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THE GOOD, THE BAD, AND THE UGLY (DEFENSE MEDICAL EXAMINERS)[1]

A DEFENSE MEDICAL EXAMINATION IS NOT AN "INDEPENDENT MEDICAL EXAMINATION."

Notwithstanding the employer/carrier's designation of a physician to examine the claimant in a claim arising under the Longshore and Harbor Workers' Compensation Act (and its extensions) as an "Independent Medical Examiner," nothing could be further from the truth. There are certainly some fair minded defense medical examiners (the rare, but good), some which are biased (the more common, bad), and some which are truly the "ugly" (Professional Independent Medical Practioners – PIMPs).

THE ONLY "INDEPENDENT MEDICAL EXAMINATION" IS A PHYSICIAN SELECTED BY THE DISTRICT DIRECTOR UNDER §907(e)

The District Director of the Office of Workers' Compensation Programs has the power, under its duty to actively supervise the medical care of an injured employee, to appoint "one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate to the facts and circumstances of the case…"[2] The physician appointed by the District Director is to be an impartial specialist called upon to evaluate medical questions which arise regarding the claimant's appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment for an injury covered by the Act.[3] The impartial examiner selected by the District Director, or his/her designee, is a physician who shall not have been for a period of two years prior to the examination, an

[1] A 1966 film starring Clint Eastwood (The Good), Lee Van Cleef (The Bad), and Eli Wallach (The Ugly).
[2] 33 U.S.C. §907(d)(4); 20 C.F.R. §§702.407, 702.408.
[3] 33 U.S.C. §907(e); 20 C.F.R. §702.408.

employee of an insurance carrier or self-insured employer, or who accepted or participated in any fee from an insurance carrier or self-insured employer, unless the parties in interest agree thereto.[4]

THE EMPLOYER/CARRIER HAS THE RIGHT TO REQUIRE THE CLAIMANT TO SUBMIT TO A MEDICAL EXAMINATION BY A PHYSICIAN OF ITS OWN CHOICE SO LONG AS THE EXAMINATION IS OF A MEDICAL CONDITION IN CONTROVERSY

The employer has the right to require the employee to submit to a medical examination by a physician selected by the employer.[5]

The employer/carrier uses the carrot and the stick method of forcing a claimant to submit to a medical examination (of the claimant's physical or mental condition) by the physician of its choice, under the thinly veiled threat that the claimant's refusal to attend a medical examination will result in the immediate termination of the claimant's compensation benefits.

While the employer/carrier's threat of termination of compensation exists, it is only after the employer/carrier has sought to compel the claimant, who has refused to attend a physical or mental examination, and upon order of the District Director or administrative law judge who *may* by order suspend the payment of further compensation during such time as the claimant unreasonably and without justification refuses to submit to a medical examination by a physician selected by the employer.[6] Compensation cannot be suspended retroactively, but only from the date of the refusal until the claimant complies with the District Director or the administrative law judge's order. The claimant does not have the right to object to the employer/carrier's physician because he "lacks confidence" in their chosen physician.[7]

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[4] 20 C.F.R. §702.411.

[5] 33 U.S.C. §907(d)(4); 20 C.F.R. §702.410(c).

[6] *Maryland Shipping and Drydock Co., v. Jenkins,* 594 F. 2d 404, 406-407 (4th Cir. 1979).

[7] *B.C. [Casbon] v. Int'l Marine Terminals,* 41 BRBS 101 (2007).

Depending upon whether the matter is pending before the District Director or the administrative law judge, determines by whom an order can be issued suspending compensation. Once the case has been transferred to the Office of Administrative Law Judges, the District Director is divested of jurisdiction to issue a suspension order and the administrative law judge, thereafter, has the authority to order the claimant to attend an examination; and if the claimant's refusal is determined to have been "unreasonable" and not "justified" by the circumstances an order suspending the claimant's compensation may be issued.[8]

The employer/carrier does not have an unfettered right to require the claimant to submit to a defense medical examination where the medical condition is not an issue in controversy in the claim, or relevant to the injury claimed.[9] For example, a claimant who sustains an injury to his head and has been treated by a neurologist with a diagnosis of a traumatic brain injury, is not required to submit to a neuropsychological examination which would constitute

> "… a lengthy and intrusive invasion of privacy that is unnecessary under the facts of this case and … Claimant is not asserting psychological or psychiatric harm."
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> While claimant does submit he has a traumatic brain injury, a neurologist is fully capable of determining whether that is true and the extent of the alleged harm; in other words, a medical diagnosis and prognosis is possible without a neuropsychological evaluation. In fact, claimant has apparently agreed to be examined by a neurologist of employer's choosing. Therefore, on the information currently before me, I find that

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[8] *Rodriguez v. Columbia Grain, Inc.,* 2004 WL 6045882 (DOL Ben. Rev. Bd.); 33 U.S.C. §907(d)(4); 20 C.F.R. §702.338 (an administrative law judge has the duty to inquire fully into matters at issue before him); 20 C.F.R. §702.339 (the administrative law judge should conduct proceedings in such a manner as to ascertain the rights of the parties); 29 C.F.R. §18.19(a)(3) (any party may serve upon any other party a request to submit to a physical or mental examination by a physician); 29 C.F.R. §18.21(a) (the party upon whom a request for such an examination is served either fail[s] to respond adequately or object to a request for an examination, the moving party may seek an order compelling the examination).

[9] *Rodriguez,* *4 (Rodriguez claimed only a work-related injury to his back. The employer had the claimant evaluated by a physician who then recommended that the claimant be seen by a medical panel consisting of an orthopedic surgeon, a neurosurgeon, and a psychologist or a neuropsychologist. The claimant objected that the ALJ did not have the authority to compel a psychiatric examination where the claim was based purely on a physical injury).

employer has not carried its burden to demonstrate claimant's refusal to undergo a neuropsychological evaluation that is unreasonable.[10]

Under the current version of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, the employer/carrier may serve on the claimant a request to submit to a physical or mental examination by a physician, without leave of the administrative law judge.[11] "The request shall: specify the time, place, manner, conditions, and scope of the physical or mental examination and the person or persons by whom it is to be made."[12] "A report of examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure, Title 28, U.S. Code, as amended."[13]

The request for the employee/claimant to submit to a physical or mental examination requires 30 day's notice be provided by the employer/carrier to allow the claimant an opportunity to serve a written response within 30 days after service of the request.[14]

PROPOSED CHANGES TO RULE §18.19 RENUMBERING AND REPLACING IT WITH RULE §18.62

Under the proposed changes to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges,[15] current rule 29 C.F.R. §18.19 has been renumbered and replaced with rule 29 C.F.R. §18.62 of the Rules of Practice and Procedure for Hearings before the Office of Administrative Law Judges **"Physical and Mental Examinations."** Set forth below is the revised (proposed) Rule.[16]

(a) Examination by notice.

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[10]*Milbank v. Service Employees Int'l, Inc.,* Case No. 2012-LDA-00535 [Notice of Hearing and Pre-Hearing Order Fn. 4] *See also Pittsburgh & Conneaut Dock Co. v. Director,* OWCP 473 F.3d 253 (6th Cir. 2007).

[11] 29 C.F.R. §18.19(a)(3)(b).
[12] 29 C.F.R. §18.19(3)(c)(4).
[13] 29 C.F.R. §18.19(3)(c)(4).
[14] 29 C.F.R. §18.19(d).
[15] 77 Fed. Reg. 233 (proposed December 4, 2012).
[16] 77 Fed. Reg. 233, 72188 (proposed December 4, 2012).

(1) *In general*. A party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitably licensed or certified examiner.
(2) *Contents of the notice*. The notice must specify:
(A) the legal basis for the examination;
(B) the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and
(C) how the reasonable transportation expenses were calculated.
(3) *Service of Notice*. Unless otherwise agreed by the parties, the notice must be served no fewer than 14 days before the examination date.
(4) *Objection.* The person to be examined must serve any objection to the notice no later than 7 days after the notice is served. The objection must be stated with particularity.

(b) *Examination by motion.*

Upon objection by the person to be examined, the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by paragraph (a)(2) of this section.

(c) *Examiner's report.*

(1) *Delivery of the report*. The party who initiated the examination must, deliver a copy of the examination report to the party examined, together with like reports of all earlier examinations of the same condition.
(2) *Contents*. The examiner's report must be in writing. It must set out in detail the examiner's findings, including diagnosis, conclusions, and the results of any tests.

The proposed rule governing physical and mental examinations provides for a shorter window within which the carrier must serve a notice for a claimant to attend an examination from 30 days down to 14 days. The previous rule allowed only a physical or mental examination by a "physician."[17] [18] The new proposed rule allows for an examination by a suitably licensed or certified examiner.[19] Query – can the employer/carrier now require the claimant to attend an examination by a "suitably licensed" registered physical therapist who will then perform a Functional Capacity Evaluation?

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[17] 29 C.F.R. §18.19(a)(3).
[18] 20 C.F.R, §702.404 ("physician" includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).
[19] 29 C.F.R. §18.62(a)(1).

The time within which the claimant can object to the employer/carrier's notice has been shortened from 30 days to 7 days after the employer/carrier serves its notice of an examination.[20] If the claimant objects, then the employer/carrier would be required to file a motion to compel the attendance at the physical or mental examination.[21] How likely is it that an administrative law judge will rule within 7 days of the claimant's objection and the employer/carrier's motion to compel, such that the examination could still take place within 7 days of the claimant's objection (assuming that the employer/carrier noticed the examination on the 14th day before the examination was to take place)?

Proposed rule §18.62, for the most part, includes language that tracks Fed.R.Civ.P. 35, except that the rule does not require that a motion first be filed demonstrating "good cause" for the examination.

Neither proposed Rule §18.62 or the existing Rule §18.19 provide for a time frame within which delivery of the defense medical examiner's report must be furnished.

The intent of the revisions to the Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges is to align the manner in which decisions and orders are entered by the administrative law judges to that in which non-jury cases proceed through the federal courts.

> Using language similar or identical to the applicable FRCP gains the advantage of the broad experience of the federal courts and the well-developed precedent they have created to guide litigants, judges, and reviewing authorities, within the Department on procedure. Parties and judges obtain the additional advantage of focusing primarily on the substance of the administrative disputes, spending less time on the distraction of litigating about procedure… .The proposed revision continues the current practice of looking to the federal civil rules to resolve procedural questions that the revised Part 18, Subpart A rules do not explicitly cover…[22]

[20] 29 C.F.R. §18.62(a)(4).
[21] 29 C.F.R. §18.62(4)(b).
[22] See 77 Fed. Reg. 233, 72144 (proposed December 4, 2012).

Thus, upon the presumed adoption of Rule §18.62, as currently proposed, the administrative law judges are likely to refer to federal precedent for interpretation of the sufficiency of the notice and scope of the physical or mental examination, (including the taking of a medical history, the description of how the incident, injury, disease or illness occurred, the conducting of the physical or mental examination, any testing to be conducted, and the length of time that the Claimant should be subjected to the examination).

> The Department [in the comments preceding the rules] proposes a new §18.62 modeled after Fed.R.Civ.P. 35 to regulate physical and mental examinations.[23] Physical and mental examinations are currently covered by §18.19; however, due to the high frequency of requests for physical and mental examinations the Department determined that there is a need for a separate section that sets forth the procedure for such requests.
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> The Department proposes to divide §18.62 into three subparts:
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> Examinations by motion, examinations by notice, and examiner's reports. This proposal reflects the distinction between examination by notice and examination by motion found in the federal rule.[24]

WHAT MUST THE RULE §18.62 NOTICE OF EXAMINATION STATE?

"Some courts have denied a request for a court-ordered Rule 35 examination solely on the basis that the request failed to provide sufficient details of the proposed examination."[25] "The failure to provide all particulars of the examination, however, does not necessitate denial of a motion for examination."[26] The notice should provide:

1. The identity of the examining physician,
2. The identity of her medical specialty,

[23] Fed.R.Civ.P. 35(a)(1) provides that the court may order a party whose a mental or physical condition – including blood group - is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. . . .

[24] 77 Fed.Reg. 233, 72166 (proposed December 4, 2012).

[25] *Calderon v. Reederei Claus-Peter Offen GmbH & Co.,* 258 F.R.D. 523, 526 (S.D. Fla. 2009); *See, e.g. Woods v. Century I, L.C.,* No. 92-2092-JWL 1993 WL 33339, at *1 (D Kan. Jan. 11, 1993) (denying Rule 35 examination for movant's failure to provide any details other than identity of the examiner).

[26] *Calderon, 258* F.R.D. at 526.

3. The date and time of the examination,
4. The location of the examination,
5. The areas into which the physician would inquire (claimant's complaints, medical, surgical, family history and history of the accident or injury),
6. The conducting of a physical [or mental] examination, and
7. The conducting of any testing, the nature of the test to be performed and the areas of the body to be examined.

One should argue to the administrative law judge that the examination (and any testing) should be limited in scope to the areas of the body that the claimant has claimed to have injured as set forth in the Claim for Compensation. "Rule 35 requires the court to specify in its order the scope and conditions of the examination, and in this way the court may pass on the diagnostic procedures to be used. No such limitation need be specified here, however, as the examination does not include physical pain, extractions, or insertions (e.g., spinal taps, barium enemas, *id. n.* 11, 12)." [Really!] [27]

As unlikely it is for a claimant to be subjected to (and for claimant's counsel to agree to allow) invasive procedures to be performed by a defense medical examiner, the author's own very recent experience has shown otherwise. In a claim involving a myocaridal infarction, the employer/carrier scheduled a cardiological evaluation, and did not include the scope of the examination or any testing to be conducted. Lo and behold, the cardiologist subjected the claimant to a thallium stress test with a pre and post stress test echocardiogram. You can be certain, that in the future, each and every request for a defense medical examination under §18.62 will require the employer/carrier to set forth any specific testing that the examiner intends on subjecting the claimant to, and an objection will be served to any functional testing that requires any invasive procedures.

CAN WE PREVENT THE DEFENSE MEDICAL EXAMINER DURING THE RULE §18.62 EXAMINATION FROM CONDUCTING A MINI-DEPOSITION?

[27] *Berry v. Mi-Das Line S.A.,* No. CV-408-159, 2009 WL 3213506, at *4 (S.D. Ga. Oct. 5, 2009); *Wright & Miller,* 8A Fed. Prac. Civ. 2D §2235 (types of examination permitted) (2009 footnote omitted).

Using the analogous federal case law defining the scope of Fed.R.Civ.P. 35 examinations, courts often allow the examiner to include "routine procedures," which would generally include a review of medical history,[28] as it assisted the defense doctor in his or her evaluation.[29] "Accordingly, courts [have] refrained from 'limit[ing] the manner in which an examination is conducted or the questions asked absent good cause for a protective order.'"[30] The burden to demonstrate circumstances that require the limitation of a Rule 35 examination rests with the party seeking restrictions.[31]

SCOPE OF NEUROPSYCHOLOGICAL EXAMINATION

As in physical examinations, when plaintiffs object to the questions that the neuropsychologist/psychiatrist may pose to the plaintiff the courts have refused to intrude into the examiner's mode of questioning a litigant.[32]

DURATION OF PHYSCIAL AND MENTAL EXAMINATION

Although Rule §18.62 and Fed.R.Civ.P. 35 are silent as to the length of time that a party can be subjected to a physical or mental examination, "the court has broad authority under Fed.R.Civ.P. 26(c) to limit or otherwise control discovery, including physical or psychological examinations authorized pursuant to rule 35. . . ."[33]

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[28] *Lerer v. Ferno-Wash., Inc.,* No. 06-81031, 2007 WL 3513189, at *2 (S.D. Fla. Nov. 14, 2007); *See also, Trenary v. Bush Entm't Corp.,* No. 8:05-CV-1630-T-30EAG, 2006 WL 333362, at *4 (N.D. Fla. Nov. 16, 2006) (ordering examinations to proceed, according to "routine procedures"); *Morton v. Haskell Co.,* No. 94-976-CIV-J-20 1995 WL 819182, at *4 (N.D. Fla. Sept. 12, 1995).

[29] See e.g., *Romano v. II Morrow, Inc.,* 173 F.R.D. 271, 273 (D. Or. 1997) (holding that review of medical history during a medical examination assisted doctor's medical conclusions).

[30] *Hertenstein v. Kimberly Home Health Care, Inc.,* No. Civ. A.98-2369-JTM 189 F.R.D. 620, 626 (D. Kan. June 14, 1999) (holding that "restriction of questions during examination 'unduly restricted physician's ability to reach medical conclusions'").

[31] *Henry v. Tallahassee*, No. 4:99 CV492-WS 2000 WL 33310900, at *2 (N.D. Fla. Dec. 6, 2000). *See, e.g., Stoner v. N.Y.C. Ballet Co.,* No. 99 CIV-0196 (BSJ) (MHD), 2002 WL 31875404, at *6 (S.D.N.Y., Dec. 24, 2002) (holding plaintiff failed to meet burden to limit a psychiatrist's questioning during Rule 35 examination).

[32] *Stoner,* 2002 WL 31875404, at *5.

[33] *Id.*

Under Rule 35, the magistrate granted the defendant's motion for an order that plaintiff submit to a psychological examination with the limitation that

> the examination may include an MMPI test or other appropriate written testing. The interview portion of the examination (excluding time for a written test) shall not exceed three hours absent good cause for a more extended interview, and the total time required of plaintiff may not exceed seven hours absent good cause shown. The court will not attempt to limit the manner in which the examination is conducted or the questions asked absent good cause for a protective order.[34]

"Magistrate judges have broad authority to structure the time and matter of medical examinations."[35]

Yet in another case, neither party cited compelling, binding or persuasive authority on the requisite length of mental examinations under Rule 35. In that event, the magistrate granted the defendant's motion to compel a mental examination consisting of 26 potential tests including proposed IQ tests, motor function tests, language tests, frontal lobe measures and an MMPI–RF over two consecutive days from 11:00 A.M., to 5:00 P.M., each day.[36]

A psychological evaluation has been limited, under the facts of the case, to no more than five hours. The scope of the examination was also limited to information "that may reasonably relate to the issues of causation and the extent of the mental distress suffered by plaintiff as an element of her claimed damages in the instant case."[37]

CAN CLAIMANT'S COUNSEL BE PRESENT AT THE DEFENSE MEDICAL EXAMINATION?

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[34] *Henry v. City of Tallahassee,* 2000 WL 333109000 (N.D. Fla. Dec. 6, 2000) ***But see*** *Newman v. San Joaquin Delta Community College Dist.,* No. 2:09-cv-03441(WBS)(KJN), 272 F.R.D. 505, at *513 (E.D. CA Feb. 15, 2011).

[35] *See, e.g. Greenhorn v. Marriott Intern., Inc.,* 216 F.R.D. 649 (D. Kan. 2003) (refusing to limit the plaintiff's psychological exam to two hours and noting that the court has broad authority to control discovery).

[36] *Newman,* 272 F.R.D. * at 513; *Simonelli v. University of California-Berkely,* No. C02-1107JL, 2007 WL 1655821, at *1-3 (N.D. Cal. 2007) (unpublished) (denying plaintiff's request to limit a mental examination to three hours, because 'the interest of both parties in the examiner's arriving at an accurate diagnosis militates against setting an artificially short time limit on plaintiff's examination, and ordering the exam to last less than 8 hours given that the plaintiff was not a child, and defendants were not seeking an unlimited time for the exam.').

[37] *Gray v. Florida,* No. 3:06-cv-990-J-20MCR, 2007 WL 2225815 (N.D. Fla. July 31, 2007).

Rule §18.62 and Fed.R.Civ.P. 35 are silent as to who may attend a defense medical examination. A court, however, "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[38] The majority of federal courts have held that third parties should be excluded from a defense medical examination absent special circumstances.[39] Courts routinely have declined to permit the attendance of plaintiff's counsel at a Rule 35 examination.[40] The party seeking the presence of a third party at a Rule 35 examination carries the burden of convincing the court that such presence is necessary.[41] "The appropriate inquiry is whether special circumstances are present which call for a protective order tailored to the specific problems presented."[42]

IS A COURT REPORTER OR VIDEOGRAPHER PERMITTED TO ATTEND THE §18.62 EXAMINATION?

"Most courts analyze a request for a recording device the same way they evaluate whether to permit the presence of an attorney at a Rule 35, Fed.R Civ.P. examination."[43] For a claimant to obtain an order allowing video recording of a defense medical examination, the claimant will have to satisfy their burden of establishing "good cause" for the video recording. Claimant would have to come forward with evidence suggesting that "the physician selected by the [employer/carrier] in this case will not 'make a fair examination.'"[44] Unfortunately, the

[38] *Calderon,* 258 F.R.D. at 526, *See also* Fed.R.Civ.P. 26(c).
[39] *Calderon,* 258 F.R.D. at 526; *See, e.g. Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 628; *McKitis v. Defazio*, 187 F.R.D. 628, 631 (D. Minn. 1993); *Wheat v. Biesecker*, 125 F.R.D. 479, 480 (N.D. Ind. 1989); *Brandenberg v. El Al Israel Airlines*, 79 F.R.D. 543, 546 (S.D. N.Y. 1978).
[40] *Bethel v. Dixie Home Crafters, Inc.,* 192 F.R.D. 320, 322 (N.D. Ga. 2000) (noting that Rule 35, like other discovery devices, is subject to the provisions of Rule 26; declining to permit an attorney be present at Rule 35 examination); *Funez v. Wal-Mart Stores, East, LP,* No. 1:12-cv-0259-WSD, 2013 WL 123566, at *7 (N.D. Ga. Jan. 9, 2013).
[41] *Bethel,* 192 F.R.D. at 322.
[42] *Tirado v. Erosa,* 158 F.R.D. 294,299 (S.D.N.Y. 1994).
[43] *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 557 (D. Conn. 2006) (quoting *Hirschheimer v. Assoc. Metals and Minerals Corp.*, No. 94 CIV.6155 (JKF), 1995 WL 736901 at *2 (S.D.N.Y. Dec. 12, 1995).
[44] *Lerer v. Ferno-Washington, Inc.,* No. 06-81031, 2007 WL 3513189, at *3 (S.D. Fla. Nov. 14, 2007); *See also Wheat,* 125 F.R.D. 480.

courts that have ruled on this issue have denied the presence of third parties, in particular, court reporters and recording devices, under the supposed "distraction" argument.

> This Court finds that an observer, court reporter, or recording device would constitute a distraction during the examination and work to diminish the accuracy of the process… [A]n observer [could] potentially distract the examining psychiatrist and examinee thereby compromising the results of the examination. Moreover the presence of the observer interjects an adversarial partisan atmosphere into what should be otherwise a wholly objective inquiry… . The Court finds that the presence of an observer would lend a degree of artificiality to the examination that would be inconsistent with the applicable professional standard.[45]

The faulty premise underlying the courts' analyses, refusing to permit observers and videographers, is the presumption that the "expert retained to conduct the examination is professional, independent and objective, as opposed to an agent or advocate for the side that retained him."[46] The courts have also bought into the defense argument that videotaping may interfere with and disrupt the examination, and that videotaping is normally unnecessary because the examining physician often will prepare his own notes and expert report.[47] To succeed in showing good cause, the party requesting the video recording must explain why the video recording is necessary. It is not sufficient to presume bias or to show that the examined party will have difficulty remembering or communicating what occurred at the examination to his attorneys.[48]

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[45] *Romano v. II Morrow, Inc.*, 173 F.R.D. 271, 274 (D. Or. 1997); see, *Haymer v. Countrywide Bank, FSB,* 2013 WL 657662 at *6 (N.D. Ill. 2013); *E.E.O.C. v. Grief Bros., Corp.*, 218 F.R.D. 59 (W.D. N.Y. 2003); *Stefan v. Trinity Trucking, LLC,* 275 F.R.D. 248, 250 (N.D. Ohio 2011) for a collection of horribles, *See Abdulwali v. Washington Metro Area Transit Authority,* 193 F.R.D. 10 (D.D.C. 2000.)

[46] *Heath v. Isenegger,* No. 2:10CV-175, 2011 WL 2610394 at *2 (N.D. Ind. July 1, 2011).

[47] *Newman v. Gaetz*, No. 08C4240 2010 WL 4928868 at *1 (N.D. Ill. Nov. 29, 2010) citing *Morrison v. Stephenson*, 244 F.R.D. 405, 406 (S.D. Ohio June 26, 2007).

[48] *Scheriff v. C.B. Fleet Co., Inc.*, No. 07-C-873, 2008 WL 2434184 at *3 (E.D.Wis. June 16, 2008) (examination should not be recorded absent some indicia of unfairness or bias . . . .). Theoretically, the examining physician's report required by Rule 35(b) is an adequate "safeguard."; *Heath* 2011 WL 2610394 at *2.

A videographer could place a camera at a fixed position while the examining physician takes the history of the claimant so that the camera would be controlled from a remote location and there would be "no distraction." As we are all too familiar, the "artful dodger" Professional Independent Medical Practitioner (PIMP) is exactly the type of expert that needs to be videotaped, so that the injured claimant has the ability to impeach the physician who claims to have taken an impartial history when, in fact, the Rule §18.62 report omits much of what the claimant told the physician. More importantly, without a videotape of the defense medical examination, the claimant has no way of rebutting the physician's recollection of the testing he performed. Nor can the claimant's treating physician or retained medical expert visualize the DME's testing to determine whether or not tests that the DME claimed he performed, were truly performed; or if the tests that were performed, reflect positive findings - when the DME's report fails to mention any positive findings. It is certainly naïve for an administrative law judge not to recognize that the DME is in an adversarial relation to a claimant, when that very examiner is paid thousands of dollars (by a repeat defense "customer") for, at most, a fifteen-minute physical examination (in this author's experience).

A recording device was allowed in a psychiatric defense examination that transformed into a "de facto deposition."[49] In *Zabkowciz*, plaintiffs had brought an action alleging emotional distress for a violation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e). There, the District Court "got it" that the defendant's argument was unavailing that the presence of a third party, or recording device, may create inhibitions detrimental to a psychiatric interview. The court noted, "in the context of an adversary proceeding, the plaintiffs' interest in protecting themselves from unsupervised interrogation by an agent of their opponents outweighs the defendants' interest in making the most effective use of their expert."

[49] *Zabkowicz v. West Bend Co.,* No. 83-C-187, 585 F.Supp. 635 (E.D. Wis. 1984).

The defendants' expert is being engaged to advance the interest of defendants; clearly, the doctor cannot be considered neutral in this case. There are numerous advantages unrelated to the emotional damage issue, which the defendants might unfairly derive from an unsupervised examination. In sum, I do not believe that the role of the defendants' expert in the truth-seeking process is sufficiently impartial to justify the license sought by the defendants. Accordingly, the plaintiffs, at their option, are entitled to have a third party (including counsel) or a recording device at the examination.[50]

Zabkowicz's logical and realistic view of the defense medical examiner's role in litigation, unfortunately, is *not* a majority view. It has been adopted in only one other case that this author could locate.

Thus, like in *Zabkowicz*, the presence of an unobtrusive tape recorder during the medical exam should not inhibit the expert's ability to question Plaintiff in this case because Defendant wishes to conduct an examination for the adversarial purpose of discovering any evidence with which to dispute Plaintiff's claims. Plaintiff argues that without an independent record, **defense experts** who are permitted to meet alone with an adversarial party may, **and in fact do, pick and choose the information they use to formulate their ultimate opinions. This is particularly true in situations involving psychological evaluations, where much of the interaction is based upon subjective assessment.**[51] (emphasis added)

A stenographer was allowed at a psychiatric examination when it appeared that the plaintiff, who was not fluent in English, would have difficulty communicating with his attorney.[52]

One thing is virtually certain, there will be videotaping on the date of the claimant's defense medical examination. It will just be by the employer/carrier's surveillance crew following the claimant from their home town to the defense medical examiner's office and then back to their hotel room, residence or claimant's attorney's office.

COMBATING DEFENSE MEDICAL EXAMINER'S TRICKS

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[50] Id.

[51] *Kuslick v. Roszczewski*, No. 09-12307-BC. 2012 WL 899355, at *5-6 (E.D. Mich. Mar. 16, 2012).

[52] *Di Bari v. Incaica Cia Armadora*, S.A., No. CV-85-0334 (EHN), 126 F.R.D. 12, 14 (E.D.N.Y. June 7, 1989).

Just as a thoroughly prepared claimant is explained the nature of a deposition at a pre-deposition conference, so too, should the claimant be prepared for what is likely to take place from the moment they leave their home to travel to attend the defense medical examination until they return home. The claimant should be advised that it is highly likely that they will be surveilled the day of their defense medical examination, as it is the one date that the employer/carrier will know exactly where the claimant will be at all times. From the moment the claimant leaves their home, the surveillance videographer will be tailing the claimant to and from the medical examination.

Make sure they are told not to run red lights, drive the speed limit, and it's not a bad idea for the claimant to exit their automobile - say every 30 minutes - for a "break."

It is certainly appropriate to explain to your client before they head off to the defense medical exam that certain orthopedic maneuvers are **not** designed to determine if the claimant truly has symptoms, but are in fact maneuvers to determine if the claimant is exaggerating their symptomatology. Pressing on the top of the claimant's skull, should not induce low back pain.

In South Florida, various defense medical examiners have been known during psychological examinations of a patient with symptoms consistent with Post Traumatic Stress Disorder, to have their office staff slam doors to see if the claimant exhibits an "exaggerated startled response."

During orthopedic and neurological examinations, defense medical experts have been known to barely palpate the claimant's spine. Then, only to contend in their report and during trial testimony that they were "unable to elicit any pain when the examiner pressed on their spine." (It is certainly proper for the claimant to let the defense medical examiner know when this ploy is being used to state: "I can barely feel you touching my spine.") During the defense

neurological examination, supposedly designed to determine whether the claimant has diminished or absent sensation, certain defense medical examiners have been known to forego using an actual pinwheel, and merely use their fingers to rub against a person's extremity. Thus, no real "testing" of dull/sharp discrimination. Worse, is the DME physician who performs the examination with such rapidity that the patient is left unable to respond before the physician claims to have completed the sensory examination. Dropping instruments on the floor is a tactic used by some examiners to determine how far the claimant can bend forward.

Claimants counsel are faced with a new Rule §18.62 with very limited favorable decisions regarding the scope of a defense medical examination under current case law. It will be our job to forge new law advancing arguments limiting the scope, duration and frequency of examinations that the claimant is subjected to by the employer/carrier's zeal to suspend, terminate, or "support" a denial of benefits.