



STATE BOARD OF WORKERS' COMPENSATION
270 Peachtree Street NW
Atlanta, Georgia 30303-1299
www.sbwc.georgia.gov

ORDER

Counsel for the Employer/Insurer requested guidance regarding an upcoming medical evaluation. Counsel for the Employer/Insurer outlined the following facts which appear undisputed. Both sides have briefly explained their respective positions in writing.

Dr. Shindell is set to examine the Employee. Counsel for the Employee notified Counsel for the Employer/Insurer of the Employee's intent to have a duly qualified physician or surgeon paid by the Employee present at the examination. Counsel for the Employer/Insurer have been informed by Dr. Shindell that the guiding ethical standards prevent his examining the Employee with an observer present.

The Act specifically provides in O.C.G.A. §34-9-202 that the Employee "shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him". While Dr. Shindell views an examination with a third party qualified professional present at the examination as inconsistent with his professional obligations, the Act affords the Employee this right. Accordingly, I find that the Employee has the right to have a duly qualified physician or surgeon present.

It is noted that both Dr. Shindell and the Employee's designated representative are both neuropsychologists. I am guided by the Act which recognizes that a practitioner of the healing arts may provide care for an injured worker, and the specific provision in O.C.G.A. §34-9-202 that "such examination may include physical, psychiatric, and psychological examinations". See O.C.G.A. §34-9-202(a). The Act allows an Employer/Insurer to set up an examination with "a duly qualified physician or surgeon" designated by the Employer/Insurer. O.C.G.A. §34-9-202(a). The Act allows an Employee to pay for "any duly qualified physician or surgeon" to be present at the examination. O.C.G.A. §34-9-202(b). I find, consistent with the Act, that reason and fairness require these same rights to be afforded to an Employee who has retained a neuropsychologist to be present as an observer at the examination of a neuropsychologist at a "psychological examination".

IT IS SO ORDERED, this the 18th day of July, 2018.

STATE BOARD OF WORKERS' COMPENSATION

**This order has been electronically signed and
approved**

MEG HARTIN

ADMINISTRATIVE LAW JUDGE

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a.gov**

ORDER

On July 18, 2018, an order was issued in the above styled case. The Employer/Insurer filed a motion for reconsideration and, in the alternative, a request that the order be certified for review. The specific provisions of the O.C.G.A. §34-9-202(e) right to obtain an independent medical examination ("IME") and the corresponding right of an employee to have a duly qualified physician present at the examination pursuant to O.C.G.A. §34-9- 202(b) appear to possibly present an ethical issue for some neuropsychologists as well as a potential question of the possibly diminished value of the empirical evidence when a third party observer is present. Given the unique issue presented in this case and its significance, it appears appropriate to certify this issue for immediate review.

The order of July 18, 2018 is certified for immediate review.

IT IS SO ORDERED, this the 03rd day of August, 2018.

STATE BOARD OF WORKERS' COMPENSATION

This order has been electronically signed and approved

MEG HARTIN

ADMINISTRATIVE LAW JUDGE



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This appeal by the Employer/Insurer is before the Appellate Division for review of an order by Judge Hartin, dated July 18, 2018¹ (“7/18/2018 Order”). No cross-appeal was filed in this case. This appeal was argued orally before the Appellate Division on September 19, 2018. After a review of the record as a whole, as well as the arguments presented, the Appellate Division now adopts as its own the order of Judge Hartin, dated July 18, 2018.

ORDER

As a preliminary matter, we note the dispute giving rise to the administrative law judge’s 7/18/2018 Order began with a telephone conference call between the parties and the administrative law judge where the Employer/Insurer sought “guidance regarding an upcoming medical examination”. (7/18/2018 Order, p. 2). Both parties submitted their contentions in writing. *See generally, Coosa Banking Co. v. Thomas*, 165 Ga. App. 313, 314, 299 S.E.2d 145 (1983) (authorizing the State Board to take judicial notice of information within the record).

The Employer/Insurer requested, pursuant to O.C.G.A. § 34-9-202(a), that the Employee submit himself for an examination and neuropsychological testing with neuropsychologist, Steve Shindell, PhD. (7/18/2018 Order, p. 2). The Employee sought to exercise his right, pursuant to O.C.G.A. § 34-9-202(b), to have a “duly qualified physician or surgeon provided and paid by him” present during the examination with Dr. Shindell. (7/18/2018 Order, p. 2). The Employee has designated a neuropsychologist. *Id.* at 2. In part, citing ethical concerns, Dr. Shindell has refused to perform the examination in the presence of a third-party observer. (7/18/2018 Order, p. 2). The administrative law judge found the Employee’s right under the Act to be clear, such that the Employee was entitled to have his designated neuropsychologist present at the examination with Dr. Shindell. *See* O.C.G.A. § 34-9-202(b). The Employer/Insurer filed an appeal.

O.C.G.A. § 34-9-202(b) uses the mandatory language of “shall” regarding the Employee’s right to have a duly qualified physician or surgeon present. Therefore, we lack discretion in the matter, are constrained by the plain, unambiguous language of the statute, and do hereby find, as did the

¹On August 2, 2018, Employer/Insurer filed a motion for reconsideration or, in the alternative, for the administrative law judge to certify the July 18, 2018 interlocutory order for immediate review, pursuant to O.C.G.A. § 34-9-103(b); Board Rule 103(d). By order, dated August 3, 2018 (“8/3/2018 Order”), the administrative law judge granted Employer/Insurer’s request for a certificate of immediate review but did not expressly grant or deny the motion for reconsideration. (8/3/2018 Order, p. 2).

administrative law judge, that the Employee is entitled to have a duly qualified physician or surgeon present at his examination with Dr. Shindell. Accordingly, we find no error with the administrative law judge's order.

Based on the foregoing, we find the preponderance of competent and credible evidence in the record supports Judge Hartin's order, dated July 18, 2018. See O.C.G.A. § 34-9-103(a). Therefore, the Appellate Division adopts as its own Judge Hartin's order, dated July 18, 2018.

ORDER ON EMPLOYEE'S MOTION TO STRIKE

While the underlying appeal was pending, the Employee filed a motion to strike and for assessed attorney's fees on September 2, 2018. The Employee contends the Employer/Insurer improperly attached two (2) affidavits, both dated August 1, 2018, from Stephen N. Macciocchi, PhD ABPP and Steve Shindell, PhD (Exhibits 1 and 2, respectively), as exhibits to "Insurer's Motion for Reconsideration," despite the record having closed with the issuance of the administrative law judge's order of July 18, 2018. (Motion to Strike, pp. 4-7). The Employee further contends the two (2) exhibits should be stricken from the record and ought not be considered by this Appellate Division as well as that the Employer/Insurer should be assessed attorney's fees for their unreasonable prosecution. *Id.* at 14. In response, the Employer/Insurer filed an objection ("E/I Objection") on September 17, 2018, contending, in part, the legal authorities cited by the Employee are inapplicable to a motion for reconsideration of an interlocutory order. (E/I Objection, pp. 2-3).

The parties appeared for oral argument of the underlying appeal on September 19, 2018. At that time, this Appellate Division granted leave for the Employee to reply to the Employer/Insurer's objection within ten (10) days of the oral argument and permitted the Employer/Insurer an additional ten (10) days to respond from the filing of the Employee's response. Thereafter, the parties complied and filed their subsequent responses on September 25 and October 5, 2018, respectively.

It appears, and we find the administrative law judge did not rule upon the substance of the Employer/Insurer's motion for reconsideration but, instead, certified the July 18, 2018 interlocutory order for immediate review. (8/3/2018 Order, p. 2). Since this Appellate Division declines to grant the Employer/Insurer any relief, we dismiss the Employee's motion to strike as moot; and, in our discretion, we decline to assess attorney's fees. See O.C.G.A. § 34-9-108(b)(1); New Amsterdam Cas. Co. v. Thompson, 100 Ga. App. 677, 686, 112 S.E.2d 273 (1959) (noting the State Board's discretion to award attorney's fees).

IT IS SO ORDERED, this the 26th day of November, 2018.

Concurring: Judge Benjamin J. Vinson and Judge Terry H. Chastain.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.

Frank R. McKay

Presiding Judge
Appellate Division

/gj