exam, as permitted by Pa.R.C.P. 4010(a)(5)(i).⁷ In response, the defendant sought a protective order. It offered expert testimony to the effect that the presence of a third-party observer was contrary to standardized protocol, would invalidate test results and would raise ethical issues.

“unprofessional conduct,” which is specifically defined to include conduct that violates the APA Ethics Code. *Id.* at §§3016(9), 3016a(a)(4).

⁷ Pa.R.C.P. 4010(a)(4)(i) states that a party who is required to submit to a physical or mental examination “shall have the right to have counsel or other representative present during the examination.” Rule 4010(a)(5)(i) permits the party, upon reasonable notice and at his or her own expense, “to make a stenographic or audio recording of the examination.”

31. The court granted the defendant's motion, and issued a protective order precluding the plaintiff's attorney from attending the testing portion of the evaluation and strictly prohibiting any audio or video recording. As authority for doing so, it cited the provisions of Pa.R.C.P. 4012(a)(6), which, "for good cause shown" and "when justice requires," allows the court to enter an order "that discovery or deposition shall be conducted with no one present except persons designated by the court." In the court's analysis, construing the plaintiff's right to third-party observation as absolute would prejudice the defendant and deny it an equal opportunity to conduct discovery. Fairness demanded otherwise, "so that a party does not abuse the rights afforded by Rule 4010." *Id.* at 295.
32. Defendant here advocates an analysis similar to the one adopted by the court in *Marion*. For statutory support, it cites Vermont Rule of Civil Procedure 26(c)(5), which grants the same discretion to enter a protective order, "for good cause shown" and "which justice requires," that discovery "be conducted with no one present except persons designated by the judge."⁸ It also cites §655, which specifically precludes the employee's right to record an examination from being "construed to deny the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability." This language, Defendant asserts, negates the absolute nature of Claimant's right to videotape, and instead adds a reasonableness requirement.
33. The legislative intent underlying the language Defendant cites is difficult to discern. The use of the term "visit" is confusing – typically it is the injured worker who presents him- or herself to the examiner, not the other way around. Limiting the physician's "visitation" rights solely to the period of total disability is also perplexing, as §655 generally allows for independent medical examinations to occur at any time "after an injury and during the period of disability," whether total, partial, temporary or permanent.
34. I acknowledge the statutory tension between the injured worker's right to videotape an independent medical examination and the employer's right to obtain one. But in this case, as in *Marion*, I agree with Defendant that the language of §655 embodies the concept that Claimant's right to videotape Dr. Hebben's examination is not absolute. Instead, fairness demands that I grant the protection Defendant has requested.
35. Although I cannot offer a perfect solution, I am convinced that there are ways to substantially protect Claimant's interest in ensuring that Dr. Hebben's evaluation proceeds appropriately and yields valid results. For one, I will hold Dr. Hebben to her agreement to allow Claimant to videotape the interview portion of her exam. Beyond that, Claimant's attorney is free to educate his client beforehand regarding proper test administration conditions, and debrief her immediately afterwards regarding the extent, if any, to which Dr. Hebben deviates from standardized procedures. And certainly Dr. Hebben can be compelled to submit to close questioning under oath on the issue.

⁸ Vermont's workers' compensation statute grants broad discretion to the Commissioner to enact rules governing process and procedure, 21 V.S.A. §602. Pursuant to Workers' Compensation Rule 17.1100, so long as the Rules of Civil Procedure do not defeat the informal nature of the hearing, they can be applied to workers' compensation proceedings.

36. Short of barring Claimant from videotaping the test portion of the exam, there is no way to safeguard the interests underlying Defendant's right. Certainly there is no legal basis for me to order an examiner to conduct an evaluation he or she is unwilling to conduct, particularly if doing so might violate professional ethics and thereby jeopardize his or her career. Thus, if I side with Claimant on the issue, Defendant will effectively be denied the right to test a central theory underlying her case in chief ó that her claimed learning disability has so narrowed her prospects for re-employment as to render her permanently and totally disabled. I cannot imagine that the legislature intended this result.
37. I conclude that Defendant has established good cause for the issuance of a protective order barring Claimant from videotaping Dr. Hebben's neuropsychological evaluation. Should she refuse to submit to an examination, in accordance with §655 I further conclude that her right to prosecute the pending claim, and/or to receive ongoing compensation benefits related thereto, shall be suspended.

ORDER:

Defendant's Motion for Reconsideration is hereby **GRANTED**. Subject to the condition that Dr. Hebben allow the interview portion of her neuropsychological evaluation to be video recorded, Claimant is hereby **ORDERED** to submit to an examination, which shall be scheduled at a reasonable time and location in accordance with 21 V.S.A. §655. Should she refuse to do so, upon Defendant's motion her right to prosecute the pending claim, and/or to receive ongoing compensation benefits related thereto, shall be suspended for so long as the refusal continues.

DATED at Montpelier, Vermont this 14th day of April 2017.

Lindsay H. Kurrle
Commissioner