

# Injured Workers' Consultants

*Representing injured workers free of charge since 1969*

November 27, 2013

Susan Adams  
Tribunal Director  
WSIAT  
505 University Ave., 7<sup>th</sup> floor  
Toronto, Ontario,  
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## **Re: WSIAT Draft Practice Directions – Surveillance Evidence**

Dear Ms. Adams:

Thank you for seeking our input on the draft practice directions and for extending the time to respond. Our comments focus on Surveillance Evidence, an area of great concern to our community, which we have consulted in formulating our response. We will begin by outlining our concerns with surveillance in general and we will then comment on the practice direction, and provide some suggested revisions.

It is our position that the harm caused by surveillance and the threat of surveillance, and its anti-therapeutic effects in a social welfare scheme, outweighs any limited probative value it may have. Ideally, it would not be admissible at all. We recognize that this may not be possible, and so we have outlined our concerns and recommendations in the hopes that at the very least, its use and ill effects can be limited.

### **The problem with Surveillance Evidence: limited probative value, huge prejudicial effect, and deleterious impact**

For the reasons outlined below, we strongly urge the Tribunal to set a high bar for the admission of surveillance evidence. Surveillance evidence is generally of limited value, but causes substantial harm. Surveillance evidence should be considered only as a last resort and should not be routinely admissible when other avenues could have been used instead.

#### **1. Limited Probative Value, Vast Prejudicial Effect**

As your Tribunal has recognized in numerous decisions, surveillance evidence and in particular, video surveillance evidence, has limited probative value. The fact that a worker can engage in a discrete activity, such as lifting a child once, or raking leaves for twenty minutes, is not indicative of his or her general abilities or level of disability. Indeed, video surveillance can be misleading as it only captures a small snippet of a person's life. At the same time, the nature of video evidence is such that it can have a "dramatic impact on the viewer", as is recognized by the WSIB in OPM Policy No. 11-01-8.

For example, one of our colleagues had a case where a video recording of a worker was introduced as evidence which showed the worker working in his garage for what appeared to be a substantial amount of time over the course of one day. The video was started and stopped so that it did not show the substantial breaks in which the worker was not in his garage. During these breaks, which were not captured on the video, the worker was in his house lying down.

Surveillance recordings connote an ‘air of truth’ by virtue of the fact that they are recordings, and supposedly show reality, even though they are only showing select aspects of a person’s life for a small snippet of time.

## **2. Deleterious Impact on Workers and Their Families**

The negative effects of surveillance on workers and their families cannot be understated. Research has documented the ill effects that surveillance has on injured workers. The fear of being watched can cause many injured workers to avoid engaging in activities that have been recommended by their doctors, such as trying to get out for walks, which can impact physical health. The effects of surveillance on mental health can be even more significant. In her paper “Legal and social issues raised by the private policing of injured workers,” Professor Katherine Lippel quotes a psychologist who specializes in workers’ compensation claims:

Contrary to lay opinion, videotaped surveillance carries little probative value when it comes to injured workers and yet I am personally aware of at least half a dozen cases where injured workers fates have been adversely effected by videotape surveillance...Once the worker is aware of having been videotaped (often for weeks) they become withdrawn, agitated, and contrary to their best health, unwilling to undertake the normal duties of daily living, i.e. limited gardening, snow removal, shopping and the like (page 15-16).

We see the ill effects of surveillance on the injured workers we represent. Below is an excerpt from a worker who was subjected to surveillance, the product of which led the Board to stop all benefits. His benefits were eventually reactivated following a successful appeal to your Tribunal, but the effect of the surveillance was profound:

I got so depressed, and worry was consuming me day and night. I got so isolated and was scared to go our fearing that I was going to be watched and followed. When I used to go out I would be checking my back all the time to see if I was being followed.

I developed phobia, fear of dogs, and became claustrophobic. I became so sensitive to noise and avoided crowded areas, and stopped going to church for some time. I lost my self esteem and got isolated and got severely anxious and depressed. The video surveillance and the criminal charge have crippled my ability to function and till this day, I still suffer its consequences.

Please note not only the negative impact surveillance caused, but also the lasting effect of it, even if the Tribunal reversed the Board decision. The damage was done.

Surveillance also affects family members of workers, as spouses and children can also be caught on film, and can also experience the discomfort of being watched. Another worker represented by our office was asked by his neighbour why there was someone at the end of his driveway taking pictures of his house. This was humiliating for both the worker and his wife and adolescent children.

Professor Lippel also points out that even when the surveillance evidence is not admissible in legal proceedings, its existence can induce workers to drop or settle their claims, or quit their jobs (page 11).

### **Surveillance is a Weapon Wielded against Workers**

It is important to recognize that surveillance evidence is not something that is equally available to all parties. This is particularly important in the context we are discussing – the use of this adversarial weapon in front of a Tribunal that is supposed to operate on an inquisitorial basis, and with a mandate provided by remedial, social welfare legislation.

Surveillance is a tool used by the Board and employers against workers. Its use is almost always based on unfounded assumptions and about injured workers and is both founded upon and perpetuates their stigmatization as liars and cheats.

The draft practice direction says that “**3.2 Parties** are permitted to rely on surveillance evidence in Tribunal proceedings.” This statement, however, is not quite correct; only one party, the employer (or the WSIB, which can order surveillance of workers), can avail themselves of this extreme instrument of investigation. The worker certainly cannot do surveillance of the workplace (and neither can the Board).

Employers or the WSIB can order surveillance of an injured worker when they dispute the existence or the extent of injury. They can follow them outside of the home, avoiding privacy concerns.

By the same token, workers often dispute the suitability of the modified work offered, often when the job on paper differs significantly from what is expected in practice. Or, workers may want to show the nature of their job duties is linked to their disabilities. Workers cannot avail themselves of surveillance evidence of their workplaces because they are considered private premises. At the October 9, 2013 Lancaster House Workplace Safety Insurance Conference, we asked Michael B. Johnston, WSIB Executive director of Regulatory Services, whether he agreed that in effect workers and the WSIB were excluded from using surveillance of workplaces. He agreed and also said that a similar question was asked at the recent Ontario Bar Association where he spoke. He admitted to the power imbalance in this respect.

Can workers videotape the workplace or ask a co-worker to do so? This may jeopardize their current and future employment and is usually considered illegal by employer or may be subject to disciplinary action. The worker often needs this evidence once he or she is no longer working there, and even obtaining this becomes very difficult.

### **Quality Concerns: Caution needed in accepting surveillance evidence as fact**

We would also like to point out that the standards for investigators are virtually non-existent. This issue was examined an article titled “Hoodwinked! Unsavoury private eyes have been known to make up evidence for unsuspecting lawyers, often setting the cat among the pigeons in family law cases” which appeared in the October 2013 edition of *Canadian Lawyer*. The article reveals the fraudulent practices and unsavoury practices of some private investigators while noting that the “the private investigation industry is one of the most poorly regulated in Canada”. In Ontario, the body responsible for the regulation of private investigators is the Private Security and Investigative Services Branch of the Ministry of Community Safety and Correctional Services. The article reveals that this body has not revoked the licence of any private investigators in the past ten years. The article further notes that to get a licence, one simply needs to pass a simple test and have no Canadian criminal record.

Both the WSIB and employers rely on private investigators to produce surveillance evidence. For this reason, there should be no special rules for WSIB obtained surveillance, as the current draft practice direction would provide.

A recent experience in our office illustrates how WSIB-ordered surveillance can contain errors and should not just be taken at face value. Our co-worker’s account of the situation is captured below.

On July 26, 2013, I was caught on video surveillance, which was ordered by the WSIB, while accompanying an injured worker to a work transition meeting. The surveillance report contains at least two factual inaccuracies and/or incomplete reports of the events that transpired on that day.

Firstly, the investigator failed to observe the injured worker and I take a taxi from her residence to the meeting, despite the fact that according to the investigator’s report, he was parked outside the injured worker’s residence, ostensibly conducting surveillance on her during the time period that the taxi ride took place. How the investigator failed to see us speaking on the sidewalk outside her residence, watch the taxi pull up, and then enter into the taxi, is a mystery.

Secondly, the investigator’s report states that when the injured worker and I took a taxi back to her residence after the meeting, the injured worker exited the taxi alone, and the taxi continued on with me still inside. This is simply incorrect. In fact, both the injured worker and I exited the taxi together outside her residence, and the taxi departed with no passengers inside. The injured worker and I then conversed on the sidewalk for several minutes, and parted ways.

As our colleague points out, the fact that there were two inaccurate event descriptions on a single day of surveillance is troubling. While in this instance, the two inaccuracies were of minor importance to the injured worker's case, it still raises questions about the reliability of surveillance evidence, and the need to use caution in how this evidence is handled.

**Recommendations:**

- 1) The procedure for disclosing surveillance evidence should include a preliminary hearing before a Panel to determine its admissibility. That panel should be composed of different members than those who will hear the case on the merits.
- 2) The investigator responsible for surveillance evidence must be made available for questioning at the preliminary hearing.
- 3) With respect to 4.3 and 4.5, the investigator should always be required to attend the hearing. When surveillance videos are obtained by the Board, the investigator should still be required to attend, as the WSIB also relies on private investigators in a largely unregulated market.
- 4) Surveillance evidence should only be admissible if there is an accompanying affidavit sworn by the investigator. The affidavit must set out a record of all dates and times that surveillance was conducted. The full unedited videotape must also be provided to all parties.
- 5) The practice direction should explicitly recognize the peril of surveillance, including its low probative value and high prejudicial effect, as well as the harm it can cause to workers.
- 6) The practice direction should specify that surveillance evidence will not be admitted when other less intrusive means could have been used instead.

For instance, surveillance evidence should not be admissible when a medical examination could yield the same findings. It should not be relied upon, as the Act provides other “non-stigmatic” instruments to ascertain the level of disability of the injured worker. The Act provides several avenues to the WSIB and employers to get more medical information. The WSIB can be asked to conduct a worksite inspection. The WSIAT has investigative powers to allow the same. Surveillance evidence should only be considered as a last resort.

- 7) The practice direction should adopt the point found in OPM Policy Document No. 11-01-08: “Decision makers may request a health examination if a worker’s portrayal of a physical capabilities is inconsistent with health care reports in the claim file”.

- 8) In 2.1 it is stated that “surveillance involves discreetly observing a person or subject”. The word subject is unclear and should be defined. In its definition, “subject” must include the workplace as it relates to possible evidence the worker need to establish work-relatedness. Unless this clarification is made, the substantial hurdles already faced by the weaker party, the worker, will become insurmountable and the WSIAT will be seen to encourage only anti-worker surveillance.
- 9) The reference in 3.2 to ‘**Parties** are permitted to rely on surveillance evidence...’ needs to be clarified. Workers are perhaps the most important party to our remedial system of legislation, but are hardly in a position to hire private investigators or have access to evidence available in the workplace. The Tribunal must acknowledge the power imbalance that exists with respect to workers procuring this type of evidence.
- 10) In 5.1 “Weight of Surveillance Evidence”, the Practice Direction should add the cautionary note in board policy that states: “audio visual recordings make a dramatic impact on the viewer”.
- 11) Considering the power imbalance inherent in the ability to collect surveillance, the fact that an employer prohibits videotaping of photographing of a workplace should not be a bar to the admissibility of evidence that a worker has obtained.

Once again, we thank you for this opportunity to consult on your practice directions and we trust that you will find this feedback useful in your revisions.

We would like to acknowledge and thank all caseworkers and injured workers who have come forward with their stories and insights.

Sincerely,

Orlando Buonastella  
Injured Workers’ Consultants Community Legal Clinic