

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Sue Ann Goodrich

Opinion No. 06-16WC

v.

By: Jane Woodruff, Esq.  
Administrative Law Judge

Fletcher Allen Health Care

For: Anne M. Noonan  
Commissioner

State File No. DD-60132

**RULING ON DEFENDANT'S MOTION TO ENFORCE CLAIMANT'S  
STATUTORY OBLIGATION TO SUBMIT TO NEUROLOGICAL  
TESTING AND, IN THE ALTERNATIVE, MOTION *IN LIMINE***

**APPEARANCES:**

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

**ISSUES PRESENTED:**

1. Do the terms of 21 V.S.A. §655 apply to independent neuropsychological examinations?
2. Does Claimant's right to make a video recording of Defendant's independent neuropsychological examination impermissibly deny Defendant's right to an examination?
3. Did Claimant give proper notice of her intent to make a video recording of Defendant's independent neuropsychological examination under Workers' Compensation Rule 6.1410?
4. If Claimant failed to give proper notice, should she be held financially responsible for the charges Defendant incurred as a consequence?
5. Should Claimant's right to prosecute her claim be suspended on the grounds that she has refused to attend a properly noticed independent medical examination?

**EXHIBITS:**

Claimant's Exhibit 1: Federal Rule of Civil Procedure 6

- Claimant's Exhibit 2: American Psychological Association, *Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision Making*, 2007
- Claimant's Exhibit 3: *Zabkowicz v. The West Bend Co., et al.*, 585 F. Supp. 635 (E.D. Wis. 1984)
- Defendant's Exhibit A: Letter from Attorney Moore to Claimant, December 11, 2015
- Defendant's Exhibit B: Affidavit of Sarah Spicer, January 26, 2016
- Defendant's Exhibit C: Emails between Attorney Talbott and Attorney Moore, January 4, 2016
- Defendant's Exhibit D: Dr. Postal's fee schedule
- Defendant's Exhibit E: Lewandowski, *et al.*, *Policy Statement of the American Board of Professional Neuropsychology regarding third party observation and the recording of psychological test administration in neurological evaluations*, <http://abn-board.com/?s=ABN+White+paper>
- Defendant's Exhibit F: *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, The Clinical Neuropsychologist, 2001, Vol. 15 No. 4, pp. 433-439
- Defendant's Exhibit G: Affidavit of thirty-three Illinois psychologists opposed to the presence of third party observers during neuropsychological and psychological assessments, June 2012
- Defendant's Exhibit H: Legal policies regarding the reproduction and dissemination of Pearson Test Materials, January 1, 2014

## **FACTUAL BACKGROUND:**

On February 12, 2012, Claimant sustained 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. On December 10, 2014 Claimant filed a Notice and Application for Hearing (Form 6), in which she asserted a claim for permanent total disability benefits. Specifically, she claims that she is unable to return to gainful employment because her learning disability prevents her from learning a new trade that does not exceed her work capacity.

On December 11, 2015, Defendant provided notice to Claimant and her counsel, Attorney Talbott, that it had scheduled her to attend a neuropsychological examination on Thursday, January 7, 2016 at 9:00 AM with Dr. Karen Postal, Ph.D. On Monday, January 4, 2016 Sarah Spicer, a paralegal employed by Attorney Moore (Defendant's counsel), telephoned Attorney Talbott between 3:01 PM and 3:10 PM to confirm that Claimant would be attending the examination as scheduled. Attorney Talbott indicated that Claimant would attend. In addition, he requested that Ms. Spicer inform Attorney Moore that Claimant intended to exercise her right, under 21 V.S.A. §655, to make a video recording of the examination.

Shortly thereafter, at 3:39 PM Attorney Moore emailed Attorney Talbott to advise that Dr. Postal would allow Claimant to make a video recording of the interview portion of the examination, but objected to any video record of the testing itself.

Attorney Talbott responded to Attorney Moore's email at 4:34 PM. In it, he asserted that Claimant had the right to videotape the entire evaluation. At 4:38 PM Attorney Moore replied, and again asserted her position that Claimant would not be permitted to make a video recording of the actual testing portion of the examination. More specifically, she advised that Dr. Postal was unwilling to conduct the examination if it was to be videotaped, due to her concern that a third party observer would render the test results unreliable. Thus, Attorney Moore asserted, if Claimant insisted on doing so the ultimate result would be to deprive Defendant of its right to the evaluation altogether. In addition, Attorney Moore questioned whether Attorney Talbott had given the requisite three business days' notice of Claimant's intent to videotape the examination, as mandated by Workers' Compensation Rule 6.1410.

On January 5, 2016 Attorney Moore sought guidance from the administrative law judge on the issues she had raised in the previous day's email to Attorney Talbott. As to the question whether Claimant should be allowed to videotape the testing portion of Dr. Postal's examination, Attorney Moore asserted that doing so would be improper because (a) the presence of a third party observer (in this case, the videographer) would invalidate the test results; and (b) videotaping would compromise the proprietary nature of the written test materials.

At a telephone status conference that same afternoon, the administrative law judge preliminarily ruled that the statute granted Claimant an absolute right to make a video recording of the examination, and that Dr. Postal's concerns could be adequately addressed by crafting an order to protect the proprietary nature of the test materials. She also ruled preliminarily that Claimant had in fact given adequate notice of her intent to videotape. She then allowed the parties additional time in which to more fully brief their respective positions on these issues.

As a consequence of the administrative law judge's preliminary rulings, Defendant canceled Dr. Postal's scheduled examination. However, because it failed to do so at least 48 hours beforehand, Dr. Postal imposed a late cancellation charge of \$1,600.00, in accordance with her established fee schedule. Now, in addition to a final ruling on the issues discussed above, Defendant also requests an order that Claimant be held responsible for the cancellation charge, on the grounds that but for her improper request to videotape the examination it would have occurred as scheduled.

## **DISCUSSION:**

### *Application of 21 V.S.A. §655 to Independent Neuropsychological Examinations*

1. I consider first Defendant's argument that the statute pertaining to independent medical examinations, 21 V.S.A. §655, does not apply to neuropsychological examinations. The specific statutory language reads:

After an injury and during the period of disability, if so requested by his or her employer, . . . the employee shall submit to examination . . . by a duly licensed physician or surgeon designated and paid by the employer.
2. Workers' Compensation Rule 6.0000 refers to the examinations that §655 mandates by their more common descriptor, "independent medical examinations." Defendant asserts that a neuropsychological examination is not a "medical" examination, and therefore that the rights granted Claimant by both statute and rule with respect to videotaping examinations do not apply here. Unlike a neuropsychological examination, it argues, a "medical" examination does not involve "testing;" thus, Claimant's right to make a video recording should not extend to the actual test portion of Dr. Postal's exam.
3. The short answer to Defendant's argument is that if a neuropsychological examination is not covered by §655, then Defendant has no right to require Claimant to submit to it in the first instance.
4. Beyond that, I reject Defendant's premise that a neuropsychological examination is not properly characterized as a "medical" procedure. "Neuropsychology" is defined as "a science concerned with the integration of psychological observations on behavior and the mind with neurological observations on the brain and nervous system." <http://www.merriam-webster.com/dictionary/neuropsychology>. "Medical" is defined as "of or relating to the treatment of diseases and injuries: of or relating to medicine." <http://www.merriam-webster.com/dictionary/medical>. The brain and the nervous system are organs of the human body and are treated for diseases and injuries. Considering these definitions together, I conclude that it is reasonable to characterize neuropsychology as a well-recognized subset of medicine.
5. The employer's statutory right to independent medical examinations has long been interpreted to include both psychological and neuropsychological evaluations. I see no basis for interpreting the statutory language as narrowly as Defendant suggests. I conclude that the parties' rights and responsibilities with respect to Dr. Postal's evaluation are squarely covered by §655 and Rule 6.0000.

Claimant's Right to Make Video Recording versus Employer's Right to Independent Examination

6. Workers' compensation-related independent medical examinations are governed by statute, 21 V.S.A. §655. Particularly with respect to video- and audiotaping, the statute safeguards both parties' rights 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. . . . 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 during which the refusal or obstruction continues.

7. Defendant contends that, under the circumstances of this case, Claimant's insistence on videotaping Dr. Postal's neuropsychological examination is tantamount to denying its right to conduct the examination itself, in violation of the language of §655 quoted in Paragraph 1 above. It argues that ethical considerations preclude Dr. Postal from allowing a third party observer to be present while the necessary tests are administered. As support, Defendant cites to two journal articles purporting to explain the positions of the American Board of Professional Neuropsychology (the "Board") and the American Academy of Clinical Neuropsychology (the "Academy") on this issue, *see* Defendant's Exhibits E and F.
8. Both the Board and the Academy state the same reasons for their policies: (1) because test results are measured against normalized standards that do not account for third party observers, validating tests conducted with an observer present is impossible; and (2) because testing materials are proprietary in nature, the presence of a third party observer will compromise their integrity and jeopardize their future use.
9. As Claimant correctly observes, *see* Claimant's Exhibit 2, the American Psychological Association (the "Association") has advocated an alternative position, one that recognizes the necessity of third party observers in certain situations, for example, where testing occurs in the context of criminal proceedings against the examinee. The Association has provided a framework under which an examination can proceed without compromising either test validity or security.
10. As to test validity, the concern raised by both the Board and the Academy is the risk that a third party observer will distort the testing environment, distract the

examinee and damage the examiner's ability to establish rapport, all of which will adversely affect the examinee's performance and skew test results. To minimize these risks, the Association has suggested various solutions, such as positioning the observer behind the examinee (with strict instructions to remain silent throughout) or recording the examination through a one-way mirror. Though perhaps not perfect, these steps represent an effective compromise between the examinee's rights and the examiner's need for valid test results.

11. In this case, both Claimant's right to have a third party videographer present at Dr. Postal's examination and Defendant's right to the examination itself derive from the same statute, 21 V.S.A. §655. As to the right to make a video recording, the statute grants permission for "any examination" to be videotaped. I can accept the need to impose whatever safeguards are reasonably necessary to address an examiner's valid concerns. However, having in mind the remedial purposes of the workers' compensation act, *Grather v. Gables Inn, Ltd.*, 170 Vt. 377, 382 (2000), I cannot countenance restrictions that are unduly limiting.
12. I conclude here that Claimant has the right to make a video recording of Dr. Postal's neuropsychological examination, including not only the interview portion of the exam but also the actual testing portion. Among the safeguards that are reasonable to impose are those discussed in Paragraph 4 above. In addition, in order to protect the proprietary nature of the test materials, I conclude that it is reasonable to prohibit Claimant from disclosing the video recording to anyone (including her attorney) other than directly to another qualified expert neuropsychologist.
13. In reaching this conclusion and imposing these safeguards, I acknowledge the very real possibility that Dr. Postal will refuse to conduct the examination. That is her right. I am reasonably confident that if this occurs, Defendant will be able to identify another equally competent neuropsychologist who is willing to proceed. If travel beyond the statutory two-hour driving limitation becomes necessary, I expect it will be within the proper exercise of the discretion granted me by §655 to allow the examination to take place nevertheless.

#### Notice of Intent to Make Video Recording

14. Workers' Compensation Rule 6.1400 reiterates the Claimant's statutory right to videotape an independent medical examination, *see* Paragraph 6 *supra*, but adds a notice requirement, as follows:

6.1410 At least three business days prior to the scheduled examination date, the injured worker shall give notice of his or her intention to make a video or audio recording of the examination to the employer or insurance carrier, who shall in turn notify the medical provider.

15. Defendant argues that Claimant did not comply with the requirements of Rule 6.1410 because she did not give three *full* business days' notice of her intent to video record the examination. Claimant contends that she complied with the plain meaning of the Rule in providing her notice.
16. The Vermont Rules of Civil Procedure apply in workers' compensation proceedings to the extent that they do not defeat the informal nature of the hearings. 21 V.S.A. §§602, 604; Workers' Compensation Rule 17.1100. Specifically with respect to determining timeliness, Workers' Compensation Rule 3.3000 incorporates the provisions of Vermont Rule of Civil Procedure 6(a). That rule states, in pertinent part, that when computing time, "the day of the act, event, or default from which the designated period of time begins to run shall not be included." The last day of the period *is* included, however, unless it falls on a weekend or holiday.
17. There is an important distinction between the time computations encompassed by the Rules of Civil Procedure and the one at issue here. Counting the last day of a period as a full day of notice makes sense when the action to be taken involves serving documents on a party or filing papers with the court, because acts such as this are not scheduled to occur at any particular hour of the day. However, when the notice concerns a scheduled medical appointment, time of day matters. And with its specific reference to "business days," Workers' Compensation Rule 6.1410 reflects that.
18. In the instant case, the three-day notice period began to run on Tuesday, January 5, 2016, the day *after* Attorney Talbott first gave notice of Claimant's intent to videotape Dr. Postal's exam. Wednesday, January 6<sup>th</sup> was the second day. Thursday, January 7<sup>th</sup> – the day of Dr. Postal's exam – would have been the third day. Had the exam been scheduled for later in the afternoon, perhaps it would have been fair to count it as a notice day. As it was, the exam was scheduled for 9:00 AM, the very start of the business day, however. Under that circumstance, to count January 7<sup>th</sup> as the third day would be manifestly unfair.
19. I conclude that Claimant failed to give adequate notice of her intent to videotape Dr. Postal's independent medical examination, as required by Workers' Compensation Rule 6.1410. Because her failure to do so led directly to the appointment's late cancellation, I further conclude that she is liable for the \$1,600.00 cancellation fee that Dr. Postal imposed.

*Defendant's Motion in Limine in the Alternative*

20. I reject Defendant's contention that Claimant should be sanctioned under §655 for "refusing to attend" Dr. Postal's examination, however. Although she failed to give adequate notice of her intention to videotape the exam, I do not interpret her actions as amounting to a refusal to attend. For that reason, I conclude that it would be improper to allow Defendant to suspend benefits on those grounds.

**ORDER:**

Based on the foregoing, Defendant's Motion to Enforce Claimant's Statutory Obligation to Submit to Neuropsychological Testing and *Motion in Limine* in the Alternative are hereby **DENIED**. Defendant's request for reimbursement is hereby **GRANTED**.

**DATED** at Montpelier, Vermont this \_\_\_\_ day of \_\_\_\_\_, 2016.

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Anne M. Noonan  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.