

Guidance Documents

Five Criteria to be Considered When Recommending Surveillance

1. Purpose

- Must be an allegation (unreported material change; false and misleading statements; misrepresentation of level of disability)
- Must be a clear evidentiary need that surveillance is the tool that is most suitable to be used to gather the required information (e.g. knowledge of return to work in and of itself will not be sufficient to support the allegation as we need to demonstrate that activities being performed exceeds their reported restrictions)
- No "fishing trips"

2. Demonstrable Evidentiary Need

- Properly conducted, surveillance demonstrates how the subject behaves naturally without changing their actions or hiding their intentions
- Must be strong likelihood surveillance evidence will prove/disprove allegation (e.g. worker claims to be totally disabled, to have no social life and is virtually housebound, however suspicion to the contrary has been objectively raised: the Case Manager consistently unable to reach worker at home, Facebook and social medial sites reflect an ongoing dynamic social life and/ or MTO indicates the worker has maintained their drivers license and while on benefits purchased a new vehicle.) Surveillance is appropriate if there is social activity / freedom of movement which we suspect may be occurring. Surveillance will inform benefit entitlement decisions by confirming or refuting this objectively raised suspicion.

3. Information Collected Will Achieve the Desired Purpose

- What activity do you and the Case Manager reasonably expect to see?
- Consider how the anticipated activity will inform benefit entitlement decisions
- Must be a strong likelihood surveillance evidence will have a demonstrable impact on benefit entitlement
- For example, if the worker is able to walk, drive and carry on normal daily living activities and that is all the activity we anticipate seeing with surveillance, then surveillance is **not to be considered**
- If however, evidence on file indicates the worker is totally disabled/homebound but the review indicates activities consistent with an ability to eg cooperate with RTW etc, then surveillance may be appropriate.

4. Loss of Privacy Proportional to Benefit Gained

- The surveillance must be for a lawful reason, and be conducted lawfully (images captured must always be in the public realm and the conduct of the private investigator must be above reproach and meet statutory provincial guidelines for private investigators). Section 8 of the Canadian Charter of Rights and Freedoms protects citizens from unlawful search and seizure.
- Invasion of privacy even within the law must be balanced against the potential benefit gained. In our circumstances, there must be a real potential to make a more informed and accurate benefit entitlement decision, to justify surveillance.

5. Less Privacy-Invasive Measures Considered/Taken First

- Compliance Specialists must first ensure that the Case Manager has considered all reasonable alternatives to surveillance
- Compliance Specialists will conduct social media searches, database searches and as appropriate avail themselves of existing MOU's with government agencies (e.g. MTO, CRA, Ministry of Government Services) in search of information as an alternative to surveillance (e.g. MTO may provide stand alone evidence of a return to work as a truck driver; CRA may provide through a T4 stand alone evidence of an unreported material change)
- These searches may also support surveillance being the most appropriate tool to be used to gather the required information

Surveillance Files - General

All requests for surveillance must be approved by the Director of the Compliance Branch. Policy and guidelines for the use of surveillance have been developed and are posted on the WSIB website.

As with Investigative Files, all Surveillance Files are opened as a result of a referral from Operations. Given the intrusive nature of covert surveillance, it is particularly important that a Compliance Specialist in each case ensures that all reasonable administrative options other than surveillance have been considered, and that it is reasonable to believe that surveillance evidence will assist a decision maker in the adjudication of a claim.

Support Analysts are responsible for the opening, maintaining, closing, vetting, copying and storing of surveillance files and the proceeds of surveillance. The Support Analyst assigned will be responsible for providing administrative support throughout the life of the file.

Surveillance Files are converted to Investigative Files in those cases where the proceeds of surveillance indicate that further investigation is required by the Investigations and Prosecutions Branch, with a view to enforcement. Surveillance files being considered for investigation are still subject to the normal intake process as described below.

Surveillance

Surveillance is used by the WSIB for the refutation or confirmation of an allegation to impact or inform an administrative decision or to inform a general or specific deterrent. Covert surveillance by its very nature is considered an invasive tool from a privacy perspective, requiring clear policy and strict guidelines. The WSIB has a duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act) and may use surveillance to gather evidence for this purpose. Policy and guidelines for the use of surveillance have been developed and are posted on the WSIB website (see OPM 22-01-09 Surveillance and OPM 11-01-08 Audio/Visual Recordings).

A Director in Regulatory Services must approve the use of surveillance in every case. Compliance Specialists will review and analyze all requests for the use of surveillance to determine the appropriateness and feasibility of conducting surveillance, to ensure all reasonable administrative options to surveillance have been considered and that the WSIB and those who conduct the surveillance adhere to all pertinent legislation and policy guidelines. The Manager of the Investigative Services Team must review and approve all recommendations for surveillance prior to them being considered by the Director. An auditable electronic "paper trail" is created in each case to document the request/review/recommendation/approval process.

Regulatory Services maintains a roster of private investigative firms who have been selected and contracted through an open, competitive procurement process to conduct its surveillance requests. Compliance Specialists manage, on a case by case basis, the use of external private investigative firms to ensure WSIB standards, guidelines and contractual obligations are met. This includes selecting the appropriate firm; negotiating terms; forwarding contracts/obligations to companies retained; managing surveillance operations on a daily basis; ensuring proceeds of surveillance are properly documented and are admissible in a court proceeding; and evaluating the performance of external surveillance firms in carrying out each assignment.

The WSIB only accepts recordings that are accompanied by a signed statement from the author setting out when (date and time) and where the recording was made, confirming that the recording was not altered, and that it is a true representation of its subject.

Proceeds of Surveillance

A Compliance Specialist in each case will review the proceeds of surveillance and assess its ability to inform an administrative decision and/or the need for a general or specific deterrent.

Surveillance evidence often has the ability to significantly impact benefit entitlement decisions yet not be worthy of a referral for investigation. In those cases where an investigation is not to be considered, the Compliance Specialists will direct the new evidence to the relevant Claim File and offer other assistance as required to the decision maker.

Surveillance evidence may also refute an allegation made against an injured worker. In all cases, the surveillance proceeds are referred to the Claim File.

In those cases where an investigation is warranted, the surveillance file will be converted to an investigative file and will enter the regular intake stream as described below. Where an investigation is warranted, the Compliance Specialist will ensure that the surveillance evidence does not become part of the accessible Claim File until the Senior Investigator has conducted an investigation to the point where disclosure will no longer compromise the integrity of the investigative process. At that point, the surveillance evidence is then referred to the Claim File.

WSIB RESTRICTED
Please check with your manager before sharing this document externally.

Title: Regulatory Services - Red Flags to Watch for

Abstract: This document, compiled by Regulatory Services, lists potential indicators of wrong-doing/fraud in a claim.
Tags: fraud; wrong-doing; cheat; deceit; offences; RSD; non-compliance; investigations
Last updated: 04/30/2013 10:36:12 AM **Contact:** [Steven Guan](#)
Author: [Steven Guan](#) **Feedback:** [Give us your feedback](#)

Below is an itemized list of Red Flags which staff should be mindful of as potential identifiers of fraud or non-compliance when dealing with workers, employers, health care providers and others. Certainly none of the Red Flags in isolation is a definitive indicator of wrongdoing, however, they can be utilized by WSIB staff as an assistive device for the early detection of non-compliance or fraud.

Table of Contents (click on the link in the Table of Contents to go to the specific topic)

<p>Workers Worker details Accident details Forms details Medical related details Benefits paid details General Worker's LMR details Worker offences</p>	<p>Employers Employer details Employer audit information Optional insurance details Employer offences</p>	<p>Providers Provider Details</p>	<p>General All Participants</p>
--	--	---	---

Workers

Worker details

- Personal Relationship with employer
- Personal Relationship with witness
- Cannot remember accident history/ Inconsistent/ Contradictory
- Delay in seeking medical attention
- Delay in reporting accident
- Delay in laying off work
- Missed appointments/medical/LMR/WSIB arranged
- Frequent change of address or phone number
- Address or phone number same as employer/witness/doctor
- Numerous Prior claims
- Prior Claims Same time of year
- SIN# information invalid or more than one
- Erratic employment history (changes job frequently)
- Motivational factors (hard to reach, uncooperative)
- Secondary Gain evident (anti-social behavior, over-reaction)
- Language barriers (rarely able to speak to worker directly)

- Canada Disability Pension/Employment Insurance Welfare/income not reported
- Worker lives out of province/relocated shortly after accident
- Accident occurs shortly after being hired
- Inconsistent or contrary identifiers (date of birth, names, SIN#'s)
- Change of Circumstance not reported
- Concurrent Employment
- Numerous recurrences
- History of incarceration
- History of lying, impersonating or forgery
- Did not or will not sign Form 6
- Has not returned Form 41's
- Noted recreational activities inconsistent with claimed disability

[Back to top](#)

Accident details

- Inconsistent/contradicting witness statements or employer statements
- No clear accident/disablement situation (could not have Occurred as described)
- Accident occurred off employer's premise or job site
- Possible serious and willful misconduct
- Questionable situation (intoxication, fight claim, third party)
- Occurred before seasonal shut down or work shortage lay-off
- Prior claims with previous conflicting accident histories
- Accident occurs on the weekend
- Accident occurs shortly after starting employment

[Back to top](#)

Forms details

- Forms 6 & 41 sent out and not returned
- Delay in returning forms
- Forms not completed/vague information
- Forms not signed
- Change of signature/handwriting
- Forms returned by someone else
- Form returned but not issued by decision maker

[Back to top](#)

Medical related details

- Frequent change of doctors/specialists
- Unreasonable distance traveled by worker to see GP.
- Lack of compatibility between diagnosis and accident history
- Lack of compatibility between treatment and diagnosis
- Lack of medical evidence/objective findings in reports
- Inconsistent symptoms reported
- Diagnosis of Chronic pain, functional overlay, overreaction anti-social behaviors
- Psychological problems
- Pre-existing medical problems (same area)
- Pre-existing medical problems (different areas)
- Worker's recovery is inconsistent with usual healing time

- Permanent impairment inconsistent with benefits paid or usual healing time
- Indication of drug dependency over prescribing worker upset when medication denied)
- Lack of compatibility between drugs and injury
- Secondary Entitlement inconsistent with accident history (Chronic pain, disability, fibromyalgia)
- Claiming numerous areas of injury (generalized pain)
- Doctor has refused to treat the worker
- First medical treatment from Chiropractor
- Worker refused medical treatment

[Back to top](#)

Benefits paid details

- Inconsistent earnings reported by worker and employer
- Inflated or deflated earnings
- Inconsistent documentation of earnings between T4 slips, Cheque stub, income tax returns
- Inconsistent info on Employment Insurance record and Employer's time cards, Revenue, tax , bank, cheques
- Overlapping benefits with prior claims on Canadian Disability Pension
- Debt created in prior claim

[Back to top](#)

General

- Anonymous phone calls/call records
- Suspicious Circumstances

[Back to top](#)

Worker's LMR details

- Missed appointments
- Multiple objectives/plans/opening and closures
- Inconsistent attendance of school/inability to provide marks
- Inconsistencies in prevalent non-work related issues (e.g. death of spouse or family member/marriage break-up)
- Erratic employment history
- Inconsistency between education, transferable skills and work history
- Lack of contact between the case manager and worker/no follow-ups
- Lack of cooperation from the employer regarding return to work process
- No contact with the employer
- Employer out of business
- Lifestyle inconsistent with alleged wages
- Worker returns to pre-accident job (or similar work) after extensive training
- Previous participation in LMR under prior claims
- No job description on file/occupation details

[Back to top](#)

Worker offences

- Worker making a false or misleading statement
- Worker wilfully fails to notified the WSIB of a material change within 10 days

[Back to top](#)

Employers

Employer details

- Employer demonstrates history of not filing Form 7 until asked
- High number of NLT claims vs Lost time
- High Healthcare costs in No Lost Time Claims
- High proportion of withdrawn or abandoned claims
- High incident of administrative charges for late reporting/non-reporting (s. 133)
- Incident of "inappropriate" modified work
- Employer refuses the reimbursement of advances for workers who cannot work
- Discrepancies in accident histories on Forms (Form 7 accident not as serious as Form 8)
- No Lost Time inconsistent with seriousness of injury sustained
- Gifts or incentives for worker to meeting safety targets
- Altering work schedules to avoid LT
- Insisting worker uses vacation time
- Worker not allowed to report to the accident
- Worker discouraged from going to doctor
- Related to worker,
- Related to an associated company
- Frequent change of Address/phone number
- Address is Post Box #
- Address associated; with previous companies that have closed their account with WSIB
- Employer went out of business (no forwarding address)
- Frequency of late filing charges
- Lack of signatures on the Form 7
- Employer is out of province
- Unable to reach anyone throughout the claim
- Uncooperative in returning worker back to work
- High number of claims registered for the company (QFRM)
- Number of claims inconsistent with assessable payroll
- Seasonal or casual industry
- High number of claims at end of season
- Company in Collections
- Disreputable Employer Representative

[Back to top](#)

Employer audit information

- Not registered with the Ministry of Consumer and Commercial Relations
- Not registered with the Canada Revenue Agency (CRA)
- Not reporting to the Ontario Ministry of Revenue for Sales Tax Remittances
- Not meeting other Licensing and Legislated responsibilities
- Utilization of an accounting firm
- Not obtaining contracts or generating revenues in the Company's or principal's name
- Not issuing invoices for work or business
- Inconsistent information on T4 slips/copies of contracts
- Unable to provide documentation for audit purposes

[Back to top](#)

Optional insurance details

Date optional insurance requested close to date of accident
Amount of optional insurance inconsistent with occupation and industry
Unable to provide proof of earnings/income
Inconsistent proof of income documentation (i.e. CRA information)
Worker continued to receive salary or some type of work while on benefits
Lengthy duration of benefits
Worker continues to operate the business
No proof that business was ever closed
Assessments not paid to date
Family members are receiving benefits under this firm #

[Back to top](#)

Employer offences

Employer making deductions from worker for WSIB coverage
Employer receives money for Health Care expenses
Employer does not comply with rules of accident associations
Employer or Employer Representative discloses Medical information
Employer fails to register in 10 days
Employer does not submit statement as required
Employer does not give access to payroll records
Employer does not allow access for inspection of premise
Employer does not give security for assessment for Temporary industry
Employer does not report accident in 3 days
Employer does not inform WSIB within 10 days of material change

[Back to top](#)

Providers

Provider details

Provider makes false or misleading statement to obtain payment
Billing excessive for type of service
Billing for services not rendered
Billing for higher level of service or better product than rendered to client
Doctor is uncooperative in giving information
Doctor has questionable relationship with pharmacy/physiotherapist/provider/specialist
Provider has questionable relationship with educational facility, training centre or apprenticeship

[Back to top](#)

General fraud

All participants

Makes false statement or representation relating to benefit entitlement

[Back to top](#)

Referral to Regulatory Services

Reason for Referral

Identification of possible non-compliance and/or possible wrongdoing/offences under the Workplace Safety and Insurance Act (WSIA) related to a worker's case, based upon:

- Identification of Red Flags (see Other Resources below)
- Review of case file
- Review of a video which did not originate within Regulatory Services
- Verbal or written information received from a stakeholder, or a member of the public, including an Anonymous Call Record

Who Can Refer

Service Delivery

- Eligibility Adjudicator
- Case Manager (Short Term)
- Case Manager (Long Term)
- Case Manager (Appeals/WSIAT Implementation)
- Managers and above

Occupational Disease & Specialized Services

- Adjudicator (Occupational Disease)
- Case Manager (Pre-1990)
- Case Manager (Serious Injury)
- Case Manager (Traumatic Mental Stress)
- Managers and above

Appeals Branch

- Appeals Resolution Officer

❖ These roles are identified as 'Referring Role' in the Referral Process below.

Role of Regulatory Services

- Provide compliance-related guidance and advice
- Determine appropriate compliance activity
- Obtain relevant information from various sources
- Arrange for and monitor surveillance
- Conduct an investigation and pursue charges when appropriate

Position Case for Referral

❖ Activity required by Referring Role

1. Discuss referral with manager

Referral to Regulatory Services

2. Review case in order to have an in-depth discussion with a Compliance Specialist about reason for referral, appropriate compliance activity, and impacts to benefit entitlement
3. Complete Referral Process (below)

Referral Process

#	Role	Activity
1	Referring Role	<ul style="list-style-type: none"> ▪ Ensure case meets reason for referral ▪ Ensure case is positioned for referral
2	Referring Role	<ul style="list-style-type: none"> ▪ Obtain name and phone number of designated Compliance Specialist from 'Compliance Specialist Sector Alignment' document (see Other Resources) ▪ Contact Compliance Specialist by telephone to discuss case and reason for referral
3	Compliance Specialist	<ul style="list-style-type: none"> ▪ Provide compliance-related guidance and advice to Referring Role ▪ Advise why referral will not be accepted, if applicable ▪ Outline next steps if referral will be considered
4	Compliance Specialist	<ul style="list-style-type: none"> ▪ Review case file to determine appropriate compliance activity ▪ Advise why referral will not be accepted, if applicable ▪ If compliance activity is/includes information request, review appropriate sources, including: <ul style="list-style-type: none"> ○ Canada Revenue Agency ○ Compliance partners ○ Internet including social media ○ Ministry of Government Services ○ Ministry of Transportation ▪ Advise Referring Role verbally or in writing of findings, if applicable ▪ Close referral if no other compliance activity will be undertaken
5	Referring Role	<ul style="list-style-type: none"> ▪ Document findings of Compliance Specialist in memo to file, if applicable ▪ File in SIB (Special Investigation Branch) section of case file ▪ Assess information and take action, as appropriate, if surveillance and/or investigation is not needed ▪ Note: If no other compliance activity, referral is complete
6	Compliance Specialist	<ul style="list-style-type: none"> ▪ Discuss next steps if surveillance and/or investigation will be recommended ▪ Send Surveillance Request, if applicable ▪ Request email from Referring Role to initiate referral ▪ Note: Compliance Specialist may complete Surveillance Request on behalf of Referring Role

Referral to Regulatory Services

#	Role	Activity
7	Referring Role	<ul style="list-style-type: none"> ▪ Send email to Compliance Specialist to initiate referral and copy manager ▪ Complete and return Surveillance Request, if required ▪ Flag case file jacket: 'File has been referred to RSD' ▪ Note: Surveillance Request document can only be obtained from a Compliance Specialist and is not on Connex or D2I
8	Compliance Specialist	<ul style="list-style-type: none"> ▪ Complete Surveillance Request, or review document completed by Referring Role ▪ Recommend and obtain approvals for surveillance and/or investigation ▪ Arrange for and monitor surveillance and/or investigation, as required
9	Compliance Specialist	<ul style="list-style-type: none"> ▪ Maintain contact with Referring Role during surveillance and/or investigation and: <ul style="list-style-type: none"> ○ Provide regular status updates ○ Request additional information as needed
10	Referring Role	<ul style="list-style-type: none"> ▪ Collaborate with Compliance Specialist and Regulatory Services during surveillance and/or investigation, if applicable ▪ Provide verbal statements to investigators, if required
11	Compliance Specialist	<ul style="list-style-type: none"> ▪ Review and validate video from surveillance ▪ Ensure Surveillance Report/Transcript and Certificate of Authentication are scanned to case file ▪ Ensure video is directed to records and advise Referring Role how to access ▪ Note: Results of surveillance may not be sent until investigation is completed
12	Referring Role	<ul style="list-style-type: none"> ▪ Review Surveillance Report/Transcript, and obtain and view video ▪ Consult with Manager about decisions/next steps ▪ If there is substantive evidence which will impact benefits, contact worker by phone and arrange for him/her to view video at a WSIB office ▪ View video with worker if applicable, and document worker's explanation in a memo to file ▪ Note: Manager may be present in meeting with worker
13	Referring Role	<ul style="list-style-type: none"> ▪ Make and implement decisions based on results of surveillance and worker's explanation, if applicable ▪ Communicate decision in writing to WPPs, if worker was contacted ▪ Communicate decision to Compliance Specialist verbally ▪ Update jacket to indicate surveillance video was reviewed ▪ Return video via interoffice mail to Central Registration and Document Management, Simcoe Place, 15th floor, for storage

Referral to Regulatory Services

Standard Forms and Letters

- Surveillance Request (Word template obtained from Regulatory Services)

Additional Information

1. Refer to Policies 11-01-08, Audio Visual Recordings and 22-01-09, Surveillance.
2. If Regulatory Services does not accept a referral, discuss next steps with Manager.
3. All documents and memos related to the referral are filed in the SIB section of the case file.
4. Surveillance will only be conducted if it may impact benefit entitlement decisions and all alternatives to surveillance have been considered. A Director in Regulatory Services approves the use of surveillance in all cases.
5. Surveillance and investigation may result in criminal charges and prosecution by Regulatory Services. Management of the case and case decisions remain with the Referring Role during this time.
6. Do not disclose to any WPPs that the case has been referred while it is still active with Regulatory Services, as it may compromise surveillance or an investigation.
7. Evidence from audio/visual recordings is considered in conjunction with all other evidence.
8. When a video and transcript are viewed by the Referring Role:
 - Video and transcript become part of case file regardless of whether the video proves or disproves the allegation
 - A copy of the video is provided to the worker if access is requested.

Timeframes

Referring Role

- Position case and contact Compliance Specialist as soon as possible after identifying reason for referral

Regulatory Services

- Timeframes to complete a referral are based upon several factors:
 - Type of compliance activity and priority of referral
 - Existing workloads
 - Availability of external providers; surveillance may begin in less than 24 hours
 - Activity of the worker; surveillance pertaining to level of disability can become protracted if worker is not very active

Referral to Regulatory Services

Other Resources

- Compliance Specialist Sector Alignment
- Regulatory Services - Red Flags to Watch for
- RSD Surveillance Requests
- Video Surveillance: A Tool for Operations

RSD Guidelines for Providing Information To Decision Makers.

Purpose: It is incumbent on Regulatory Services to report and provide to decision makers in operations in a timely fashion any new information which is obtained through the course of surveillance, analysis or investigation which may positively or negatively impact a worker's entitlement to benefits. While it is important to provide new information to decision makers at the earliest opportunity, guidelines must be followed to ensure that integrity of the RSD investigation is protected and privacy guidelines are met. The Compliance Branch plays a significant role in the transfer of new information to decision makers and staff should bear in mind the following practices and procedures.

Senior Investigator:

General: While it is the role of Senior Investigators to gather evidence to support or refute an allegation, they should bear in mind that on occasion they may obtain information (e.g. confirmation of employment) which if placed before a decision maker at an early opportunity, may substantially reduce the loss to the WSIB on a claim. The Senior Investigator should:

1. Consider the impact of any new information on a worker's entitlement to benefits.
2. If new evidence/information exists which is important to be placed before the decision maker as it might impact a worker's entitlement to benefits consider the earliest opportunity to release the information to the claim file bearing in mind the anticipated time required to complete the investigation and any need for the investigation to remain covert.
3. Communicate clearly to the Support Analyst those materials which can be released to claim.
4. Provide direction to the Support Analyst on any vetting which may be required (e.g. witness address and telephone number).
5. When surveillance has been conducted, coordinate through the Compliance Specialist the timing of the transfer of the proceeds of surveillance to the decision maker (as the investigator is not to provide copies of the proceeds of surveillance directly to the decision maker. In the past, copies of surveillance materials have been misplaced by operations and as a result, a more clearly defined process using the records area has been developed to reduce the risk of materials becoming lost.
6. Document the evidence which is being released to the decision maker in an interim report (or closure report) clearly noting any attachments which are being provided.

Compliance Specialist:

General: It is incumbent upon the Compliance Specialist to be cognoscente of opportunities at any stage in a worker's file to address non-compliance and reduce the financial impact to the WSIB of worker non-compliance/fraud. It is the Compliance Specialist's role to coordinate and facilitate the exchange of information/evidence to the decision maker, however, it is not incumbent upon them to perform the administrative tasks normally associated with the role of the Support Analyst.

Surveillance:

1. In accepting a referral for surveillance, ensure a sound case can be made that the anticipated proceeds of surveillance will impact (positively or negatively) a worker's entitlement to benefits.
2. Once surveillance is approved, monitor day by day the proceeds of surveillance and assess the activity as reported by the surveillance company for its potential to impact benefits. The Compliance Specialist will seek advice from the decision maker as required.
3. Ensure where possible that sufficient periods of surveillance are conducted to provide sufficient grounds for the decision maker to make an informed decision regarding the worker's entitlement to benefits.
4. The Compliance Specialist will review at the earliest opportunity the proceeds of surveillance for its potential to impact benefits using the assistance of the decision maker or SAST as required. If

it appears the proceeds of surveillance in and of itself are sufficient to impact benefits, the Compliance Specialist is to notify their manager. If the Compliance Manager believes that the proceeds of surveillance can be sent to the SIB portion of the worker's file without impacting the potential to successfully investigate/prosecute issues of non-compliance, the Compliance Manager will meet with one or more of the Investigative Managers to seek authorization to release the surveillance materials to the claim file. Should the Investigative Managers concur that surveillance materials can be sent to the claim without impacting an investigation, the usual practices and procedures for attaching surveillance materials to a claim will be followed (as detailed below).

5. The Compliance Specialist will facilitate the transfer of surveillance materials to the claim file and provide ongoing support to the decision maker as required.
6. The Compliance Specialist will inform the operating area (including the decision maker's manager) on any decision to refer the worker's claim for investigation by RSD. The Compliance Specialist will also educate the operating area as to the normal course of an RSD investigation/prosecution and provide ongoing assistance/education as required.

Surveillance Materials to Claim File:

1. General - In all cases where the worker was observed and especially when images have been obtained, the proceeds of surveillance will be directed to claim (at the appropriate time).
2. At any point where it has been determined that surveillance materials can be released to the worker's claim file, the Compliance Specialist is to assess its potential impact on the claim and provide such assistance as is required to the decision maker. This typically results in a face to face meeting in the Toronto and Hamilton Offices and at least a telephone call to the decision maker in Regional Offices. The Compliance Specialist will advise the decision maker as to the location of the surveillance materials (SIB portion of claim -tape housed in records) and will facilitate/provide equipment as needed to view the surveillance. The Compliance Specialist will also advise the decision maker on resources available to them to assist in the assessment of the surveillance (e.g. SAST, Medical Consultant). The Compliance Specialist is not to advise or direct a decision maker regarding a worker's entitlement to benefits.
3. The Compliance Specialist will educate the decision maker on the need to continue to adjudicate a worker's claim following normal policies, practices and procedures including those cases where further investigation by RSD is warranted. Should an investigation ensue, the Compliance Specialist is to educate the operating area as to the normal course of an RSD investigation/prosecution and provide ongoing assistance/education in this regard as required.
4. It is the role of the Support Analyst to place surveillance materials on a worker's claim file and as such, the Compliance Specialist will not provide surveillance materials directly to a decision maker. Approved practices and procedures regarding transfer and storage of video surveillance is to be followed including ensuring that the surveillance tape flow through records to the decision maker.

Support Analysts Role

1. SA makes a copy of the original surveillance DVD and report. A copy stays with the file and the original/master is stored in RSD's file room.
2. When the file is closed or we are able to send the surveillance to claim w/o impacting the investigation, the SA sends a copy of the DVD to Records Control, and scans the report to the claim file.
3. The original/master DVD and report remains in RSD.
4. When the Case Manager / Appeals wants to review the DVD, they make a request through Records Control.
5. We sometimes step outside of this process when there is an urgency for the CM to see the DVD i.e. we allow them to come up and watch our copy, or we lend them our copy to watch on our DVD player, but when this is done it should be documented well in the IF (i.e. Surveillance Tracking Sheet) so that we can ensure it is returned to us.

Ongoing Worker Investigation:

1. A Compliance Specialist should routinely review active worker investigation files for the existence of evidence and/or materials which might impact a worker's entitlement to benefits as investigators tend to focus on gathering evidence to support or refute an allegation and may miss an early opportunity to impact a worker's benefits.
2. Should a Compliance Specialist note that there is evidence on file which is likely sufficient to impact an entitlement decision, then they should discuss the opportunity with the Senior Investigator assigned to the file. The Compliance Specialist understands that the ultimate decision as to the timing of the release of information/documentation to the claim file rests with the Senior Investigator and his manager as the need to protect the integrity of the investigation usually supersedes the potential for cost savings.
3. Once the investigator identifies specific proceeds of the investigation which can be released to the claim file, then normal practices and procedures (including the need to document the materials being provided in the IF and the Interim Report) as detailed below need to be followed. The Compliance Specialist will provide ongoing assistance/support to the decision maker as required.
4. At the closure of a worker file which does not result in charges, the Senior Investigator should review the results of the investigation with the Compliance Specialist. It is important at the closure of a worker file (with or without charges) that any information/documentation (positive or negative) which is pertinent to entitlement considerations be sent to the claim. This process can be facilitated by the Compliance Specialist who will ensure the decision maker is aware of the materials and report and will also provide ongoing education/support to the decision maker as required.

Charges Laid:

1. In all cases where charges are laid against a worker, new information to claim memo needs to be prepared by the Senior Investigator and the proceeds of the investigation as they pertain to entitlement to benefits directed to the claims file. In many cases, materials will have to be vetted for privacy reasons (e.g. protect address and telephone number of a witness); the authority and responsibility for vetting materials rests with Investigations and Prosecutions Branch though a Support Analyst may perform the actual vetting. Should a Compliance Specialist or Support Analyst have any Privacy concerns with materials being directed to a claim file, they should seek direction from their manager the Investigations and Prosecutions Branch. Usual practices and procedures including the need to document the materials being provided in the IF and the new information to claim memo need to be followed.
2. The Compliance Specialist's role is that of coordination, not that of actually performing administrative tasks as required. The Compliance Specialist will ensure that the decision maker is advised of the new evidence/materials.
3. Once a worker file is closed, a Closure Report is to be prepared for the decision maker. The report will advise the decision maker of the results of court and will include any new information/materials which can be released which might impact benefit entitlement. The Senior Investigator should review any outstanding compliance issues with the Compliance Specialist. The Compliance Specialist will coordinate the distribution of the closure report, will speak with the decision maker about any outstanding compliance issues and will provide ongoing assistance to the decision maker as required.

Interim/Closure Reports:

1. At file closure or any time during an investigation where the proceeds of the investigation or surveillance are being directed to a claim file, new information to claim memo or closure report needs to be created by the Senior Investigator. It is important that in addition to communicating new information, the report also clearly identifies below the signature block, all attachments which are being included.

2. The distribution of the interim/closure report will be coordinated by the Compliance Specialist. This will eliminate any confusion the Senior Investigator (or Support Analyst) may have concerning carriage of the claim file (original Claims Adjudicator vs Appeals) and it will also ensure that the Compliance Specialist is in a position to provide ongoing education/support to decision maker.
3. The Support Analyst assigned to the file will provide the Senior Investigator with assistance as required (review, copy, scan, vet) to facilitate the transfer of the proceeds of the investigation to the claim file. In addition to attachments being noted on the Interim/Closure Report, all evidence and materials being sent to claim should be documented in the IF by either the Senior Investigator or the Support Analyst.

Support Analyst:

General: It is the Support Analysts role to undertake those administrative tasks as required to facilitate the transfer of the proceeds of the investigation to the claim file.

1. The Support Analyst will be responsible for the transfer of the proceeds of surveillance to the claim file. The direction to transfer the materials to claim should be coordinated through the Compliance Specialist as this ensures a "warm handoff" to the decision maker. Normal practices and procedures for sending evidence/materials to claim are to be followed but include:
 - Maintaining a master surveillance tape/CD in the designated RSD records area at all times
 - Preparing a copy of the surveillance video/CD for the claim, marking it accordingly and noting the tape identifier in the IF (e.g. Admin. Copy 1)
 - Scanning of the surveillance report and Certificate of Authenticity to the claim
 - Preparing Covering memos
 - Directing surveillance video/CD to claim via Records (never directly to the decision maker)
 - Documenting the scanning and video/CD creation and transfer to Records in the IF
2. The Support Analyst during any stage of an investigation will be responsible to assist the Senior Investigator with the administrative steps required to send the proceeds of an investigation to claim including:
 - Vetting (Privacy Concerns)
 - Printing
 - Copying
 - Scanning
 - Ensuring the materials being directed to claim are documented in the IF and in the closure/interim report
 - That the original materials which were directed to claim are maintained in the investigation accordion folder

GUIDLINES FOR ASSIGNING & MONITORING SURVEILLANCE

Assignment to Private Investigative Firm:

- The Compliance Specialist will select a Private Investigative Firm (PIF) from the WSIB's contracted roster of PIF's. Selection is based on factors that include; location, availability, specialized needs and prior performance.
- An Acceptance Letter is faxed to the selected PIF by the Compliance Specialist. The selected firm will sign and fax the PIF Acceptance Letter back to the Compliance Specialist, acknowledging receipt of the assignment and agreeing to adhere to the protocols, expectations and fee schedule within.

Monitoring:

- Prior to the surveillance assignment commencing, the Compliance Specialist will speak with the Private Investigator (PI) to ensure the assignment requirements are clearly understood.
- The Compliance Specialist monitors and directs the PI while they are out in the field. Daily contact is made with the PI to obtain status updates and provide further direction. These discussions are documented in the RSD file.
- The Compliance Specialist determines the duration of surveillance assignments on a day to day basis. Long periods of inactivity must always be reported to the Compliance Specialist.
- The Compliance Specialists must pre-approve the use of multiple PIs on an assignment.
- The Compliance Specialists advises the PI as to when they should conclude the assignment and submit the video evidence obtained.
- A Report Card is completed by the Compliance Specialist upon receipt and review of the surveillance evidence. The Report Card documents the quality of the services provided by the PIF, populating a score for that ranges from Unacceptable to Excellent. The Report Cards are used to assist in educating the PIFs regarding opportunities for improvement, with major concerns addressed by the Manager of the Compliance Branch whom has the discretion to remove the PIF from the roster.

Assignment Expectations:

- Two copies of the written report and four copies of the video are required by RSD.
- All Surveillance assignments pertain to covert video surveillance only and do not include contact with the subject, the taking of statements or conducting inquiries without direction by the Compliance Specialist.
- Should it be determined that the subject is performing activities exceeding the restrictions noted or that contradict what the subject claims they can or cannot do, video evidence should be conducted on at least 2 consecutive days and should include all physical activities observed.
- Should it be determined that the subject is working, surveillance evidence should confirm who the employer is/are, all work locations, days/hours of work and all physical activities involved.
- A still photo is required showing a close-up of the subject's face.
- All photos & videos should be dated and unedited.
- Comments in the report are to be supported by evidence/facts with no subjective or opinion based evidence.
- Video of the subject is not to be recorded when the subject has a reasonable expectation of privacy.
- Video should only be captured when the subject is in view or is reasonably expected to soon be within view.
- The capturing of third party images not associated with the subject's activity should be kept to a minimum and avoided where reasonably possible.
- Surveillance should be aborted if the subject becomes aware they are under surveillance, with contact made immediately with the Compliance Specialist who will determine next steps.

- PIs must not impersonate police, fire, clergy, public utility, government employees or any other person prohibited by law. They are not to create unnatural opportunities or entrap the subject. And their conduct at all times must be lawful, ethical and bear close scrutiny.
- Invoices must be specific and clearly detail all fees being billed. PIFs do not invoice the WSIB for costs related to the PIs attendance in court, they are paid fees similar to other non-professional court witnesses.

Assignment Protocol:

- The WSIB requires that all video submissions be authenticated. A covering letter signed by the PI must accompany the video evidence outlining; 1) date/time of when the recording was made, 2) type of equipment used and 3) confirmation that the video recording was not altered in any way and is a true representation of its subject.
- PIFs must be in compliance with the law which precludes the interception of verbal communication.
- All PI licences must be current and in good standing
- PIF's WSIB accounts, if applicable, must be current and in good standing.
- PIFs must comply with confidentiality and conflict of interest provisions according to their contract and the confidentiality and conflict of interest agreements with the WSIB. Immediate disclosure of any potential or actual conflict of interest must be reported verbally to the Manager of the Compliance Branch.
- Corrections or revisions in documentation must be agreed to by both parties and will be made in writing in a timely manner.
- PIs will obtain assignment clarification prior to conducting surveillance and daily through contact with the Compliance Specialist.
- Documentation relating to assignments (e.g. DVDs, photographs) are to be provided to the Compliance Specialist via registered mail or courier with receipts retained.
- All documentation is to be retained according to the laws of Canada for 7 years or for whatever time required to ensure that any proceeding requiring the information has taken place.
- Any changes to the contract, agreements, assignments must be agreed to in advance in writing by RSD.

Bob Thomas

From: Bob Thomas
Sent: Wednesday, June 08, 2011 4:45 PM
To: RSD-Specialists
Cc: Martin Ruthven; Mike Johnston
Subject: Grounds for Conducting Surveillance
Attachments: 02522323.jpg; 02716854.jpg; 02928245.jpg

Hi

Now that we are conducting more surveillance related to misrepresentation of level of disability where we don't have an actual allegation, e.g. call record, there have been lots of questions from Compliance Specialists around what constitutes sufficient grounds to warrant surveillance. While it may appear I am applying some sort of voodoo science in making my decisions, I actually have specific things I look for before I approve a request. In an effort to provide some clarity and guidance, I would like to provide the team through Martin with some documentation and training that will assist you in determining whether or not there exists sufficient grounds for you to recommend surveillance.

Where it Begins:

Pierre Trudeau has provided all Canadians with protection against unreasonable search and seizure. Section 8 of the Canadian Charter of Rights and Freedoms states everyone has the right to be secure against unreasonable search or seizure; you do not waive or forfeit this right just because you receive benefits from the "state". This section has been interpreted as including protecting personal information that can be obtained through surveillance thus all the fuss that gets raised every time the police try to set up surveillance cameras in public places.

I am going to firstly provide Martin with a selection of slides from a presentation I prepared to inform others of some of the general principles of our surveillance program. The first slide under the banner "Where it all starts - Red Flags" although not all inclusive, can almost act as a check list for surveillance requirements. You don't have to be able to check off each one of the red flags to recommend surveillance, but once you have a number of them showing up together on a claim, you are building reasonable grounds for conducting surveillance.

I am also providing a document prepared by the Office of the Privacy Commissioner called "Guidance on Covert Surveillance in the Private Sector" that while it does not apply directly to us being a government agency, I think it certainly helps to articulate concerns and the type of principles we should have in place. The other document I am providing is called "Covert Surveillance Guidelines for Federally Regulated Employers" by Scott T. Williams, Hicks Morley. It identifies four factors to be considered when determining whether surveillance is appropriate and if you remember nothing else, this is a good guide:

- First, the organization must have a strong basis to support the use of covert video surveillance, and not mere suspicion.
- Second, the surveillance must be clearly related to a legitimate business purpose, and there should be a strong likelihood that the surveillance will help achieve the purpose.
- Third, an organization should first weigh whether the loss of privacy is proportional to the benefit gained.
- Fourth, an organization should also first consider whether other less "privacy" invasive means of collecting the personal information would be more appropriate prior to engaging in covert surveillance.

Lastly, I will provide Martin with a copy of a fairly lengthy document that you can borrow called "Legal and social issues raised by the private policing of injured workers" by Katherine Lippel, Professor of Law. This document is quite specific to injured workers benefits "policed" by private insurers and compensation boards. Interesting read.

The end result of your review of these materials is that you should have a much better understanding of why we need sufficient grounds to conduct surveillance and what those sufficient grounds might look like. If you have any questions after going through the materials, please come and see me.

Bob Thomas, Director, Compliance Branch

☎ 416-344-4503 ☎ 416-344-4166

TTY / ATS : 1-800-387-0050

1-800-387-0750

www.wsib.on.ca

wsib
cspaat
ONTARIO

OPC Guidance Documents

Guidance on Covert Video Surveillance in the Private Sector

Introduction and scope

The Office of the Privacy Commissioner considers covert video surveillance to be an extremely privacy-invasive form of technology. The very nature of the medium entails the collection of a great deal of personal information that may be extraneous, or may lead to judgments about the subject that have nothing to do with the purpose for collecting the information in the first place. In the Office's view, covert video surveillance must be considered only in the most limited cases.

This guidance is based on the federal private sector privacy law *The Personal Information Protection and Electronic Documents Act (PIPEDA)*, and is intended to outline the privacy obligations and responsibilities of private sector organizations contemplating and engaging in covert video surveillance. We consider video surveillance to be covert when the individual is not made aware of being watched.

This document serves as a companion piece to the following guidelines for video surveillance issued by this office: *Guidelines for Overt Video Surveillance in the Private Sector* (prepared in collaboration with Alberta and British Columbia) and *Guidelines for surveillance of public places by police and law enforcement authorities*.

Please note that the following is guidance only. We consider each complaint brought before us on a case-by-case basis.

PIPEDA requirements governing covert video surveillance

PIPEDA governs the collection, use and disclosure of personal information in the course of a commercial activity and in the employment context of federally regulated employers¹. The capturing of images of identifiable individuals through covert video surveillance is considered to be a collection of personal information. Organizations that are contemplating the use of covert video surveillance should be aware of the criteria they must satisfy in order to collect, use and disclose video surveillance images in compliance with PIPEDA. These criteria are outlined below and address the purpose of the covert video surveillance, consent issues, and the limits placed on collecting personal information through covert video surveillance.

A common misconception is that organizations are released from their privacy obligations if covert video surveillance is conducted in a public place. In fact, under PIPEDA, any collection of personal information taking place in the course of a commercial activity or by an employer subject to PIPEDA, regardless of the location, must conform to the requirements described below.

A. Purpose

The starting point for an organization that is contemplating putting an individual under surveillance without their knowledge is to establish what purpose it aims to achieve. What is the reason for collecting the individual's personal information through covert video surveillance? Under PIPEDA, an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances (subsection 5(3)).

In deciding whether to use covert video surveillance as a means of collecting personal information, an organization should closely examine the particular circumstances of why, when and where it would collect personal information and what personal information would be collected. There are a number of considerations that factor into determining whether an organization is justified in undertaking covert video surveillance. Given the different contexts in which covert video surveillance may be used, the ways in which the factors apply and are analyzed vary depending on the circumstances.

Demonstrable, evidentiary need

In order for the organization's purpose to be considered appropriate under PIPEDA, there must be a demonstrable, evidentiary need for the collection. In other words, it would not be enough for the organization to be acting on a mere suspicion. The organization must have a strong basis to support the use of covert video surveillance as a means of collecting personal information.

Information collected by surveillance achieves the purpose

The personal information being collected by the organization must be clearly related to a legitimate business purpose and objective. There should also be a strong likelihood that collecting the personal information will help the organization achieve its stated objective. The organization should evaluate the degree to which the personal information being collected through covert video surveillance will be effective in achieving the stated purpose.

Loss of privacy proportional to benefit gained

Another factor to be considered is the balance between the individual's right to privacy and the organization's need to collect, use and disclose personal information. An organization should ask itself if the loss of privacy is proportional to the benefit gained. It may decide that covert video surveillance is the most appropriate method of collecting personal information because it offers the most benefits to the organization. However, these advantages must be weighed against any resulting encroachment on an individual's right to privacy in order for a reasonable person to consider the use of covert surveillance to be appropriate in the circumstances.

Less privacy-invasive measures taken first

Finally, any organization contemplating the use of covert video surveillance should consider other means of collecting the personal information given the inherent intrusiveness of covert video surveillance. The organization needs to examine whether a reasonable person would consider covert video surveillance to be the most appropriate method of collecting personal information under the circumstances, when compared to less privacy-invasive methods.

B. Consent

As a general rule, PIPEDA requires the individual's consent to the collection, use and disclosure of personal information (Principle 4.3). It is possible for covert video surveillance to take place with consent. For example, an individual can be considered to have implicitly consented to the collection of their personal information through video surveillance if that individual has initiated formal legal action against the organization and the organization is collecting the information for the purpose of defending itself against the legal action. It is important to note that implied consent does not authorize unlimited collection of an individual's personal information but limits collection to what is relevant to the merits of the case and the conduct of the defence.

In most cases, however, covert video surveillance takes place without consent. PIPEDA recognizes that there are limited and specific situations where consent is not required (paragraph

also be a documented record of every decision to undertake video surveillance as well as a record of its progress and outcome.

i. Policy on covert video surveillance

Organizations using covert video surveillance should implement a policy that:

- sets out privacy-specific criteria that must be met before covert video surveillance is undertaken;
- requires that the decision be documented, including rationale and purpose;
- requires that authorization for undertaking video surveillance be given at an appropriate level of the organization;
- limits the collection of personal information to that which is necessary to achieve the stated purpose;
- limits the use of the surveillance to its stated purpose;
- requires that the surveillance be stored in a secure manner;
- designates the persons in the organization authorized to view the surveillance;
- sets out procedures for dealing with third party information;
- sets out a retention period for the surveillance; and
- sets out procedures for the secure disposal of images.

ii. Documenting specific instances of video surveillance

There should be a detailed account of how the requirements of the organization's policy on video surveillance have been satisfied, including:

- a description of alternative measures undertaken and their result;
- a description of the kind of information collected through the surveillance;
- the duration of surveillance;
- names of individuals who viewed the surveillance;
- what the surveillance was used for;
- when and how images were disposed of; and
- a service agreement with any third party hired to conduct the surveillance, if applicable.

Best practices for using private investigation firms

Many organizations hire private investigation firms to conduct covert video surveillance on their behalf. It is the responsibility of both the hiring organization and the private investigation firm to ensure that all collection, use and disclosure of personal information is done in accordance with

7(1)(b)). In order to collect information through video surveillance without the consent of the individual, organizations must be reasonably satisfied that:

- collection with the knowledge and consent of the individual would compromise the availability or accuracy of the information; and
- the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.

The exception to the requirement for knowledge and consent could, in certain circumstances, provide for the collection of a third party's personal information.

In the employment context, an organization should have evidence that the relationship of trust has been broken before conducting covert video surveillance. Organizations cannot simply rely on mere suspicion but must in fact have evidentiary justification.

Regardless of whether or not consent is obtained, organizations must have a reasonable purpose for collecting the information.

C. Limiting collection

When collecting personal information, organizations must take care to limit both the type and amount of information to that which is necessary to fulfill the identified purposes (Principle 4.4). Organizations should be very specific about what kind of personal information they are looking to collect and they should limit the duration and scope of the surveillance to what would be reasonable to meet their purpose. Moreover, the collection must be conducted in a fair and lawful manner.

As well, organizations must limit the collection of images of parties who are not the subject of an investigation. There may be situations in which the collection of personal information of a third party² via covert video surveillance could be considered acceptable provided the organization has reason to believe that the collection of information about the third party is relevant to the purpose for the collection of information about the subject. However, in determining what is reasonable, the organization must distinguish between persons who it believes are relevant to the purposes of the surveillance of the subject and persons who are merely found in the company of the subject. In our view, PIPEDA does not allow for the collection of the personal information of the latter group without their knowledge or consent.

Organizations can avoid capturing individuals who are not linked to the purpose of the investigation by being more selective during video surveillance. If such personal information is captured, it should be deleted or depersonalized as soon as is practicable. This refers not only to images of the individuals themselves, but also to any information that could serve to identify them, such as street numbers and licence plates. We advocate the use of blurring technology when required. Though we acknowledge its cost to organizations, we view the expenditure as necessary given that, pursuant to PIPEDA, the personal information of any individual can only be collected, used and disclosed without consent in very limited and specific situations.

The need to document

Proper documentation by organizations is essential to ensuring that privacy obligations are respected and to protect the organization in the event of a privacy complaint. Organizations should have in place a general policy that guides them in the decision-making process and in carrying out covert video surveillance in the most privacy-sensitive way possible. There should

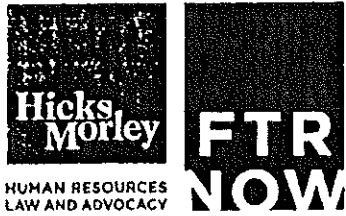
privacy legislation. We strongly encourage the parties to enter into a service agreement that incorporates the following:

- confirmation that the private investigation firm constitutes an "investigative body" as described in PIPEDA "Regulations Specifying Investigative Bodies";
- an acknowledgement by the hiring organization that it has authority under PIPEDA to collect from and disclose to the private investigation firm the personal information of the individual under investigation;
- a clear description of the purpose of the surveillance and the type of personal information the hiring organization is requesting;
- the requirement that the collection of personal information be limited to the purpose of the surveillance;
- the requirement that the collection of third party information be avoided unless the collection of information about the third party is relevant to the purpose for collecting information about the subject;
- a statement that any unnecessary personal information of third parties collected during the surveillance should not be used or disclosed and that it should be deleted or depersonalized as soon as is practicable;
- confirmation by the private investigation firm that it will collect personal information in a manner consistent with all applicable legislation, including PIPEDA;
- confirmation that the private investigation firm provides adequate training to its investigators on the obligation to protect individuals' privacy rights and the appropriate use of the technical equipment used in surveillance;
- the requirement that the personal information collected through surveillance is appropriately safeguarded by both the hiring organization and the private investigation firm;
- the requirement that all instructions from the hiring company be documented;
- a provision prohibiting the use of a subcontractor unless previously agreed to in writing, and unless the subcontractor agrees to all service agreement requirements;
- a designated retention period and secure destruction instructions for the personal information;
- a provision allowing the hiring company to conduct an audit.

¹ For information on whether your organization is subject to PIPEDA, please see "A Guide for Business and Organizations" online at http://www.priv.gc.ca/information/guide_e.cfm

² By "third party", we mean the person who is not the subject of surveillance.

May 2009



JULY 29, 2009
BY: SCOTT T. WILLIAMS

COVERT SURVEILLANCE GUIDELINES FOR FEDERALLY REGULATED EMPLOYERS

On May 27, 2009 the Office of the Privacy Commissioner of Canada issued an *OPC Guideline Document: "Guidance on Covert Video Surveillance in the Private Sector"*. The Guideline Document outlines the Commissioner's recommendations to private sector organizations engaging in covert surveillance in the course of commercial activity, as well as to federally regulated employers engaging in covert surveillance with respect to their employees. These activities are governed by the *Personal Information Protection and Electronic Documents Act ("PIPEDA")*, which the Commissioner is responsible for enforcing.

The Commissioner applies a fairly stringent test in order to justify the undertaking of covert surveillance, and identifies four factors to be considered when determining whether it is appropriate:

- First, the organization must have a strong basis to support the use of covert video surveillance, and not a mere suspicion.
- Second, the surveillance must be clearly related to a legitimate business purpose, and there should be a strong likelihood that the surveillance will help achieve the purpose.
- Third, an organization should first weigh whether the loss of privacy is proportional to the benefit gained.
- Fourth, an organization should also first consider whether other less "privacy" invasive means of collecting the personal information would be more appropriate prior to engaging in covert surveillance.

The Guideline Document notes that consent is normally required when engaging in covert surveillance. According to the Commissioner, consent may be implied in certain cases, such as when an individual has initiated legal action and such surveillance is necessary to defend the action. The



Guideline Document further notes that, in many cases, covert surveillance will be conducted without consent and that, in such cases, the organization must justify the surveillance under one or more of the statutory exceptions to *PIPEDA*'s consent requirement.

The Guideline Document also provides recommendations on documenting covert surveillance and developing a covert surveillance policy, and also provides recommended steps when engaging private investigation companies to engage in covert surveillance.

Federally regulated employers, such as banks and inter-provincial transportation companies, as well as provincial companies which engage in covert surveillance in relation to their commercial activities are advised to review the Guideline Document, which can be found on the Commissioner's website at:

http://www.priv.gc.ca/information/pub/gd_cvs_20090527_e.cfm

While the guidelines are not legally binding, they provide some insight into how the Commissioner may adjudicate in cases involving covert surveillance.

For more information, please feel free to contact any member of the firm's Information and Privacy Group.

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Store LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Store LLP.

Hicks Morley Hamilton Stewart Store LLP
www.hicksmorley.com

TORONTO
Toronto Dominion Tower
66 Wellington St. W.
30th Floor, Box 371
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Télé: 613.234.0418

Legal and social issues raised by the private
policing of injured workers

Katherine Lippel

Professor of Law
Faculté de science politique et de droit
L'Université du Québec à Montréal

January 24th 2003

Legal and social issues raised by the private policing of injured workers¹

Introduction

In a survey study that appeared in 2001², researchers in Ontario learned that 56% of injured workers with litigious claims and 29% of all injured workers surveyed felt they were being punished because of their work injury. This sentiment is echoed in interviews and studies by health care professionals in other Canadian jurisdictions. Yet injured workers who receive workers' compensation benefits have no less the right to benefits than do tort law plaintiffs who have the right to seek redress from the wrongdoer. Injured workers in all Canadian jurisdictions are precluded from suing the employer and colleagues even in those cases where injury is clearly attributable to employer negligence³. The only recourse available to these workers is that provided by workers' compensation legislation. It is thus sad to acknowledge that the program designed to improve worker and employer relations by removing litigation from the courts has served to make workers feel punished.

In interviews with injured workers we were often told that they feel they are treated like criminals, that they felt like "bandits". One of the reasons given for this relates to the activity of private detective agencies hired to covertly surveille the worker. Stigmatisation

¹ Thanks to Beatrice Sassoli for her research assistance and to the Social Science and Humanities Research Council of Canada for its financial support. Thanks particularly to l'Union des travailleurs et travailleuses accidentés de Montréal (UTTAM), l'Association des travailleurs et travailleuses accidentés du Québec, (ATTAQ), the Office of the Worker Advisor, various lawyers and legal clinics in Quebec and Ontario and to the injured workers and their care givers who accepted to share information with us. Thanks also to the Law Commission of Canada, Dennis Cooley and Kelly Mahoney for sharing research results that were helpful in the development of this paper

² The injured workers' participatory research project, Making the System Better, Toronto, 2001, p. 10

³ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345. In several provinces this prohibition extends to suits brought against all employers covered by the Act. See *Kovach v. British Columbia (W.C.B.)* [2000] 1 S.C.R. 55; *Lindsay v. Saskatchewan (W.C.B.)* [2000] 1 S.C.R. 59.

of injured workers is often the result of derogatory comments about them in the media and by politicians. The stereotypic image applied to all welfare recipients, that associated with welfare fraud, is often stretched to include injured workers receiving compensation benefits, so that pejorative comments from co-workers and the media contribute to the already negative self image of disabled workers who have lost much of their self esteem because of their injury.

Stigmatisation of beneficiaries of these programmes is not good for their health⁴, and even from an economic perspective one would think that strategies that were conducive to negative self-image of workers would also increase costs of compensation paid to workers because resulting disability would also lead to compensation. As we shall see, this is not necessarily the case, even in those cases where the compensation board (or the employer) is found to have abused their right to evaluate (or contest) the legitimacy of a claim.

This study examines the nature and extent of private surveillance of injured workers in several provinces, both in order to describe the phenomenon and to circumscribe legal issues it raises. In particular, we are interested in determining whether the legal framework generally governing these issues is applied in the same way when the subject of surveillance is an injured worker rather than an insurance claimant. Previous research⁵ has led us to hypothesise that historical victim blaming and stigmatisation of

⁴ G. Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", (1996) 22 *The Canadian Practitioner* 5; D. Mendelson, «The Expert Deposes but the Court Disposes: the Concept of Malingering and the Function of Medical Expertise», (1995) 18:4 *International Journal of Law and Psychiatry* 425; T.J. Ison, "The Therapeutic Significance of Compensation Structures», (1986) 64 *Canadian Bar Review* 605; W. Wilkinson, «Therapeutic Jurisprudence and Workers' Compensation», (1994) 30 *Arizona Attorney* 28; J. Reid, C. Ewan and E. Lowy, «Pilgrimage of Pain: The Illness Experiences of Women with Repetition Strain Injury and the Search for Credibility», (1991) 32:5 *Soc. Sci. Med* 601.

⁵ K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 *International Journal of Law and Psychiatry* 521.

injured workers, in the context of mass adjudication⁶ by state agencies, may lead to a looser application of fundamental rights and freedoms legislation when injured workers claiming compensation are the subject of the surveillance.

Methodology for the study included traditional legal analysis as well as focus group interviews of lawyers, union and community group members who represent injured workers before the administrative tribunals, and individual interviews with workers and health care professionals. The paper is part of a broader study on the therapeutic and anti-therapeutic consequences of workers' compensation legislation in Canada.

The first part of this paper describes the role played by private surveillance services hired to follow and sometimes videotape workers' compensation claimants without their knowledge; the second part examines some of the legal issues raised by these practices. Although examples are drawn from various Canadian provinces, the legal analysis focuses more particularly on Ontario and Quebec.

Part 1: Use of private policing of injured workers

1.1 Why police injured workers?

Workers are followed in order to obtain evidence allowing the client of the surveillance firm, the employer or the workers' compensation board, to contest or deny compensation benefits. Sometimes the activity is designed to obtain evidence for use in administrative tribunal or arbitration hearings; at other times it is simply used as a bargaining tool in order to encourage a worker to accept a settlement or to drop his claim.

⁶ For an interesting discussion of issues specific to mass adjudication systems in a Canadian context see J.M. Evans, "Problems in Mass Adjudication: The Courts' Contribution", (1990) XL: 3 U of T. Law Journal, 606; P. Issalys, "Le droit administratif et la décision collective", (1990) XL: 3 U of T. Law Journal, 611, and J.D.A. Vaillant, "Problèmes que posent les décisions collectives", (1990) XL: 3 U of T. Law Journal, 621-629.

Analysis of case law shows that most instances in which video-surveillance reports are put into evidence involve one of two issues. In the occasional case, workers are suspected of working while receiving benefits for total disability, or while receiving other forms of benefits that would not be payable if they were known to be working. These cases more closely resemble what could be described as quasi-criminal activity, where the worker is receiving benefits in circumstances tantamount to fraud, and they are relatively rare⁷.

In the majority of cases we found, the video-surveillance aimed to show that the worker's physical or psychiatric condition was less serious than he or she had lead the Board or the employer to believe. The party seeking to deny benefits or to sanction the worker hoped to show by video-surveillance evidence that the worker could drive a car, lift her child, remove groceries from a car, wait for a bus while standing, bend his elbow or walk without a limp. In one case, the purpose of the surveillance was simply to demonstrate that a severely injured worker who was also compensated for profound depression had, at least on one occasion, left the security of her home and that she was not seen on the videotape to be cowering or crying.

The official reasons to employ private surveillance firms to follow injured workers are thus to detect individual cases of dishonesty, either flagrant violation of the law or exaggeration of degree of disability .

Aside from the overt rationale for following injured workers, it is clear, at least in some jurisdictions, that workers' compensation boards see private surveillance to be a good

⁷ See, for one of the rare examples in the case law, *Lapointe v. C.A.L.P.*, [1995] C.A.L.P. 1319, (C.A.Q.). This case describes clearly fraudulent behaviour but is often used as a precedent in cases where the dishonesty of the worker is far from established.

management practice to incite all workers to behave. As a recent judgement of the Quebec superior court put it:

«Covert shadowing and surveillance, or their spectre, particularly when practised without warning, constitute a pragmatic method to promote respect for the law.⁸»

The C.S.S.T., the workers' compensation board in Quebec, seems to see covert surveillance as an incentive to all workers to keep out of trouble. In its official magazine it concludes an article on covert surveillance on its behalf in these terms:

"The lesson to be learned? Honesty is the best way to avoid becoming the "star" of a video for which, in any case, there is no chance of winning an Oscar...⁹"

There is some feeling that compensation boards or employers don't want their workers to be too comfortable while they are receiving workers' compensation benefits. To make the experience unpleasant is to contribute to the reduction in future claims. It is less clear that those workers who abstain from claiming because of such tactics are in any way unworthy claimants. Good evidence exists both in Canada¹⁰ and in the U.S.¹¹ that many workers do not claim benefits when they have a legitimate right to do so.

This is not a new phenomenon. In 1994 the Ontario Medical Association was preoccupied with pressures placed on physicians both by workers and their employers:

⁸ Our translation. The original quote is «La filature et la surveillance, ou leur spectre, surtout si elles sont pratiquées à l'improviste, constituent un moyen pragmatique d'inciter au respect de la loi». *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

⁹ Our translation. The original quote is "Leçon à tirer? L'honnêteté est le meilleur moyen de ne pas devenir la "vedette" d'une vidéo pour laquelle, de toute façon, il n'y a aucune chance de remporter un Oscar..." J. Quirion, "Être filmé à son insu dans une «drôle» de vidéo", [1997] *Prévention au Travail* at 32.

¹⁰ H. Shannon and G. Lowe, "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?", [2002] *42 American Journal of Industrial Medicine* 467.

¹¹ See for instance L. Davis, H. Wellman H. L. Punnett, "Surveillance of work-related carpal tunnel syndrome in Massachusetts 1992-1997: A report from the Massachusetts sentinel event notification system for occupational risks (SENSOR)", [2001] *39 Am J Ind Med* 58; T. Morse, C. Dillon, N. Warren, "Reporting of Work-related Musculoskeletal Disorder (MSD) to Workers' Compensation", [2000] *10(3) New Solutions*:281-29.

"Physicians are often placed in a difficult position in terms of reporting workplace injuries. It is not uncommon for a physician to be pressured, by workers and employers, to refrain from reporting WCB-compensable workplace injuries.

At present, physicians cannot report to the Board without the consent of the patient because of the legal obligation of confidentiality imposed on the physician.

On the other hand, if a physician is of the opinion that a patient who presents has suffered a WCB-compensable workplace injury and the physician knowingly bills the Ontario health Insurance Plan ("OHIP") instead of the Workers' Compensation Board for the treatment, then the physician may be in violation of the *Health Insurance Act.* " (sic)¹².

The threat of severe policing of injured workers has undoubtedly a dampening effect on some potential claimants. When injured workers abstain from claiming workers' compensation benefits, costs are transferred from employers, who fund the workers' compensation boards, either to private insurers, when salary insurance is available or directly to the worker and his or her family. Medical costs, and economic support, if the worker is eligible for employment insurance or welfare, are transferred to the public purse.

1.2 Who polices injured workers?

In many of the cases in which private surveillance personnel gathered videotape evidence of an injured worker's activities, the mandate to gather the information was given by the employer, often for the purpose of building a case against the worker who the employer wished to discipline. Most case law regarding these situations was developed in the context of arbitration hearings, although there are some decisions by specialised compensation tribunals that address the issues surrounding evidence gathered by private surveillance firms at the behest of employers.

¹² Ontario Medical Association Submission to the Standing Committee on Resources Development Regarding Bill 165 *An Act to Amend the Workers' Compensation Act and the Occupational Health and Safety Act*, September 8, 1994, p. 4.

In some provinces video-surveillance is initiated primarily by the employer or the employer's lawyer, who are wary of the legitimacy of the worker's claim, or who question the degree of disability described by the worker. For instance, in Ontario, although policy allows the WSIB (the Workers' Safety and Insurance Board, the workers' compensation board of Ontario) to use video-surveillance if the director of the Special Investigations Branch (SIB) authorises it in a specific case¹³, in practice, until recently few cases of video-surveillance were ascribed to the board, either by representatives we interviewed or in the case law.

Compensation boards in Quebec and British Columbia¹⁴ do have regular recourse to private detective agencies mandated to spy on day to day activities of injured workers.

Specific legal issues will be raised when these public agencies mandate private surveillance agencies to follow and clandestinely videotape injured workers. From information available, those boards that did use evidence before the courts that had been obtained through covert surveillance usually relied on outside agents rather than their own staff.

In Quebec there are a significant number of such mandates delivered every year. After peaking at 1683 cases in 1998, the number of cases in which the C.S.S.T. ordered video-surveillance of a worker dropped to 813 in 2000 and then rose by 13% to 920 in 2001. During the four year period between 1998 and 2001, the average number of cases of surveillance ordered by the C.S.S.T. was 1141. On average 646/1141 or 56% were contracted out to private firms¹⁵. At least in Quebec, it is possible that both the employer and the C.S.S.T. have each contract with a different private investigator to watch the

¹³ WSIB policy on Surveillance, Offences and Penalties, document number 11-02-06, September 1st 1997.

¹⁴ Information obtained during interviews with workers, their representatives and health care professionals. See also Quebec case law in this article.

same worker¹⁶. No figures are available as to the number of contracts given to private firms by employers, but a Quebec lawyer specialized in representing injured workers told us that videotape evidence was sufficiently frequent to justify the purchase of a videotape player for the law firm.

Although the general motivation in hiring an investigator is always to check up on the worker's behaviour, at least two sets of circumstances lead to the decision to target a specific worker. In some cases, the workers' compensation board has received specific, sometimes anonymous, tips regarding fraudulent behaviour on the part of the worker¹⁷. Some compensation boards even have web-sites inviting anonymous denunciations, a type of snitch line analogous to Crime Stoppers or other public services designed to catch criminals¹⁸. Private contractors are thus hired by the board to follow up on an anonymous tip.

The Board may also target a worker for other reasons. Among the reasons stated in the case law are difficulties in contacting the worker by phone, lack of co-operation in rehabilitation and return to work attempts¹⁹. Information provided in interviews with injured workers and their representatives added or perhaps qualified this list. If relations with the compensation board were conflict ridden, surveillance was more likely to ensue. Workers told us they felt that surveillance in specific cases was sometimes used as

¹⁴ Information compiled by an injured workers' defence group, l'ATTAQ, from information provided by the C.S.S.T. to the official opposition of the Quebec National Assembly.

¹⁶ See for instance *Cournoyer v. Cie Martin-Brower Du Canada*, C.L.P. 159969-63-0105, 25th of February 2002. Interviews allowed us to identify other cases in which the worker was followed by agents of both the CSST and the employer.

¹⁷ See for instance Decision No. 2021-01, W.S.I.A.T., January 29th 2002 (Ontario); *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.*, C.L.P. 109869-72-9902, March 5th 2001 (Quebec).

¹⁸ Such a line was set up by the Workers' Safety and Insurance Board in Ontario see <http://www.wsib.on.ca/wsib/ysibsite.nsf/public/EmployersFraudNoncomplianceZeroTolerance>, consulted January 23rd 2003. For British Columbia: http://www.worksafebc.com/report_fraud/default.aspx consulted January 23rd 2003. No such invitation is available at the C.S.S.T. website.

¹⁹ See for instance *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023. (C.S.Q.)

punishment or revenge for having stood up to the claims agent. In many cases discussed, surveillance commenced after the worker had complained about the attitude of the caseworker or the tardiness of his cheque or after an argument with compensation board personnel.

Advocates also cited examples in which surveillance was initiated by the Board because the claim was a particularly costly one given the gravity of the injury. It was understood that videotape evidence could be an investment to reduce the eventual cost of the claim. Two of the cases studied illustrated this point, in the sense that the workers subject to surveillance were without question severely disabled because of a work accident. In one case, a worker had been electrocuted and had suffered severe burns to his body and severe sensory difficulties as well as documented severe depression.

In another, the compensation board itself had recognised over 68% permanent disability and had undertaken surveillance of a profoundly depressed worker who had suffered an acute injury which severely limited the use of his left hand. He had told his case worker he couldn't move it at all. Surveillance evidence where he is seen to be moving his hand was obtained and used to convict him under penal provisions of the workers' compensation Act. The C.S.S.T. then tried to use this evidence as proof that he was capable of working, despite a vast amount of medical evidence to the contrary. The worker was in constant severe pain for which morphine was regularly prescribed. The C.S.S.T. contended he could work as a security guard, but the C.L.P. in spite of video evidence that he could move his arm, and in light of the medical evidence (which the penal court had refused to consider) concluded that the worker was totally disabled because of his injury²⁰.

²⁰ *Champagne v. Arcadian inc. & C.S.S.T.*, C.L.P. 113018-71-9903, November 23rd, 2000, Margaret Cuddihy.

Literature and case law describing use of covert surveillance on behalf of private insurance companies shows that targeted claimants have usually been receiving benefits for a long time and are often claiming for long-term permanent disability for disease that is difficult to document on the basis of objective medical tests²¹. In contrast, in the cases we studied involving injured workers it was not infrequent to find examples of surveillance instituted very rapidly after the initial claim, because an individual's back injury had taken more than eight weeks to heal or because they had refused temporary reassignment to light duties²².

1.3 How are injured workers policed?

As we shall see in the second part of this paper, fairly clear legal constraints are designed to limit covert surveillance, or at least to limit the admissibility of evidence gathered in defiance of predetermined rules. In this section we will simply describe some of the situations we have been made aware of either through case law or through literature analysis and interviews. As we shall see, while some surveillance practices are respectful of the limitations imposed by the courts in the application of privacy law, others are manifestly beyond the pale. It must be understood that although surveillance tapes obtained in violation of the right to privacy may be held to be inadmissible, the exclusion of evidence does not undo the damage caused to the worker because of the violation of his or her privacy. Videotapes are also used on occasion to «encourage» the worker to settle or drop his compensation claim (or quit his job). Many of these tapes will never be seen by a court, their legitimacy never subjected to quasi-judicial scrutiny, but

²¹ M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 206. See for instance *Chaplin v. Sun Life Assurance Co. of Canada*, [2001] 27 C.C.L.I., (3d), 70 (B.C.S.C.); *Lalonde v. London Life Insurance Co.*, [2001] 33 C.C.L.I. (3d) 108; *Bouliane v. SSQ(service santé du Québec) Mutuelle d'Assurance-Groupe*, [1997] R.R.A. 368 (S.C.Q.); *Charpentier v. Compagnie d'Assurance Standard Life*, [1998] R.R.A. 448 (S.C.Q.) and [2001] R.R.A. 573(C.A.Q.); *Bastien v. Crown Compagnie d'Assurance Vie*, [1998] R.R.A. 1043; *Bolduc v. S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207.

²² *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001). Montreal, 500-05-064211-012, D.T.E. 2001 T-1023. (C.S.Q.).

in all provinces where we had interview data we were told they were an efficient tool used as a threat to obtain a certain behaviour from the worker.

1.3.1 Legal surveillance

The legal strategies are the ones that are more likely to be the object of judicial or quasi-judicial decisions. Following a worker from the outside of his or her home to other public places, on several days at varying times, without editing the tape, is seen by most courts as potentially legitimate, if the reasons for undertaking the surveillance are appropriate. Filming the claimant in his back yard or on his front steps is not uncommon, and is sometimes held to be legal, sometimes not²³. Filming the worker picking up his or her children at school, by car or on foot, waiting for a bus, riding a motorcycle or actively working are some of the activities discussed in the case law.

Even when surveillance strategies seem legal, the enthusiasm with which private surveillance firms undertake their mission is sometimes troubling. During the course of our interviews with worker representatives we were provided with copies of three reports by a private surveillance firm, reports submitted to the detective's client, the workers' compensation board. The reports cover a two month period. In the first report the detective praises the board for choosing to target the particular worker, as

"[the worker's family name] have a very large family out there and they are always into something like this. I can almost guarantee you are correct in questioning this claim".

Over several weeks the detective fails to identify any untoward activity on the part of the worker, and he becomes increasingly frustrated at his failure to find anything suspect.

"There is more movement from people coming and going than there is for him (sic)...I do not seem to be having a great deal of success with this matter. So far I have spent about 16 of the hours

²³ Compare *Cournoyer v. Cie Martin-Brower Du Canada*, C.L.P. 159969-63-0105, 25th of February 2002 with *Boklic v. S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207.

you approved watching this guy's place and all I have on him is a couple of trips to the local corner store and one trip to [the local village].

Nevertheless the detective suggests surveillance be continued:

"...I notice that he heats with wood so he will also have to start looking for the winter's supply of firewood very soon. I am in the area a lot anyway so I will keep an eye (overall) on his place at no charge to you. If he is there or if he is doing something then I will start the clock on your time and stay on him."

1.3.2 Illegal strategies

Among the more outrageous Canadian examples that came to light in the course of our study two manifestly illegal strategies were mentioned on several occasions: filming or taping the worker in his or her home without consent, and entrapment, provoking the worker to do something he or she would not normally do were it not for the behaviour of the investigator. We traced several examples in which the worker was filmed in the intimacy of his own home. In one case where the video was actually submitted to a review board, the worker was filmed making love in his bedroom²⁴. In other cases the detective entered the worker's home, which was for sale, pretending to be a prospective buyer²⁵. We interviewed a worker whose wife rented rooms out of their home. He discovered, without warning in the middle of a review board hearing, that a private detective had entered their home pretending to rent a room, had filmed him going about his day at home and had clandestinely questioned and audio-taped his wife with regard to distribution of household tasks.

Entrapment is also not uncommon. Injured workers' advocates told us of more than one case in which an investigator slashed the tires of a worker's car to see if he would stoop

²⁴ Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, report adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999. p. 2, example first discussed in L. Laurin, "Les ripoux de la C.S.S.T." [1998] 438 *Nouvelles CSN* 3.

²⁵ Laurin, *Ibid.*, at 5.

to change his tire. In that example, the community group had been puzzled by the unusual number of workers who had cancelled their appointments because they had flat tires. They understood what was going on when the neighbour of one of the workers informed him that a strange man was seen letting air out of the tire of his car. The practice seems fairly widespread as it was separately documented elsewhere²⁶. Another way of entrapping injured workers is to leave money lying near their car door so as to film them bending down to pick it up²⁷.

Sometimes entrapment takes place when the investigator overtly asks the worker for help. In the parking lot of a local strip mall a pretty woman asked the targeted worker to help her carry a heavy package. He apologised, saying he could not because he had a bad back. She insisted, saying together they could move it safely. He fell for the trap and was filmed. The woman even kissed him and apologised for setting him up, saying she had to earn her living. The arbitrator did not sanction the worker in this case, recognising that he had made an exceptional effort under exceptional circumstances²⁸. Cases in other jurisdictions have held to be inadmissible surveillance evidence obtained under conditions in which the grievor was enticed to perform certain acts²⁹.

In the United States both workers' compensation boards and private insurance firms often hire detectives. In one case the detective befriended an injured worker and invited her to Disneyland where he then filmed her enjoying herself and making gestures she was not medically authorised to make³⁰. We've not come across anything quite so outrageous in Canada, but it should be noted that the American woman who had been

²⁶ Laurin, *Ibid.*, at 4.

²⁷ *Ibid.*

²⁸ Rollande Parent and Pierre Saint-Arnaud, "Accidentés du travail - Les images peuvent être trompeuses", *Le Devoir*, January 20th 2003, at B-6.

²⁹ *Pacific Press Ltd. and Vancouver Printing Pressman, Assistant and Offset Workers' Union, Local 25 (Dales Grievance)*, [1997] 64 L.A.C. (4th) 1.

the subject of romantic entrapment was awarded damages under the law governing the tort of bad faith.

Even in those cases where under prevailing privacy law videotape evidence was obtained legally with regard to the injured worker, many examples were provided in which several individuals from the worker's family, including children, were seen in the videotape, sometimes in cases where the worker was not even present. Aside from the questionable legality of such practices, given that the privacy rights of family members can not be presumed to be relinquished simply because there is a claimant in the family, such practices can have particularly damaging consequences. Children and spouses may share in the stress of being followed. Even if they don't, we were told of cases where the workers themselves may feel even more violated and at the same time guilty, when their claim has exposed the whole family to clandestine surveillance.

1.4 Effect of private policing of injured workers

There are many reasons why clandestine surveillance techniques may lead to adverse health consequences for the injured workers subject to surveillance. Workers, their representatives, literature³¹ and case law³² all describe how such strategies lead to or aggravate psychiatric disability, including paranoia.

A psychologist specialised in workers' compensation claims described to us the effect on his patients of clandestine surveillance:

"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

³⁰ *Unruh v. Truck Insurance Exchange et al.* 498 P. 2d 63 (California 1972).

³¹ See generally G. Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", (1996) 22 *The Canadian Practitioner* 5.

³² In Ontario see *Decision No. 1212 97*, (1997) 44 W.S.I.A.T.R. 129. In Quebec see the evidence discussed in *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T., C.L.P.* 109869-72-9902, March 5th 2001, compensation for psychotraumatic disability denied.

surveillance. Of course, when the worker is unaware that he/she is under surveillance there is no adverse effect. 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."

Legal representatives from all provinces studied have described the devastating effect on their clients of clandestine surveillance strategies. In the words of one worker representative:

«It's amazing to me how deeply it hurts people to know that they have been surveilled. Even if the benefits don't get taken away, workers are really cut to the bone by being videotaped.»

Information provided us by a medical expert in another province described the effect of surveillance and harassment on his patient who had suffered a severe traumatic injury including third degree burns to a significant percentage of his body:

"[The patient] denied serious depressive symptoms at this time stating that he has been more positive and hopeful over the last two weeks. However, he stated that last winter was the worst, when he could only see the negative parts of life. He felt harassed by the Workers Compensation Board who "slashed at the core of my being, treating me as if I were a fraud." He became hopeless, felt worthless and had suicidal ideation. He stated that he cried a lot but then talked to God, his wife and a very special friend. Over time these symptoms of major depression have lessened."

Another worker representative told us that the representatives themselves sometimes share a feeling of paranoia. In one incident, in which a fire alarm went off in an office building during an interview with a worker who had had several conflicts with the board, the lawyer suggested that he and the worker ignore the fire alarm, fearing it had been set off by an investigator trying to provoke the disabled worker into using the staircase instead of the elevator. The lawyer was giving advice based on his previous experience

with strategies of private investigators who followed other injured workers and tried to entrap them.

A woman who was filmed by a private detective hired by the workers' compensation board (C.S.S.T.) was seen in the video walking down the street with a young child. She learned she had been the subject of surveillance when she received the video in the mail. She describes how the experience made her feel:

"I felt really bullied. They have no right to come into my private life like that! I feel cornered, like in a mousetrap, treated like an object. Not only am I in pain I'm also spied on. For a week I kept looking around to see if I was being watched. Do we have to stop moving because we're receiving benefits from the C.S.S.T.? They want me to feel guilty because I receive a little cheque, but I didn't choose to have a back injury. If they only knew what I would give to be able to go back to work..."³³

Over and above the obvious effects on the mental health of the workers under surveillance, it seems clear that the pervasive use of surveillance practices has a clearly negative effect on the physical health of all injured workers who hesitate to undertake movements or activities, even those they're encouraged to do by their health professionals, for fear that someone might be spying on them.

A severely injured worker suffering from both painful physical ailments, significant disfigurement and post-traumatic stress disorder was encouraged by her care givers to try to leave the security of her home, despite her disabling fear. She finally went out and was subsequently confronted by videotape evidence that she was capable of going out.

³³ Our translation. The original reads as follows: "Je me suis sentie très brimée. Ils n'ont pas le droit d'entrer comme ça dans ma vie privée! Je me sens coincée comme dans une souricière, réduite à l'état d'un objet qu'on utilise. En plus d'avoir mal, je suis épiée. Pendant une semaine, je regardais autour de moi pour voir si j'étais surveillée. Est-ce qu'on doit arrêter de bouger parce qu'on touche des indemnités de la C.S.S.T.? Ils veulent me faire sentir coupable de recevoir un petit chèque, mais je n'ai pas choisi d'avoir mal au dos. S'ils savaient comme je donnerais n'importe quoi pour recommencer à travailler..." Cited by Laurin, supra note 24, at 4.

Workers are encouraged by health care professionals and even by board policy³⁴ to try to regain a maximum of mobility by attempting movements they fear they are unable to do. If they can't peacefully attempt them without fear of being «caught in the act», they are much less likely to ever attain the therapeutic plateau they could attain if they were left to test their own limits without fear of reprisals. This phenomenon was raised not only by worker representatives and health care professionals we interviewed, but also by adjudicators and judges³⁵. Legal specialists in insurance law have also emphasised the potential perverse effect on claimants struggling to overcome their disability while at the same time having to cope with the fear of being tailed to prove they are less disabled than they claim³⁶.

In some cases the worker's family also suffers adverse health consequences, not only because the increased paranoia of the worker has negative effects on a child or spouse, but also because the family itself is, and feels, spied upon³⁷. One representative of an injured worker described to us a case in which the whole family left Canada to get away from the feeling of being constantly under surveillance. They were then subject to surveillance in their new community, the workers' compensation board of the Canadian province having mandated an American detective agency to follow the worker in the United States.

Because of the dramatic nature of videotape evidence, even in those cases where nothing really incriminating appears on the videotape, the impact on decision makers can be disproportionately significant. Several lawyers pointed out that the very existence

³⁴ Dr. A. Neveu, *Pour un meilleur suivi des travailleurs victimes de lésions professionnelles au dos*, Fédération des médecins omnipraticiens du Québec, 2001. Publication supported by the C.S.S.T.

³⁵ See for instance *Bolduc v. S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207; *Charpentier v. Compagnie d'Assurance Standard Life*, [1998] R.R.A. 448 (S.C. Q.) and (2001) R.R.A. 573 (C.A.Q.).

³⁶ M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 206-207.

³⁷ The claimant's child was filmed in several of the cases studied. See for instance *Druken v. R.G. Fewer and Associates Inc.* [1998] N.J. o. 312. Nfld Supreme Court. Damages were not granted.

of a videotape, at least in some jurisdictions, leads decision-makers to suspect the claimant, as if the decision makers believe that where there is smoke there is fire. While, as we shall see, policy in Ontario explicitly warns adjudicators to beware of this pitfall, many people interviewed confirmed that the existence of the videotape, almost regardless of content, left the adjudicator with the impression that something fraudulent was going on.

Part 2: The law governing private policing of injured workers

This part addresses the legal issues that arise when covert surveillance, including video-surveillance, is used in the context of workers' compensation. We will first look at the legality of such surveillance techniques, in light of human rights issues, including the right to privacy. General issues raised by the right to privacy will be addressed, followed by considerations specific to the context of administrative law and mass adjudication. Over and above the issue of legality, there is a separate issue as to admissibility of evidence obtained by private investigators who target a person who alleges disability. We will look at several issues regarding such evidence, including admissibility, right to prior notice and examination of the evidence, and issues regarding the weight that should be given to such evidence. Finally we will examine the legal remedies available to workers who have been victims of abuse with regard to recourse to and behaviour of private investigators.

2.1 Legality of the surveillance

In some of the jurisdictions studied, there exists specific provincial legislation governing the right to privacy, while other jurisdictions have no such legislation. All jurisdictions

were subject to section 8 of the *Canadian Charter of Rights and Freedoms*, insofar as the *Charter* was applicable to the specific circumstances.

When reflecting on the legality of the surveillance the methodology chosen may colour the legal issues raised. A case law approach raises primarily privacy law issues, and almost without exception these issues are examined to determine the admissibility of evidence. If the analytical objective is to examine the legality of private surveillance from a policy approach, it is not sufficient to look at arguments raised in the case law, as the social phenomenon of surveillance raises other legal issues that are not necessarily justiciable. It is also important to question whether these surveillance practices are compatible with the right to dignity and equality rights.

2.1.1 The Right to Privacy

In his treatise on the right to privacy³⁸, Alain-Robert Nadeau shows that while the right to privacy has long been recognised in Civil law, Common law jurisdictions did not historically acknowledge such a right without legislative intervention. The interpretation of the *Civil Code of Lower Canada* recognised liability for the violation of privacy, and the *Civil Code of Quebec*, in force since the 1st of January 1994, explicitly recognises the right to privacy at section 35:

"Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person unless authorized by law."

and specifies, at section 36:

" The following acts, in particular, may be considered as invasions of the privacy of a person:

(1) entering or taking anything in his dwelling;

³⁸ A.R. Nadeau, *Vie Privée et droits fondamentaux* (Cowansville, Qc: Yvon Blais, 2000) at 33-48.

- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;
- (4) keeping his private life under observation by any means;
- (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) using his correspondence, manuscripts or other personal documents."

Section 5 of the Quebec *Charter of Human Rights and Freedoms*³⁹ explicitly recognises the right to privacy in unequivocal terms:

"Every person has a right to respect for his private life".

The Supreme Court of Canada has confirmed that the violation of the right to privacy under Quebec law will be sanctioned by granting of moral and, in the case of malice, exemplary damages to the person who is photographed in a public place without her consent, when that photograph, even if uncompromising, is then published without her consent⁴⁰. This case was judged on the basis of the law applicable prior to the coming into force of the *Civil Code of Quebec*⁴¹, so that premises applied in the *Aubry* case can only have been strengthened by the adoption of the far more explicit guarantees contained in the *Civil Code of Quebec*. In Quebec, it is henceforth clear that the right to privacy extends not only to the private home, but to public places; it binds both the state and private individuals, regardless of the application of section 8 of the *Canadian Charter of Rights and Freedoms*.

³⁹ L.R.Q. c. C-12.

⁴⁰ *Éditions Vice-Versa v. Aubry*, [1998] 1 R.C.S. 591.

⁴¹ *Ibid* at paragraph 39.

These legislative and quasi-constitutional guarantees surpass those provided for in other provincial legislation. Other provinces⁴² have adopted laws explicitly protecting the right to privacy, but in those that have not, common law does not protect the right to privacy and the traditional view states that only when the violation is directly or indirectly attributable to state action will constitutional guarantees under section 8 of the *Canadian Charter of Rights and Freedoms* apply⁴³.

In practice, private surveillance by workers' compensation boards would be governed both by section 8 of the *Canadian Charter of Rights and Freedoms*⁴⁴ and, in those provinces with explicit privacy legislation, by provincial legislation as well. This premise is fairly obvious with regard to surveillance by employees of the compensation boards, but it also extends to private security firms hired by the boards. When private security firms are hired by compensation boards, they are mandated by state actors and as such are also obliged to comply with constitutional obligations⁴⁵.

When the private surveillance of an injured worker is done at the behest of the employer, the right to privacy in those jurisdictions that do not have specific privacy legislation is

⁴² For example, British Columbia and Newfoundland. See *Druken v. R.G. Fewer and Associates Inc.* [1998] N.J. 312, Nfld Supreme Court.

⁴³ In light of section 32 of the Charter, section 8 would not apply according to *Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN) v. Trudeau*, [1999] R.J.Q. 2229 (C.A.Q.), paragraph 53. There may, however, be an obligation to evaluate admissibility of such evidence according to "Charter values" even if the substantive provisions of the Charter are inapplicable. See *M. A. v. Ryan* [1997] 1 S.C.R. 157. In Alberta and Ontario, where no specific privacy legislation exists, recourse to video-surveillance seems relatively unfettered. See, in Alberta, *United Food and Commercial Workers, Local 401 v. Medicine Hat*, [2001] A.G.A.A. No. 68; in Ontario, *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Fallon)*, [1999] 79 L.A.C. (4th) 85.

⁴⁴ *City of Longueuil v. Godbout*, [1997] 3 S.C.R. 844; *Blencoe v. B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307 at 332-333; *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

⁴⁵ *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.); *Blencoe v. B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307. *Ville de Mascouche v. Houle* [1999] R.J.Q. 1894 (C.A.Q.). See also Pierre Patenaude (ed.), *Police, techniques modernes d'enquête ou de surveillance et droit de la preuve*, Actes du Colloque, Sherbrooke, 1998 at 10.

limited⁴⁶, although when the employer is a municipality or an agent of the state section 8 of the Charter applies⁴⁷. What is clear, is that in those jurisdictions, like Quebec, that do have privacy legislation governing non-governmental actors, the special relationship between an employer and an employee has been used by courts to whittle away, at least in part, the general obligations to respect the worker's privacy. Nevertheless, as Veilleux⁴⁸ points out, while the worker's right to privacy within the workplace may be significantly reduced, the worker has a reasonable expectation of privacy outside of the workplace, even more so outside of working hours, and the existence of a master-servant relationship does not justify unfettered invasion of a worker's privacy. The Supreme Court of Canada made this point clearly in the case of *Godbout*⁴⁹, and held that the right to privacy under section 5 of the Quebec *Charter of Human Rights and Freedoms* prevented the employer from imposing conditions on the worker's choice of residence.

In a case involving private surveillance of a worker who claimed to be temporarily disabled because of a work accident, the Court of Appeal of Quebec⁵⁰, while holding that surveillance by the employer in the case before the court was not done in violation of the right to privacy, confirmed that the employer's right to have his worker followed was limited both by the conditions of the Quebec *Charter of Human Rights and Freedoms* and by the explicit recognition of the right to privacy under the *Civil Code of Quebec*.

⁴⁶ Because of section 32 of the Charter, section 8 would not apply according to *Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN) v. Trudeau*, [1999] R.J.Q. 2229 (C.A.Q.), paragraph 53.

⁴⁷ *Ville de Mascouche v. Houle*, [1999] R.J.Q. 1894 (C.A.Q.).

⁴⁸ See generally D. Veilleux, "Le droit à la vie privée-sa portée face à la surveillance de l'employeur" (2000) 60 R. du B. 3.

⁴⁹ *City of Longueuil v. Godbout*, [1997] 3 S.C.R. 844.

⁵⁰ *Syndicat des travailleuses et travailleurs de Bridgestone Firestone de Joliette (CSN) v. Trudeau*, [1999] R.J.Q. 2229.

The Court of Appeal relied on criteria developed by the Quebec Human Rights Commission⁵¹, to circumscribe conditions under which private surveillance could be justified. Section 9.1 of the Quebec *Charter of Human Rights and Freedoms* in terms analogous to s. 1 of the Charter of rights and freedoms, allows for infringement of rights under certain restrictive conditions⁵². After underlining that privacy could be violated by the simple act of undercover surveillance, whether or not the subject was videotaped, the Court concluded that the existence of a work contract was not in itself a renunciation by the worker to his or her right to privacy. The court held that such a renunciation must be explicit, and can not be presumed. Nevertheless, the employer could undertake clandestine surveillance outside the workplace without the consent of the worker if certain conditions applied:

1. The decision to target a specific worker must not be arbitrary or random, and the employer must have reasonable grounds to suspect the legitimacy of the worker's behaviour prior to undertaking surveillance; those grounds can not be established *a posteriori*.
2. The employer of an injured worker has an interest in insuring the loyalty of the worker and the legitimacy of his behaviour, however this in itself does not justify undertaking surveillance unless there exist serious reasons leading to doubt the honesty of the worker.

⁵¹ Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.

⁵² The Supreme Court of Canada has clearly determined that section 9.1 of the Quebec *Charter of Human Rights and Freedoms* shall be interpreted similarly to section 1 of the Canadian *Charter of Rights and Freedoms*. see *City of Longueuil v. Godbout*, [1997] 3 S.C.R. 844.

3. Surveillance must be necessary to control the legitimacy of the claim and the nature of the surveillance must be the least intrusive possible. The court cites with approval an Alberta judgement:

"In suspicious circumstances surrounding the medical condition of the grievor, the employer has every right to conduct a full investigation but only as a last step should it choose the intrusive alternative of invading the employee's privacy by conducting surveillance."³³

4. Surveillance must be done in a way that respects the worker's dignity. The case cited by the Human rights commission in which a worker was filmed in his bedroom was cited by the Court as an example of abuse.
5. In the case in point, the employer had cause to be suspicious because of contradictions in the worker's statements and the means chosen for surveillance were not excessively intrusive because surveillance took place in public places or places that were in public view, surveillance was not continuous, but on three separate days over a three month period, and the conditions of surveillance were not in violation of the worker's dignity.

The Court of Appeal of Quebec has thus accepted to limit the right to privacy, if the conditions described by the Human Rights Commission are shown to have been met. Actual consultation of the examples given by the Human Rights Commission show that the Commission's caveats with regard to admissibility are far more significant than those generally described in the legal literature. For instance, the Commission precludes recourse to video-surveillance if the employer has not exhausted all other means to

³³ Quoting from *Re Alberta Wheat Pool and Grain Workers' Union, Local 333*, 48 (L.A.C.) (4th) 341, p. 345, arbitration decision by B. Williams.

determine the truth. Other means include obtaining an additional medical opinion, calling the worker in for a discussion about his health. Invading the employee's privacy by conducting surveillance must be demonstrated to be the last step available to get to the truth.⁵⁴

Yet legal literature aimed at practitioners paints with a far broader brush when describing the rights of employers to conduct video-surveillance. Although referring in the footnotes to the Court of Appeal decision in *Bridgestone/Firestone*, Pedneault, Bernier and Granosik include none of the detailed conditions therein set out when they state that:

"When an employee's personal activities are incompatible with the alleged disability to perform his work the employer may conduct electronic surveillance of the employee as long as the surveillance takes place in public."⁵⁵

The legal opinion of the Quebec Human Rights Commission clearly states that the employer or the compensation board must bear the burden of demonstrating that the criteria justifying the violation of the right to privacy as prescribed by section 9.1 of the Quebec *Charter of Human Rights and Freedoms* have been met. For the Commission, this means that the decision to undertake surveillance was based on serious circumstantial evidence and not on simple impressions, and that surveillance was a last resort when no other means of verification were available.⁵⁶

⁵⁴ Ibid at 13.

⁵⁵ J.F. Pedneault, L. Bernier, L. Granosik, *Les droits de la personne et les relations de travail*, (Yvon Blais, Cowansville, Qc. 2002) at section 22.050. Our translation, the original states: "Lorsqu'il s'agit d'activités personnelles incompatibles avec la prétendue incapacité de l'employé à effectuer sa prestation de travail l'employeur peut effectuer la surveillance électronique du moment où cette surveillance survient dans les lieux publics." The authors go on to say, at section 22.051, that it would be inappropriate to hide a camera in the employee's home, but beside that type of situation, videotapes will be admitted in arbitration hearings.

⁵⁶ Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.

2.1.2. Special powers for state agencies?

In the opinion of the Commission, state actors like the C.S.S.T. have an even greater obligation to respect the right to privacy than do employers or private insurers, and in its directive on this issue the Commission concludes:

"It would thus be out of the question to invoke the the C.S.S.T.'s responsibility in the application of the *Act Respecting Industrial Accidents and Occupational Diseases* in order to justify diluted rules regarding the right to privacy."⁵⁷

The Supreme Court of Canada has clearly stated the importance of placing limits on the practice of the state to use electronic devices to obtain evidence regarding the behaviour of citizens. In *R. v. Wong*, Justice Laforest, speaking for the Court stated:

"I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorisation, enjoy the right to record the words of whomever they choose, it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video-surveillance. George Orwell in his classic dystopian novel 1984 paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video-surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. As in the case of audio surveillance, to permit unrestricted video-surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society."⁵⁸

The Quebec Human Rights Commission relied on this case in its legal opinion as to the limits that should apply with regard to video-surveillance evidence of injured workers,

⁵⁷ Our translation. The original reads as follows: "Il ne saurait être question, en conséquence, d'invoquer la responsabilité de la C.S.S.T. au regard de l'application de la *Loi sur les accidents du travail et les maladies professionnelles*, pour justifier à l'endroit de cet organisme une dilution des normes applicables en matière de droit à la vie privée.", *Ibid* at 10.

⁵⁸ [1990] 3 S.C.R. 36, at 47.

particularly when the video-surveillance is done at the behest of the C.S.S.T. and not by the employer⁵⁹.

In at least one Quebec case the Court has refused to apply this reasoning when a worker is charged under the penal provisions of workers' compensation legislation. The court distinguishes violations of privacy by the state in the context of regulatory infractions, and concludes that the policing of injured workers is an activity that does not require a vigilant respect of Charter rights and Charter values, given the importance of the C.S.S.T.'s mandate to manage public funds. The idea that any worker may be under surveillance is seen as an incentive to all workers to be honest⁶⁰. Given that the decision regarding the regulatory infraction may be subsequently invoked to support denial of benefits, benefits that insure the subsistence of a worker, it seems surprising that the context of workers' compensation would somehow mitigate the obligation of the state to meticulously respect the criteria set out in section 8 of the Charter.

The idea that workers' compensation legislation required a lower standard of vigilance with regard to Charter rights is troubling. It was first introduced by the Quebec Court of Appeal in a very different legal and factual situation. In *Lapointe*, the worker was suspected of having fabricated an accident to access compensation. An accomplice who had later denounced the worker had accepted at the behest of the employer to covertly audio-tape a conversation with the worker regarding the fraud⁶¹. Subsequent cases have relied on the relaxing of Charter rights proposed in *Lapointe* to support the admissibility of video-surveillance evidence in cases where the worker's degree of disability was the

⁵⁹ Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999.

⁶⁰ *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.). see quote supra note 8.

⁶¹ *Lapointe c. Commission d'appel en matière de lésions professionnelles* [1995] C.A.L.P. 1319, p. 1323.

issue⁶². The principles of Wong, applicable to these circumstances according to the Human Rights Commission, seem to have been whittled away in the name of administrative needs of regulatory agencies. It is unclear whether the decisions encourage this type of flexibility to manage disability claims would survive scrutiny by the higher courts.

2.2 Private surveillance evidence

Whether or not the evidence obtained by private detectives violates Charter rights, there are still legal issues to be determined with regard to 1) its admissibility, 2) pre-trial access to the evidence, and 3) the weight it should be given.

2.2.1 Admissibility of evidence

In Quebec, three questions will be examined in order to determine the admissibility of the evidence. If the worker's right to privacy has not been violated, issues as to admissibility will be governed by the general rules of evidence. If the worker's right to privacy has been violated, the court will be called upon to determine whether under s. 9.1 of the Quebec *Charter of Human Rights and Freedoms*, the violation was legitimate according to the criteria set out by the Quebec court of Appeal in *Bridgestone/Firestone*⁶³. Even if the judge concludes that section 9.1 does not justify the violation of the right to privacy, the court may still admit the evidence in application of section 2858 of the *Civil Code of Quebec*, which invites the judge to evaluate admissibility by determining whether the admission of evidence obtained in violation of human rights would bring the administration of justice into disrepute⁶⁴.

⁶² *Eppelé v. C.L.P. and C.S.S.T. and Santa Cabrini Hospital*, Superior Court, 505-05-004691-983, June 22, 2000.

⁶³ Evidence was thus held to be admissible in *Eppelé v. C.L.P. and C.S.S.T. and Santa Cabrini Hospital*, Superior Court, 505-05-004691-983, June 22, 2000.

⁶⁴ *Syndicat des travailleuses et travailleurs d'abattoir de volaille de St-Jean-Baptiste c. Corriveau*, DTE 2001 F-206, Quebec Court of Appeal.

In Ontario, where no legislation specifically guarantees the right to privacy⁶⁵, case law has determined that admissibility must nevertheless be evaluated with care. Admissibility is dependent on the relevance of the video-tape evidence and proof that it was reasonable to engage in video-surveillance, and that the surveillance was done in a reasonable manner⁶⁶.

In one Ontario case, a report prepared by a medical expert who viewed the video without the worker's consent and prior to a decision by the tribunal as to the admissibility of the videotape was itself excluded from evidence, even though the tribunal reserved judgement as to the admissibility of the videotape itself⁶⁷.

In Ontario, the Tribunal frowns upon employers providing treating physicians or medical experts with videotaped evidence of the worker's movements and behaviour, and the employer must request permission to transmit such videotapes to medical experts, permission that, in at least one case, was not granted, judgement being reserved pending the hearing of the merits of the case⁶⁸.

In Quebec, in order for the videotape to be admitted into evidence, the party responsible for ordering the videotape surveillance must be present at the hearing to give evidence as to the context in which the evidence was obtained, and the investigator must be present to give evidence as to the authenticity of the videotape⁶⁹. This rule is based on the law of evidence, and is not specific to videotapes obtained in *prima facie* violation of

⁶⁵ *Poersch v. Aetna*, [2000] 19 C.C.L.I. (3d) 92 (O.S.C.).

⁶⁶ See for instance *Decision No. 688/87*, [1987] 6 W.C.A.T.R. 198. In grievance arbitration there is some debate as to the extent in which evidence may be excluded. Compare *Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304*, [1994] 42 L.A.C. (4th) 151; *Re Toronto Transit Commission and A.T.U., Loc 113 (Collins)*, [1999] 80 L.A.C. (4th) 53, with *Re Toronto Transit Commission and A.T.U., Loc 113 (Fallon)*, [1999] 79 L.A.C. (4th) 85; *Kimberly-Clark Inc. and I.W.A. Canada, Loc. 1-92-4*, [1996] 66 L.A.C. (4th) 266.

⁶⁷ WCAT Decision 851 97 1, September 29th, 1997.

⁶⁸ WSIATR 1273 99 1, July 27th 1999.

the right to privacy. When the right to privacy has also been violated, the burden of proof of the party who wishes to produce the evidence is presumably greater.

In several jurisdictions studied, if the videotape is tainted or inadmissible, reports based on that evidence will also be excluded. In a recent Quebec case the C.L.P., the final appeal tribunal, excluded medical evidence provided after the doctor had viewed a surveillance video at the request of the C.S.S.T. The C.S.S.T. made no attempt to enter the videotape as evidence before the appeal tribunal, and did not provide any evidence surrounding the reasons justifying covert surveillance of the worker. Nor was the detective/cameraman present at the hearing, so there was no evidence as to the context in which the videotape was made. The C.L.P. recognised that the worker was presumed to be in good faith and concluded the existence of the videotape in itself constituted *prima facie* evidence that his right to privacy under s. 5 of the Quebec *Charter of Human Rights and Freedoms* had been violated. The C.L.P. noted the "nonchalance" of the C.S.S.T. who had mandated the surveillance but failed to appear at the hearing. Lacking evidence that could justify the invasion of the worker's privacy, the C.L.P. excluded the medical report, given that the videotape on which the report was based was held to be tainted in the absence of evidence as to its admissibility⁷⁰.

In Quebec, there are cases in which issues governing the right to privacy could have been raised, but where the C.L.P. has admitted video evidence regardless of privacy issues because the worker had obtained an expert opinion from a physician as to the compatibility between gestures performed in the videotape and medical constraints documented by the worker's doctor. The C.L.P. held that by submitting the report of the

⁶⁹ *Habib et Cie de la Baie d'Hudson* [2000] C.L.P. 1059 citing *Cadieux c. Service de gaz naturel Laval inc* [1991] R.J.Q. 2490 (C.A.Q.)

⁷⁰ *Viau et Rénovations R. Rivard (fermé)*, C.L.P. 185176-71-0205, 21st of November, 2002, Francine Juteau.

expert the worker had renounced his right to request the exclusion of the evidence for Charter or privacy reasons⁷¹.

Usually, relevancy will dictate that evidence be admitted, even when it has been obtained in violation of the right to privacy⁷². This is in keeping with the case law regarding grievance arbitration and insurance. While judges tend to want to see the evidence, they will be careful to limit its weight, and will sometimes even grant damages for the violation of privacy rights, while holding the evidence to be admissible⁷³.

2.2.2 Right to view evidence prior to hearing

Most cases that raised the issue of pre-trial access to video-surveillance evidence granted the right of the party who had been put under surveillance to view and obtain a copy of the evidence prior to trial.

Ontario policy specifically provides that recording evidence destined to be submitted in a hearing must be made available to all parties as early as possible in order to allow them to review the evidence prior to the hearing⁷⁴.

This is in sharp contrast to the situation in Quebec where the appeal tribunal has recently denied a worker the right to view a video prior to a hearing even though the worker sought access to the video in order to avoid the expense of having his medical expert witness attend the hearing in person. The employer refused to hand over the

⁷¹ *Champagne and Arcadian inc. and C.S.S.T.*, C.L.P. 113018-71-9903, 23rd of November 2000, Margaret Cuddihy.

⁷² Some cases will only admit the evidence if there were valid grounds for undertaking the surveillance. See *Re Alberta Wheat Pool and Grain Workers' Union Local 333*, [1995] L.A.C. 332.

⁷³ See for instance an insurance claim: *Bolduc v. S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207. We found no cases granting damages to injured workers in similar circumstances.

⁷⁴ WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999. WSIB policy on Surveillance, document number 11-02-06, September 1st 1997. See *Decision 280 01*, [2001] ONWSIAT 2329.

video prior to the testimony of the worker. In denying the worker's petition to access the video prior to the hearing, the C.L.P. stated:

"The Commission des lésions professionnelles finds that the non-disclosure of the video does not compromise the worker's right to a fair hearing. The worker is the principle actor in the video and thus the surprise effect will be less important, futhermore the worker will no doubt be able to respond to the video in his own testimony.⁷⁵"

The tribunal held that the argument relating to the increased costs imposed on the worker because of the need to have an expert witness attend the hearing was an economic consideration that could not override the natural justice and procedural equity considerations raised by the employer who maintained, with success, that he had the right to present his evidence as he saw fit.

Quebec law applicable to other claimants provides communication of evidence prior to trial⁷⁶, and insurance textbooks insist on the importance of not taking the claimant by surprise⁷⁷. The same is true in other jurisdictions, where opportunity to view videotapes prior to hearing⁷⁸, or at least to have counsel view the videotape and receive a written account of what facts were allegedly ascertained in the video⁷⁹.

2.2.3 Weight given to evidence by the courts

⁷⁵ *Reis et Industries Maintenance Empire inc.* C.L.P.E. 2002 LP-117, October 3rd 2002, Me Danièle Gruffy. Our translation, the original states: "La Commission des lésions professionnelles est d'avis que la non-divulgation de la cassette vidéo ne compromet pas, en l'espèce, le droit du travailleur à une défense pleine et entière. Ce dernier étant, en quelque sorte, l'acteur principal du vidéo, l'effet de surprise risque d'être pour lui moins important; de plus, le travailleur pourra certainement y répondre par son propre témoignage."

⁷⁶ This seems to be standard practice. See *Léger v. Télémedia inc.*, [1995] R.R.A. 179 (S.C. Q.). Failure to communicate such evidence in a timely manner can lead to criticism and even refusal of costs to a victorious defendant, see *Bouliane v. SSQ (service santé du Québec) Mutuelle d'Assurance-Groupe*, [1997] R.R.A. 368 (S.C.Q.).

⁷⁷ M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998) at 207.

⁷⁸ *Thorpe v. Insurance Corp. of British Columbia*, [2001] 31 C.C.L.I. (3d) 132 (British Columbia Master).

⁷⁹ *Xenophontos v. AIG Life Insurance Co.*, [2000] 32 C.C.L.I. (3d) 37 (O.S.Q.).

While many decisions of specialised tribunals underline the limited probative value of video-surveillance evidence to determine disability⁸⁰, the value of such evidence can be more significant if the film appears to show the worker actually undertaking regular paid employment while receiving benefits⁸¹. Many decision makers⁸², as well as medical experts⁸³, and in some provinces compensation board policy⁸⁴, underline the fact that it is often difficult to extrapolate from evidence that a worker has performed a given task, like lifting her child or mowing the lawn, to determine that he or she is capable of assuming regular gainful employment. Some panels underline the futility of such evidence, letting it be understood that investment in covert surveillance is not necessarily money well spent⁸⁵.

If the videotape evidence is selective, if the tape has been cut or does not reflect a full day's activities, some tribunals question its admissibility while others, while admitting the evidence, limit its weight⁸⁶. During the course of our study we were provided with several illustrations of incidents where the video itself had been tampered with⁸⁷. One health care professional who provided us with information added

"I personally have reviewed three sets of videotaped data, none of which were in my lay view as a psychologist, probative of medical malfeasance. There were no 'home runs'. [Compensation Board]

⁸⁰ The limited probative value of video-tape evidence was underlined in several decisions of the Worker Safety and Insurance Appeal Tribunal of Ontario, and in decisions of its predecessor the Workers Compensation Appeal Tribunal. See for instance: *Decision No. 688/87*, [1987] 6 W.C.A.T.R. 198; *Decision No. 732-93*, January 9th, 1997; *Decision No. 851 97*, WCAT September 15th 1998; *Decision No. 1589 97* WSIAT, 31 March 1999; 2000 ONWSIAT 1609, 2002 ONWSIAT 1267.

⁸¹ *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T., C.L.P.* 109869-72-9902, March 5th 2001; WCAT, Decision No. 1071 96, February 12th 1998.

⁸² For an example drawn from insurance law see *Lalonde v. London Life Insurance Co.*, [2001] 33 C.C.L.I. (3d) 108.

⁸³ B. J. Molzen, "Malingering, Videotape Analysis, and the Use of the Independent Medical Examination in Disability Determination," (1999) January-February, *The Forensic Examiner* 11.

⁸⁴ In Ontario see WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999.

⁸⁵ Decision No. 851 97, WCAT September 15th 1998.

⁸⁶ 2002 ONWSIAT 1267.

⁸⁷ See for instance Rollande Parent and Pierre Saint-Arnaud, "Accidentés du travail - Les images peuvent être trompeuses", *Le Devoir*, January 20th 2003, at B-6, where evidence was provided that the videotape had been subtly speeded up to make the worker look more lively.

Medical Advisors, however, seize upon the tapes as evidence of alleged malingering on the basis of selected portions of the videotapes. Of the tapes I reviewed all of them showed evidence of editing, including figures under surveillance curiously moving backwards and in some cases snippets of the tape repeated several times."

Ontario WSIB policy specifically warns against giving too much weight to this type of evidence, as the film does not show rest periods or periods in which the worker is visibly in pain⁸⁸. This point has also been made in the case law of several provinces⁸⁹. If the nature of the worker's illness leads to fluctuations in his ability to perform the tasks of daily living, videotape evidence over only a few days has been held to be of limited value, as it is plausible that the worker was filmed on a good day that did not necessarily reflect his general state of health⁹⁰.

Aside from what the videotape actually shows or does not show, information provided in interviews as well as case law⁹¹ shows a further use of videotape evidence, that related to the general credibility of the worker. Even if those activities demonstrated in the videotape are banal, the videotape may be damning to the worker if he or she has been caught exaggerating or lying to the employer or the workers' compensation board. Thus, for example, even if the worker was not doing anything wrong, but simply waiting for a bus, lying about the fact she was capable of waiting for a bus has been used to tarnish her credibility on all issues relevant to her claim. The worker is then more amenable to out of court settlements⁹².

⁸⁸ WSIB policy on Audio/Visual recordings, document number 11-01-08, June 15th 1999.

⁸⁹ See for instance *Decision No. 1589 97*, W.S.I.A.T., March 31st 1999; *Champagne v. Arcadian inc. & C.S.S.T.*, C.L.P. 113018-71-9903, November 23rd, 2000, Margaret Cuddihy.

⁹⁰ *Decision No. 1589 97 WSIAT*, 31 March 1999. See also WCAT Decision No. 732-93, January 9th, 1997.

⁹¹ *Decision 280 01*, [2001] ONWSIAT 2329; In insurance law, see for instance *Chaplin v. Sun Life Assurance Co. of Canada*, [2001] 27 C.C.L.I., (3d), 70 (B.C.S.C).

⁹² In 2001-2002, in Quebec, 59% of the 21809 appeals to the C.L.P. were dropped or settled out of court. 74% of the files thus closed were closed after negotiations involving a conciliator of the appeal tribunal. See Commission des lésions professionnelles, *Rapport annuel 2001-2002*, Québec, 2002.

2.3 Legal recourse for damages resulting from surveillance

There is no doubt that covert surveillance of injured workers is sometimes damaging both to their physical and mental health. In many cases it is also a violation of their right to privacy and to their right to dignity. In this section we will examine the remedies that may be available to workers injured by covert surveillance procedures. We will first look at compensation available under the workers' compensation legislation and then the law of torts.

2.3.1 Workers' compensation legislation

The primary issue raised by the person seeking compensation for disability attributable to covert surveillance is that regarding the right to compensation for injury caused by the compensation process itself⁹³. Disability attributable to the surveillance may include a more prolonged temporary disability and even a more severe degree of permanent disability. Usually the new pathology will result from psychological problems. Access to compensation for psychotraumatic disability caused by the injury is covered under all jurisdictions but, at least in some jurisdictions, it is far more difficult to access compensation when disability is attributed to the claims management process.

In an Ontario case, the worker was granted benefits for psychotraumatic disability, including anxiety with paranoid features, attributed to the employer's surveillance activities. The Tribunal recognised that the surveillance activities had harmed the worker's health, and had also "irrevocably damaged the employer-employee relationship". It confirmed not only the right to benefits but the restriction against work for the accident employer⁹⁴. In Quebec, the majority of the case law refuses to grant

⁹³ See generally K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 *International Journal of Law and Psychiatry* 521.

⁹⁴ *Decision No. 1212-97*, (1997) 44 W.S.I.A.T.R. 129.

compensation attributable to what are termed "tracasseries administratives" or administrative troubles⁹⁵, and many would hold that disability caused by surveillance falls within this category.

2.3.2 Civil liability

Over and above the issue of compensation for disability resulting from surveillance there is some question as to whether damages may be sought for violation of Charter rights. While such a violation by the employer or a colleague would normally not give rise to damages because of the exclusionary provisions contained in all workers' compensation legislation in Canada⁹⁶, there may be more leeway with regard to suits claiming damages to the worker's reputation⁹⁷. Law suits for damages inflicted by the behaviour of private surveillance firms may also be a possibility, although most legislation prohibit law suits against all employers covered by the compensation scheme, so that, depending on the province, the right to sue for damages might be curtailed⁹⁸ or non-existent if the private detective agency was also an employer under the Act⁹⁹.

In insurance law there have been some cases where courts have granted damages against the insurance company for the invasion of the worker's privacy by a private investigator, even in cases where the judge has accepted to hear the evidence because of issues of relevance. In a Quebec case, damages were granted because the claimant

⁹⁵ *Lefebvre et Infirmières Plus enr. (fermé) et C.S.S.T.*, C.L.P. 109869-72-9902, March 5th 2001 (Quebec). See generally K. Lippel, *La notion de lésion professionnelle*, 4ième édition, (Yvon Blais, Cowansville, 2002) at 125-138.

⁹⁶ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Genest et Genest v. Commission des droits de la personne et des droits de la jeunesse et Beaudet*, C.A.Q. n° 500-09-004729-976, January 12th 2001.

⁹⁷ A few recent Court of Appeal decisions in Quebec have allowed the right to sue in cases in which the worker was claiming damages from the employer for damage to his or her reputation: See *Arthur et al c. Williams*, C.A.Q. , 500-09-007443-989, September 23rd 2002; *P.S.B.G.M. c. Williams*, C.A.Q. 500-09-007429-988, September 23rd 2002; *Kupelian c. Nortel Networks Corp.*, C.S.500-05-069071-015, D.T.E. 2002T-377, March 26 2002; *Parent v. Rayle* 500-09-012323-028, November 21st, 2002.

⁹⁸ In Quebec, section 441 of the *Act Respecting Industrial Accidents and Occupational Diseases* would allow for a law suit against third party employer for the balance of the damages.

was on his own property at the time the video was made. Even though the video was found to be admissible, the judge held that the claim for disability insurance did not imply that the claimant renounced his charter rights to privacy¹⁰⁰. In Newfoundland a lawsuit seeking compensation from the private surveillance firm was refused because of the facts of the specific case, but the Court did not preclude the possibility of a successful damage suit if other facts had been proven¹⁰¹.

Worker representatives interviewed told us they were currently pursuing claims for damages against workers' compensation boards on the basis of intentional infliction of emotional distress. While there are few Canadian cases granting damages against a compensation board¹⁰², similar claims have been upheld against insurance companies in the U.S. on the basis of the tort of bad faith. In those cases the private insurance companies had shown bad faith in their administration of a worker's claim based on workers' compensation legislation¹⁰³.

Conclusion

The pervasive recourse to covert surveillance of injured workers is damaging to the health not only of those workers who are subjected to surveillance but also of those who refrain from attempting any activity, regardless of their doctor's recommendation, for fear of being video-taped by a private detective. Over and above the incentive to refrain from

⁹⁹ *Kovach v. British Columbia (W.C.B.)*, [2000] 1 S.C.R. 55; *Lindsay v. Saskatchewan (W.C.B.)*, [2000] 1 S.C.R. 59.

¹⁰⁰ *Bolduc v. S.S.Q. Société d'assurance-vie inc.*, [2000] R.R.A. 207.

¹⁰¹ *Druken v. R.G. Fewer and Associates Inc.* [1998] N.J. o. 312, Nfld Supreme Court.

¹⁰² There are some. See for instance *Butler v. Newfoundland (W.C.C.)* [1998] N.J. No. 190.

¹⁰³ See for instance Wendell J. Kiser, "Bad Faith Handling of Workers' Compensation Cases: Can It Give Rise to a Separate Tort Action Against Employers, Carriers, or Self-Insureds?", (1987) 23 Tort and Insurance Law Journal 147. See also Marvin Duckworth, «The Tort of Bad Faith arising from Workers' Compensation Matters: A Rumbling Volcano», (1989-90) 39 Drake Law Review 87; M. Lasswell, «Workers' Compensation-Employee's Allegation that Workers' Compensation Insurer Terminated his Benefits in Bad Faith Stated Bad Faith Tort Claim against the Insurer», (1994) 43 Drake Law Review 477; Edward Main, «Bad Faith in the Workers' Compensation Context: A Cause in Search of an Action», (1995)

all activity, there is also the collective stigmatisation of injured workers that is enforced by the idea that Charter rights and the rights to privacy somehow should be applied more leniently when the purpose is to discipline injured workers and ensure that the spectre of covert surveillance promotes respect for the law¹⁰⁴. Such a spectre would no doubt prevent many reprehensible activities in all walks of life, so it is interesting to note that the practice of video-surveillance in other regulatory contexts does not seem pervasive.

In Quebec, the C.S.S.T. admits that 35% of the video-surveillance done at its behest failed to justify suspension of benefits¹⁰⁵ but the worker's privacy had nonetheless been violated, and in those cases where the worker had been made aware of the surveillance, the mental anguish associated with this type of violation remains unrecognised and uncompensated.

A certain number of issues lead us to hope that the current situation will be called into question by the courts or lawmakers. Equality principles allow us to question the different treatment by the courts of situations which should be analogous. A comparison of recourse to and legal treatment of video-surveillance by insurance companies and by compensation boards or employers appears to show that workers are more rapidly targeted for more banal reasons and with fewer adverse consequences for those responsible for the surveillance.

It is also unclear why some jurisdictions permit video-surveillance of workers in cases where it would be illegal to use the same techniques to catch criminals. When the state

30 *Tulsa L.J.* 507; Edward Main, «Removal, Remand, and Review of 'Bad Faith' Workers' Compensation Claims», (1996) 13 *T. M. Cooley Law Review* 121.

¹⁰⁴ *Duguay v. Plante et le Tribunal du travail*, (July 16th 2001), Montreal, 500-05-064211-012, D.T.E. 2001 T-1023, (C.S.Q.).

¹⁰⁵ Laurin, *supra* note 24 at 4.

itself is mandating the surveillance, rather than the employer, legal issues are quite different because of Charter principles, and care should be taken in order to insure they are treated as such.

Because hundreds of thousands of decisions are made under workers' compensation legislation, some decision makers imply that it is cost effective and thus legitimate to allow more flexibility in determining the power of the state to violate a worker's right to privacy. Yet the consequences of decisions taken on the basis of video-surveillance evidence are often much more serious for an injured worker than those affecting many accused under the *Criminal Code*. Loss of economic support, stigmatisation and humiliation, in a context in which health and self-esteem are often extremely fragile, are all serious consequences, and it is postulated that workers could claim protection from abusive state action under sections 7 and 8 of the Charter¹⁰⁶.

Although workers relinquished, historically, the right to sue employers for damages, they never relinquished their right to dignity. Pervasive use of video-surveillance to manage workers' compensation claims constitutes in many cases a violation of that right.

¹⁰⁶ *City of Longueuil v. Godbout*, [1997] 3 S.C.R. 844; *Blencoe v. B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307.

Bibliography

- Anon. The injured workers' participatory research project, Making the System Better, Toronto, 2001
- Commission des droits de la personne, *Filature et surveillance des salariés absents pour raison de santé: conformité à la Charte*, report adopted by resolution of the Commission, COM-440-5.1.1, April 16, 1999
- L. Davis, H. Wellman H, L. Punnett, "Surveillance of work-related carpal tunnel syndrome in Massachusetts 1992-1997: A report from the Massachusetts sentinel event notification system for occupational risks (SENSOR)", [2001] 39 Am J Ind Med 58
- Marvin Duckworth, «The Tort of Bad Faith arising from Workers' Compensation Matters: A Rumbling Volcano», (1989-90) 39 Drake Law Review 87
- J.M. Evans, "Problems in Mass Adjudication: The Courts' Contribution", (1990) XL:3 U of T. Law Journal, 606
- M. Gilbert, *L'assurance collective en milieu de travail*, (Cowansville, Qc: Yvon Blais, 1998)
- T.J. Ison, "The Therapeutic Significance of Compensation Structures», (1986) 64 Canadian Bar Review 605
- P. Issaiys, "Le droit administratif et la décision collective", (1990) XL:3 U of T. Law Journal, 611
- Wendell J. Kiser, "Bad Faith Handling of Workers' Compensation Cases: Can It Give Rise to a Separate Tort Action Against Employers, Carriers, or Self-Insureds?", (1987) 23 Tort and Insurance Law Journal, 147.
- M. Lasswell, «Workers' Compensation-Employee's Allegation that Workers' Compensation Insurer Terminated his Benefits in Bad Faith Stated Bad Faith Tort Claim against the Insurer», (1994) 43 Drake Law Review 477
- G.Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", (1996) 22 The Canadian Practitioner 5.
- K. Lippel, *La notion de lésion professionnelle*, 4ième édition, (Yvon Blais, Cowansville, 2002)
- K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 International Journal of Law and Psychiatry 521.
- E. Main, «Removal, Remand, and Review of 'Bad Faith' Workers' Compensation Claims», (1996) 13 T. M. Cooley Law Review 121.

D. Mendelson, «The Expert Deposes but the Court Disposes: the Concept of Malingering and the Function of Medical Expertise», (1995) 18:4 *International Journal of Law and Psychiatry* 425

B. J. Molzen, "Malingering, Videotape Analysis, and the Use of the Independent Medical Examination in Disability Determination, (1999) January-February, *The Forensic Examiner* 11

T. Morse, C., Dillon, N. Warren, "Reporting of Work-related Musculoskeletal Disorder (MSD) to Workers' Compensation", [2000] 10(3) *New Solutions*:281-29.

A.R. Nadeau, *Vie Privée et droits fondamentaux* (Cowansville, Qc: Yvon Blais, 2000)

Ontario Medical Association Submission to the Standing Committee on Resources Development Regarding Bill 165 An Act to Amend the Workers' Compensation Act and the Occupational Health and Safety Act, September 8, 1994

Dr. A. Neveu, *Pour un meilleur suivi des travailleurs victimes de lésions professionnelles au dos*, Fédération des médecins omnipraticiens du Québec, 2001. Publication supported by the C.S.S.T.

Rollande Parent and Pierre Saint-Arnaud, "Accidentés du travail - Les Images peuvent être trompeuses", *Le Devoir*, January 20th 2003, at B-6

P. Patenaude (ed.), *Police, techniques modernes d'enquête ou de surveillance et droit de la preuve*, Actes du Colloque, Sherbrooke, 1998

J.F. Pedneault, L. Bernier, L. Granosik, *Les droits de la personne et les relations de travail*, (Yvon Blais, Cowansville, Qc. 2002)

J. Quirion, "Être filmé à son insu dans une «drôle» de vidéo", [1997] *Prévention au Travail* at 32.

J. Reid, C. Ewan and E. Lowy, «Pilgrimage of Pain: The Illness Experiences of Women with Repetition Strain Injury and the Search for Credibility», (1991) 32:5 *Soc. Sci. Med.* 601.

H. Shannon and G. Lowe, "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?", [2002] 42 *American Journal of Industrial Medicine* 467;
ontario medical association statement to legislature

J.D'A. Vaillant, "Problèmes que posent les décisions collectives", (1990) XL:3 *U of T. Law Journal*, 621-629.

W. Wilkinson, «Therapeutic Jurisprudence and Workers' Compensation», (1994) 30 *Arizona Attorney* 28;

**TPX – INDEXING CODES FOR
OPTIONAL INFO: _____**

SM1 Acknowledgement Memo

SM2 Security File Memo

SM3 Wrongdoing Confirmed Memo

SM5 Admin Closure Memo

SM6 SIB/RSD Notification of File Review Memo

SN1 Surveillance Notification

SR1 Surveillance Report

CR Correspondence Rec'd (Assistance)

CS Correspondence Sent (Assistance)

0404A – Referral TO SIB/RSD Surveillance Request

1316A - Confidential Call Record

Standard Memos and Reports Directed to Claim by Regulatory Services

To:/OPERATIONS/WCBO, Case Manager,
Construction/Transportation, 3rd Floor, Desk 1
From: Support Analyst, RSD
Date:
Subject: Surveillance Acknowledgement Memo - To Operations
Claim No: SIB#: SIB11- Name:

UNDER INVESTIGATION BY REGULATORY SERVICES - DOCUMENT IS NOT TO BE RELEASED

Your Surveillance Referral Memo has been received. This file has been assigned to Compliance Specialist, at

Surveillance is considered an investigative tool, as provided for in the Policy #22-01-09. While an RS investigation is underway, access to the SIB section of the claim file will not be granted. Non-disclosure of documentation is also supported as an exception under FIPPA, Section 14 - law enforcement.

It is recommended that you continue to adjudicate the claim as part of your regular course of business. While this file remains active in RS, please notify the Compliance Specialist of any pertinent claim activity. Information pertaining to entitlement decisions, such as NEL (P.D), FEL, LMR or Appeals activity, as well as any major changes in level of disability or address changes, are of particular importance.

A copy of this memo has been filed to the SIB Section of the claim file. Please ensure that the jacket is updated to reflect that a referral has been made to RS.

Do not permit access to the SIB Section until this investigation is complete.

If you have any questions, please contact the Compliance Specialist directly.

Support Analyst
Regulatory Services Division

To: _____, LTCM, Desk # _____, Transportation/Construction Sector,
Toronto Office

From: _____, Compliance Specialist, Compliance Branch

Date:

Subject: Surveillance Approved (Company Selected) - to Operations
Claim No: _____ SIB#: SIB11- _____ Name: _____

UNDER RSD INVESTIGATION - DOCUMENT IS NOT TO BE RELEASED

Your request for surveillance has been approved. A private investigation firm has been selected, with case details provided to them.

When the investigation is complete, you will be provided with an original written report. A duplicate original report will be retained by Regulatory Services, along with the video evidence. If, as a result of the surveillance, wrongdoing is suspected, a consultation process with you and this Branch will ensue.

A copy of this memo has been file in the SIB section of the claim file.

If you have any questions, please contact the me directly at _____

Compliance Spécialist
Regulatory Services Division

To: OPERATIONS/WCBO, Ottawa - Long Term Case Management -
Team 2. Location - Desk #

From:

Date:

Subject: Closure Memo
Claim No: SIB#: SIB12. Name:

DOCUMENTS CAN BE RELEASED.

Regulatory Services has completed its review of this file. Please find attached a Closure Report with the details of the investigation.

Should you require any further information or clarification please contact Senior Investigator or Compliance Specialist

Investigations and Prosecutions Team
Regulatory Services Division

To: Long Term Case Manager, Desk #
Transportation/Construction Sector, Toronto Office

From: , Compliance Specialist, Compliance Branch, RSD

Date:

Subject: Surveillance Complete - To Operations
Claim No: SIB#: SIB13- Name:

REGULATORY SERVICES INVESTIGATION IS COMPLETE - DOCUMENT CAN BE RELEASED

This file was referred to Regulatory Services by the Long Term Case Manager (LTCM) to consider surveillance services as it was alleged that Mr. , may be misrepresenting his level of disability, and/or working while in receipt of benefits from the WSIB.

Mr. suffered a right distal tibia and fibula fracture which was immediately treated surgically with an open reduction and internal fixation. There were no surgical complications as evidenced by the operative report from ; however Mr. continued to present with pain and deficits in function that was not keeping with clinical expectations.

Mr. reports that he has not worked since the date of his original injury yet clinical records dated indicates that during the assessment Mr. reported he worked in construction. Additionally, a prior Confidential Call Record (CCR) from (see attached), alleged that Mr. was working under the table renovating houses

Surveillance was approved pursuant to possible charges under Section 149(1) and 149(2) of the WSI Act. A period of surveillance was conducted from to

The surveillance assignment is now complete. During the period of surveillance Mr. was observed performing the following activities:

- operating a motorized scooter in his residential area
- securing a motorcycle to a trailer
- test driving an ATV
- spraying a motorized vehicle with paint

The surveillance DVD (1) will be sent to Records Control for filing. The Surveillance Report will be indexed and scanned by RS into the SIB section of the Imaged Claim file. Should you need to acquire the DVD for viewing, you can do so by e-mailing Records Control at "exhibits", clearly stating the reason for your request. The original written report and DVD have been retained by RS.

The information gathered through a surveillance assignment should be used in conjunction with existing information on file in accordance with Policy No. 11-01-08, Audio/Visual Recordings.

As the investigation would then be complete, access to the documentation in the SIB Section of the claim file is no longer exempt.

If you have any questions, please contact me at

To:

From:

Date:

Subject: New Claims Information Being Provided to Operations by Regulatory Services.
Typical worker/file info here

An investigation being conducted by Regulatory Services has surfaced significant new information that appears pertinent to the above named worker's benefit entitlement. The information is being provided for your immediate consideration; our investigation is ongoing.

Background:

New Information:

To:

From:

Date:

Subject: Charges Laid - New Information Being Provided to Operations by Regulatory Services.
Typical worker/file info here

Charges related to the obligations of a worker under the Workplace Safety and Insurance Act have been laid against the above noted worker. The investigation conducted by Regulatory Services has surfaced new information that appears pertinent to the worker's entitlement to benefits. The information is being provided for your immediate consideration; Regulatory Services will report in a timely fashion the outcome of the court proceedings.

Background:

Charges Laid:

New Information:

To:
From: Carrie Millman
Date: December 4, 2013
Subject: Surveillance Not Approved - To Operations
Claim No: [REDACTED] SIB#: [REDACTED] Name: [REDACTED]

NO INVESTIGATION - DOCUMENT CAN BE RELEASED

This file was referred to Regulatory Services on (INSERT DATE) requesting a period of surveillance.

Your request has not been approved for the following reason(s):

-
-

A copy of this memo has been filed into the SIB section of the claim file. As the request has not been approved, there is no outstanding investigation. Access to the documentation in the SIB Section is no longer exempt.

If you have any questions, please contact the me directly at 416-344-xxxx.

Name
Title

Surveillance Template

Surveillance Request

Background/Rationale for Surveillance

BACKGROUND:

Name	
Date of Birth	
Date of Accident	
Claim #	
Area of Injury	
Accepted Diagnosis	
Accident History (brief)	
Pre-accident job	
Employer Name	
Relevant and/or upcoming surgeries	
NEL or PD Quantum	

PERMANENT OR CURRENT RESTRICTIONS

--

RELEVANT/CURRENT BENEFITS PAID

--

ALLEGATION

(what about the claim has caused you to make a referral for surveillance)

RELEVANT FACTS

(what facts from the claim help support your "allegation")

Modified Work

Does the employer have suitable modified work available?	
Did the employer offer modified work to the worker?	
If suitable modified work is not available, has the file been referred for work transition?	

Brief Work Transition History

(especially describe any barriers)

Physical Description

Height		Weight	
Skin Colour		Hair colour	
Gender		Identifiable features	

Rationale for Surveillance

(what decisions do you expect to inform and why will surveillance assist in making those decisions)

Surveillance Request

Name of Requestor
Request Date

Surveillance Status Referred to SIB

Draft Date	11/25/2011
Date Sent For Approval	12/05/2011
Date Approved	12/06/2011
Date Sent to Company	12/07/2011
Date Completed	01/03/2012
Date Referred to SIB	01/03/2012
Date Response Sent to Requester	
Date Not Approved	

Surveillance Information

Allegations

POA

s.149(1) - WSIA - Knowingly making a false statement or representation to WSIB relating to benefit entitlement

s.149(2) - WSIA - Wilfully failing to inform WSIB within 10 days of material change relating to benefit entitlement

Criminal

Internal

Background/Rationale for Surveillance

BACKGROUND:

Name	
Date of Birth	
Date of Accident	
Claim #	
Area of injury	
Accepted diagnosis	
Accident history (brief)	
Pre-accident job	
Employer name	
Relevant and / or upcoming surgeries	
NEL or PD Quantum	

PERMANENT OR CURRENT RESTRICTIONS:

-
-

•

RELEVANT/CURRENT BENEFITS PAID:

ALLEGATION:

Referral from the Operating area notes the following:

-
-
-
-

RELEVANT FACTS

-
-
-
-

Does the employer have suitable modified work available?	
Did the employer offer suitable modified work to the worker?	
If suitable modified work is not available, has the file been referred for an LMR program?	

BRIEF LMR HISTORY (if applicable):

PHYSICAL DESCRIPTION OF SUBJECT:

Height		Weight	
Skin colour		Hair colour and style	
Sex		Any other identifiable features	

RATIONALE FOR SURVEILLANCE:

Has an issue of non-compliance been identified? Yes

Type of Investigation

Type of Investigation

- Worker
- Internal
- Provider
- Other
- Employer
- Supplier
- Assistance
- Witness Support

Worker Details

Name

Alias

Current Address

City

Province ON

Country Canada

Postal Code

Phone No.

Previous Address and Phone 1 at

From To
Previous Address and Phone 2 at

From To
Previous Address and Phone 3 at

From To

Gender

Date of Birth

SIN

Language Preference

Physical Description

PIF Information

Information Required

Information/Evidence

Requested	Received
<input checked="" type="checkbox"/> Documents	<input type="checkbox"/> Documents
<input checked="" type="checkbox"/> Photographs	<input type="checkbox"/> Photographs
<input checked="" type="checkbox"/> Video	<input type="checkbox"/> Video

Information/Evidence Required

BACKGROUND:

Name	
Date of Birth	
Date of Accident	
Area of injury	
Pre-accident job	
Employer name	

PERMANENT OR CURRENT RESTRICTIONS:

<ul style="list-style-type: none">•••

•

ALLEGATION:

Referral notes the following:

-
-
-
-

PHYSICAL DESCRIPTION OF SUBJECT:

Height		Weight	
Skin colour		Hair colour and style	
Sex		Any other identifiable features	

Vehicle Description:

Addresses Frequented:

Assignment:

Special Instructions:

1. Should it be determined that _____ is performing activities exceeding the restrictions noted above or activities that contradict what he claims he can or cannot do, video footage should be conducted on at least 2 consecutive days and should include all physical activities.
2. Should it also be determined that _____ is working, surveillance should also confirm who the employer is/are, all work locations, days/hours of work, and all physical activities involved.
3. Please ensure that all activities are recorded on video. The video must be unedited with date and time indication.
4. Please provide a still photo showing a close-up of subject's face.
5. Please contact _____ Compliance Specialist (416) 344-____ each day following surveillance or at any time when sharing of information would enhance this assignment. Please advise of any periods of extended inactivity where direction may be required. Should you be unable to reach _____, please contact _____ at (416) 344-____.
6. Please forward 4 copies of the video and 2 copies of the completed report to _____, Compliance Specialist, Investigative Services Branch, 200 Front St. West, 20th Floor, Toronto ON., M5V 3J1.

Date Response Requested By

Reply From Company

Surveillance Start		Surveillance End	
Overall Duration (# of days)	6 days		
# of Surveillance Hours		Rate per Hour	
Mileage (# of kms)		Mileage Rate (per km)	
Admin Costs		Disbursements	
Total Cost			

Report Card Score: 30 - Excellent

Open Report Card

Comments	
Findings	Wrongdoing Confirmed

Manager Approval

SIB Manager Approval Approved
Date Approved 12/06/2011
Approved By Carrie Millman

Assistant Director Approval

SIB Assistant Director Approval Approved
Date Approved 12/06/2011
Approved By Bob Thomas

Director Approval

SIB Director Approval Approved
Date Approved 12/06/2011
Approved By Bob Thomas

Report Card

Surveillance Company:

Key 25

1. Communication	Very Satisfied
2. Authentication Letter	Very Satisfied
3. Were opportunities exhausted?	Very Satisfied
4. Is video useful and/or admissible?	Very Satisfied
5. Are statements objective?	Very Satisfied
6. Was evidence useful and/or admissible?	Very Satisfied
7. Report - sufficiently detailed?	Very Satisfied
8. Information - as requested?	Very Satisfied
9. Timely completion?	Very Satisfied
10. Invoice - proper?	Very Satisfied
Total Score / Rating: 30 Excellent	
Comments	allegation confirmed

SIB File Number: .

416-344-
Toll Free 1-800-387-0750,
Fax 1-416-344-4166

August 23, 2013

[REDACTED]

SIB Case #
Subject

A surveillance assignment for your firm is available upon signature and return of this letter. Please review the following:

The following protocol applies to your firm during the assignment:

Authenticity:

1. Workplace Safety and Insurance Board (WSIB) Policy requires that all video submissions be authenticated. A covering letter signed by the investigator should accompany the video evidence outlining:
 - when (date and time) and where the recording was made
 - what type of equipment was used
 - confirmation that the video recording was not altered in any way and is a true representation of its subject

Legal:

2. Compliance with the law (e.g., FIPPA; PI & SGA, R.S.O. 1990, C. P.25, as amended, WSIA, formerly WCA), which precludes the interception of verbal communication
3. All private investigators' licences must be current and in good standing.
4. WSIB accounts, if applicable, must be current and in good standing. Clearance certificates to be provided to WSIB's Regulatory Service on request.

Confidentiality & Conflict of Interest:

5. Compliance with confidentiality and conflict of interest provisions according to your contract and the confidentiality and conflict of interest agreements with the WSIB.
6. Immediate disclosure to Regulatory Services of any potential or actual conflict of interest per section 9.2 of Contract - immediate telephone contact with Regulatory Services.

Documentation:

7. Corrections or revisions in documentation must be agreed to by both parties and will be made in writing by both parties, in a timely manner.
8. You will obtain assignment clarifications prior to conducting surveillance and day by day through contact with Regulatory Services Compliance Specialist.
9. Documentation relating to assignments (DVD, photographs, etc.) is to be provided to Regulatory Services by registered mail or courier (protocol exempted). Receipts must be kept. All video/photographs are to be unedited and dated.
10. All documentation is to be retained according to the laws of Canada, for 7 years or for whatever time required to ensure that any proceeding requiring the information has taken place, whichever is longer.

Changes:

11. Any changes to the contract, agreements, assignments must be agreed to in advance by Regulatory Services and in writing.

Acceptance & Agreement:

12. Your signature on this letter and its return, by fax, confirms acceptance of the assignment and agreement to comply with the provisions of this protocol, the contract with the WSIB and the confidentiality/conflict of interest agreement.

Expectations of all Assignments:

13. Clear photos and visual surveillance which confirms the identity of the subject, vehicles and their license plates, and other persons, businesses, etc., observed during the surveillance.
14. Comments in reports to be supported by evidence/facts (no subjective or opinion evidence).
15. Use of every opportunity to determine activities & obtain useful/admissible evidence for criminal prosecution and/or administrative action.
16. Daily contact with Regulatory Services.
17. Two duplicate written reports & Four videos.

Fee Schedule

18. The fee structure for your firm is based on your tender submission as outlined below. A detailed invoice, including actual surveillance times and specific disbursements, is to be submitted upon completion of this assignment.

- 1 Hourly rate during surveillance for one investigator [REDACTED]
- 2 Hourly rate during surveillance for each additional investigator [REDACTED]
- 3 Hourly rate during travel time [REDACTED]
- 4 Mileage rate (per kilometre) [REDACTED]
- 5 Administrative hourly rate (e.g. To Include but not limited to report preparation, office expenses, pre-surveillance background/planning etc) [REDACTED]
- 6 DVD's \$5.00 per assignment
- 7 Stationary Camera services [REDACTED] per week
- 8 Photography (per photo costs) [REDACTED]
- 9 Duplication/photocopy charges (per page) [REDACTED]
- 10 Cell phone charges (per minute) [REDACTED]
- 11 Search fees (e.g. MOT, Corporate searches, Land Registry - per search) [REDACTED]
- 12 Accommodations (per day) [REDACTED]

Case Detail:

BACKGROUND:

Name	
Date of Birth	
Date of Accident	

Area of injury	
Accepted diagnosis	
Pre-accident job	
Employer name	

PERMANENT OR CURRENT RESTRICTIONS:

•

ALLEGATION:

•

PHYSICAL DESCRIPTION OF SUBJECT:

Height		Weight	
Skin colour		Hair colour and style	
Sex		Any other identifiable features	

Vehicle Description:

•

Addresses Frequented:

•

Special Instructions:

1. Should it be determined that NAME is performing activities exceeding the restrictions noted above or activities that contradict what he claims he can or cannot do, video footage should be conducted on at least 2 consecutive days and should include all physical activities.
2. Should it also be determined that NAME is working, surveillance should also confirm who the employer is/are, all work locations, days/hours of work, and all physical activities involved.
3. Please ensure that all activities are recorded on video. **The video must be unedited with date and time indication.**
4. Please provide a still photo showing a close-up of subject's face.
5. Please contact NAME Compliance Specialist (416) 344- each day following surveillance or at any time when sharing of information would enhance this assignment. Please advise of any periods of extended inactivity where direction may be required. Should you be unable to reach NAME, please contact NAME at (416) 344-.
6. Please forward **4 copies of the video** and **2 copies of the completed report** to NAME, Compliance Specialist, Investigative Services Branch, 200 Front St. West, 20th Floor, Toronto ON., M5V 3J1.

Please provide Documents, Photographs, Video.

This assignment must be completed by: 10/11/2013

Please contact me directly, should there be any questions.

Sincerely,

NAME, Compliance Specialist
Regulatory Services Division

PIF's Acceptance:

Name

Date (dd/mm/yyyy)

Position

Firm

To:
 From:
 Date: December 4, 2013
 Subject: Surveillance Tracking Form
 Claim No: [REDACTED] SIB#: [REDACTED] Name: [REDACTED]

Date Received in RSD:

Period(s) of Surveillance:

Exhibits	RSD File	File Room	Disclosure	Rec Control DVD Sent	PI Report Scanned	Others
DVD 1						
DVD 2						
DVD 3						
Master						
PI Report Copy 1						
PI Report Copy 2						
Letter of Authenticity Copy 1						
Letter of Authenticity Copy 2						
Invoice						

Comments:

Name
 Title

To:
From:
Date: December 4, 2013
Subject: INTERNAL RS - WARNING MEMO
Claim No: [REDACTED] SIB#: [REDACTED] Name: [REDACTED]

INTERNAL RS - WARNING MEMO

ENTITLEMENT:

	ISSUE	REFERENCE DOCUMENTS
Psych Issues Identified		
Risk of Personal Harm		
Threats of Personal Harm		
WSIB Security Warnings		

Name
Title

Reference Materials



Surveillance

Compliance

Application Date This policy applies to all decisions made to use surveillance on or after September 1, 1997, for all accidents.

Published 12-Oct-2004

Subject Compliance

Title Surveillance

Document No. 22-01-09

| [Policy](#) | [Guidelines](#) | [References](#) |

Policy

The WSIB has a duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act), and may use surveillance to gather evidence for this purpose.

A director in Regulatory Services must approve the use of surveillance in every case.

[Back to top](#)

Guidelines

Surveillance involves discreetly observing one or more subjects. It may also involve the use of audiotape, video, film, and/or photographs. For information about which WSIB staff may view or listen to surveillance recordings, see [11-01-08, Audio/Visual Recordings](#).

If a surveillance recording is made, that recording is transcribed and the transcript is added to the claim or employer file.

When there is an issue in dispute, the parties have full access to the surveillance recording and/or the transcript. However, if an inquiry by the operating area, or the Regulatory Services/ Legal Services investigation is underway, access will not be granted until the inquiry or investigation is completed. (See [21-02-01, Access to Claim File Information - Issue in Dispute](#).)

Application date

This policy applies to all decisions made to use surveillance on or after September 1, 1997, for all accidents.

Document history

This document replaces 11-02-06 dated April 6, 2001.

[Back to top](#)

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended
Section 131

Workers' Compensation Act, R.S.O. 1990, as amended
Section 72

Minute

Board of Directors

#5, May 8, 1997, Page 5972

Administrative

#6, June 18, 2004, Page 372

[Back to top](#)



Audio/Visual Recordings

Decision Making	
Application Date	This policy applies to all decisions made on or after January 1, 1999, for all accidents.
Published	12-Oct-2004
Subject	Adjudication Principles
Title	Audio/Visual Recordings

Document No. 11-01-08

| [Policy](#) | [Guidelines](#) | [References](#) |

Policy

The WSIB accepts audio/visual recordings as evidence, if they

- provide new or more complete information than is already in the claim file
- are relevant and pertain to the WSIB's duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act*, and
- are authenticated.

[Back to top](#)

Guidelines

Definition

Audio/visual recordings - audio/visual recordings include audiotapes, videos, films, and photographs. For information about other types of evidence used in the appeals process, see the "[Appeal System - Principles and Procedures](#)" document on the WSIB website (www.wsib.on.ca).

When recordings are used

On occasion, the WSIB is provided with audio/visual recordings by someone who has an interest in the claim.

The WSIB uses these recordings as evidence if

- there is an issue in dispute
- the decision maker is presented with information to support the investigation of an issue
- staff in Regulatory Services or Legal Services are investigating an issue or considering legal action (see *22-01-05, Offences and Penalties - General*), and/or
- it is necessary to assess a worker's ergonomic needs.

Authenticity

Audio/visual recordings

The WSIB only accepts recordings that are accompanied by a signed statement from the author

- setting out when (date and time) and where the recording was made, and
- confirming that the recording was not altered, and is a true representation of its subject.

If evidence is received that does not meet these guidelines, the WSIB returns the evidence to the sender and asks that it be authenticated and re-submitted.

The WSIB may ask the author to attend a hearing to establish the recording's authenticity through cross-questioning.

Weighing the evidence

WSIB staff must exercise caution when determining the weight to give information revealed in recordings, recognizing that

- audio/visual recordings make a dramatic impact on the viewer, and
- in general, recordings may be selective, i.e., information relevant to the issue in dispute, such as when a worker rests or experiences pain, may not be recorded.

Evidence from audio/visual recordings is considered in conjunction with all other evidence.

Decision-makers may request a health examination if the portrayal of a worker's physical capabilities is inconsistent with health care reports in the claim file.

Review of evidence by workplace party

The workplace party who is the subject of the information, or the representative, is given the opportunity to review the information and provide an explanation.

Disclosure of evidence at a hearing

Parties submitting recordings for a hearing must make these materials available as early as possible before the hearing, since all parties must be given time to review this evidence.

If recordings are first submitted at a hearing, the decision-maker may

- call a short recess to review the evidence, and give the other party an opportunity to review it, or
- adjourn the hearing to give the other party time to review the evidence and prepare a submission, or
- if both parties agree, continue with the hearing and permit the other party to make a post-hearing submission on the new evidence.

Application date

This policy applies to all decisions made on or after January 1, 1999, for all accidents.

Document history

This document replaces 11-01-08 dated June 15, 1999.

Previously, this document was published as:

09-01-09 dated January 4, 1999.

[Back to top](#)

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended

Section 132(1)

Workers' Compensation Act, R.S.O. 1990, as amended

Section 74(b)

Minute

Administrative

#7, June 24, 2004, Page 378

[Back to top](#)



Video Surveillance - A Tool for Operations

Abstract: This document discusses how video surveillance can be a powerful decision-making tool for Adjudicators. It lists the benefits and how to request, review and use audio and visual recordings.

Topic: RSD; compliance; case management; surveillance; regulatory services; compliance

Created: 04/30/2013 10:12:16 AM **Contact:** [Julia Rodricks](#)

Author: [Carrie Millman](#) **Feedback:** [Give us your feedback](#)

Video Surveillance: A Tool for Operations

Video surveillance is a powerful decision-making tool that has been available for use since 1999. Prior to viewing any video surveillance, the decision-maker must ensure that the videotape is authenticated.

Audio/Visual Recordings - Policy Document No. 11-01-08

According to Policy # 11-01-08, the WSIB only accepts recordings that:

- Are accompanied by a signed statement from the author
- Identify when (date/time) and where the recording was made, and
- Confirm the recording was not altered and is a true representation of its subject.

If evidence is received that does not meet the above requirements, the WSIB returns the evidence to the sender and asks that it be authenticated and re-submitted.

What is Surveillance?

Surveillance is:

- An investigative tool used by RSD to gather information about an allegation of possible non-compliance.
- A service we offer to Operations.
- A means to collect objective evidence to support or refute allegations.
- A tool to support administrative decisions.

Benefits of Surveillance

Surveillance:

- Provides point in time evidence of current activity and level of disability.
- Enables investigation of allegations of current wrong-doing – a window of opportunity determined by a Compliance Specialist's review of the file.

Surveillance Request – things to consider

Prior to making a "Request for Surveillance", you need to:

1. Consider the timing, duration and details of your request. For example:

- Are there time constraints? (e.g. seasonal work)
- Should the surveillance be conducted on a specific day or time?
- Where does the subject reside?
- What are the subject's expected activities? (e.g. medical appointments, LMR, etc..)

2. Provide a detailed description of the subject including:

- Height
- Weight
- Hair colour
- Language spoken and
- Any physical identifiers.

The more information you provide, the better. However, use caution when contacting an external party or it may compromise the surveillance. RSD will consult with you regarding any missing information.

Other items:

1. Surveillance must impact claim file decisions and benefits.
2. Compliance Specialists will contact Operations to provide status on surveillance requests.
3. Contact your designated Compliance Specialist if you want to request surveillance.

Video Surveillance – facilitated by RSD vs. Other

1. Where RSD has facilitated the video surveillance through their roster of Private Investigator Firms (PIFs), RSD will:

- View all videotapes
- Monitor the quality and
- Ensure that they are authenticated before providing the tapes to decision-makers.

2. If the video originates outside RSD and wrongdoing or an offence is evident after reviewing video evidence, the decision-maker should:

- Contact the assigned Compliance Specialist and
- Refer the claim file to RSD for possible investigation and prosecution.

Reviewing Video Surveillance – Helpful Tips

1. Is the person on the video the worker?

- If unsure, the decision-maker should call the worker and arrange a time to view the tape together
- Video surveillance is "here and now" evidence, although it can lead to documentary evidence confirming past material change or wrongdoing.

2. Decision-makers should review the videotape against the evidence on file, specifically permanent or current precautions, to determine:

- Does the video demonstrate functioning at a level inconsistent with medical precautions?
- Does the level of functioning demonstrated in the video, contradict level of benefits being paid?
- If the worker receives a permanent impairment award, does the video support the need for a reassessment of the impairment?

3. If you answered "yes" to any of the questions in #2 above, you may want to consider taking one or more of the following actions:

- Provide the worker with a copy of the tape and ask him/her to explain and/or provide submissions.
- Refer the worker to a medical consultant for an opinion on the worker's level of functioning and the possibility of a medical reassessment.
- Suspend or close worker's benefits, if the video confirms the worker is working at his/her pre-injury level or if the evidence suggests that the worker is not sustaining a loss of earnings.
- Create a benefit debt if the video evidence leads to documentation that confirms the worker has been functioning at the pre-accident level or without a loss of wages for a past period.

Video Surveillance – Use & Storage

Whether facilitated through RSD or submitted by another party, video surveillance should be used with caution.

If viewed by the decision-maker:

- The video becomes part of the claim file regardless of whether the video proves or disproves the allegation.
- The jacket should be flagged
- A copy of the videotape should be stored by Records Management
- A copy of the videotape should be provided to the worker if ACCESS is requested.



Video Surveillance A Tool for Operations Sept 3 2012.docx (38k, Word)

OPC Guidance Documents

Guidance on Covert Video Surveillance in the Private Sector

Introduction and scope

The Office of the Privacy Commissioner considers covert video surveillance to be an extremely privacy-invasive form of technology. The very nature of the medium entails the collection of a great deal of personal information that may be extraneous, or may lead to judgments about the subject that have nothing to do with the purpose for collecting the information in the first place. In the Office's view, covert video surveillance must be considered only in the most limited cases.

This guidance is based on the federal private sector privacy law *The Personal Information Protection and Electronic Documents Act (PIPEDA)*, and is intended to outline the privacy obligations and responsibilities of private sector organizations contemplating and engaging in covert video surveillance. We consider video surveillance to be covert when the individual is not made aware of being watched.

This document serves as a companion piece to the following guidelines for video surveillance issued by this office: *Guidelines for Overt Video Surveillance in the Private Sector (prepared in collaboration with Alberta and British Columbia)* and *Guidelines for surveillance of public places by police and law enforcement authorities*.

Please note that the following is guidance only. We consider each complaint brought before us on a case-by-case basis.

PIPEDA requirements governing covert video surveillance

PIPEDA governs the collection, use and disclosure of personal information in the course of a commercial activity and in the employment context of federally regulated employers¹. The capturing of images of identifiable individuals through covert video surveillance is considered to be a collection of personal information. Organizations that are contemplating the use of covert video surveillance should be aware of the criteria they must satisfy in order to collect, use and disclose video surveillance images in compliance with PIPEDA. These criteria are outlined below and address the purpose of the covert video surveillance, consent issues, and the limits placed on collecting personal information through covert video surveillance.

A common misconception is that organizations are released from their privacy obligations if covert video surveillance is conducted in a public place. In fact, under PIPEDA, any collection of personal information taking place in the course of a commercial activity or by an employer subject to PIPEDA, regardless of the location, must conform to the requirements described below.

A. Purpose

The starting point for an organization that is contemplating putting an individual under surveillance without their knowledge is to establish what purpose it aims to achieve. What is the reason for collecting the individual's personal information through covert video surveillance? Under PIPEDA, an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances (subsection 5(3)).

In deciding whether to use covert video surveillance as a means of collecting personal information, an organization should closely examine the particular circumstances of why, when and where it would collect personal information and what personal information would be collected. There are a number of considerations that factor into determining whether an organization is justified in undertaking covert video surveillance. Given the different contexts in which covert video surveillance may be used, the ways in which the factors apply and are analyzed vary depending on the circumstances.

Demonstrable, evidentiary need

In order for the organization's purpose to be considered appropriate under PIPEDA, there must be a demonstrable, evidentiary need for the collection. In other words, it would not be enough for the organization to be acting on a mere suspicion. The organization must have a strong basis to support the use of covert video surveillance as a means of collecting personal information.

Information collected by surveillance achieves the purpose

The personal information being collected by the organization must be clearly related to a legitimate business purpose and objective. There should also be a strong likelihood that collecting the personal information will help the organization achieve its stated objective. The organization should evaluate the degree to which the personal information being collected through covert video surveillance will be effective in achieving the stated purpose.

Loss of privacy proportional to benefit gained

Another factor to be considered is the balance between the individual's right to privacy and the organization's need to collect, use and disclose personal information. An organization should ask itself if the loss of privacy is proportional to the benefit gained. It may decide that covert video surveillance is the most appropriate method of collecting personal information because it offers the most benefits to the organization. However, these advantages must be weighed against any resulting encroachment on an individual's right to privacy in order for a reasonable person to consider the use of covert surveillance to be appropriate in the circumstances.

Less privacy-invasive measures taken first

Finally, any organization contemplating the use of covert video surveillance should consider other means of collecting the personal information given the inherent intrusiveness of covert video surveillance. The organization needs to examine whether a reasonable person would consider covert video surveillance to be the most appropriate method of collecting personal information under the circumstances, when compared to less privacy-invasive methods.

B. Consent

As a general rule, PIPEDA requires the individual's consent to the collection, use and disclosure of personal information (Principle 4.3). It is possible for covert video surveillance to take place with consent. For example, an individual can be considered to have implicitly consented to the collection of their personal information through video surveillance if that individual has initiated formal legal action against the organization and the organization is collecting the information for the purpose of defending itself against the legal action. It is important to note that implied consent does not authorize unlimited collection of an individual's personal information but limits collection to what is relevant to the merits of the case and the conduct of the defence.

In most cases, however, covert video surveillance takes place without consent. PIPEDA recognizes that there are limited and specific situations where consent is not required (paragraph

7(1)(b)). In order to collect information through video surveillance without the consent of the individual, organizations must be reasonably satisfied that:

- collection with the knowledge and consent of the individual would compromise the availability or accuracy of the information; and
- the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.

The exception to the requirement for knowledge and consent could, in certain circumstances, provide for the collection of a third party's personal information.

In the employment context, an organization should have evidence that the relationship of trust has been broken before conducting covert video surveillance. Organizations cannot simply rely on mere suspicion but must in fact have evidentiary justification.

Regardless of whether or not consent is obtained, organizations must have a reasonable purpose for collecting the information.

C. Limiting collection

When collecting personal information, organizations must take care to limit both the type and amount of information to that which is necessary to fulfill the identified purposes (Principle 4.4). Organizations should be very specific about what kind of personal information they are looking to collect and they should limit the duration and scope of the surveillance to what would be reasonable to meet their purpose. Moreover, the collection must be conducted in a fair and lawful manner.

As well, organizations must limit the collection of images of parties who are not the subject of an investigation. There may be situations in which the collection of personal information of a third party² via covert video surveillance could be considered acceptable provided the organization has reason to believe that the collection of information about the third party is relevant to the purpose for the collection of information about the subject. However, in determining what is reasonable, the organization must distinguish between persons who it believes are relevant to the purposes of the surveillance of the subject and persons who are merely found in the company of the subject. In our view, PIPEDA does not allow for the collection of the personal information of the latter group without their knowledge or consent.

Organizations can avoid capturing individuals who are not linked to the purpose of the investigation by being more selective during video surveillance. If such personal information is captured, it should be deleted or depersonalized as soon as is practicable. This refers not only to images of the individuals themselves, but also to any information that could serve to identify them, such as street numbers and licence plates. We advocate the use of blurring technology when required. Though we acknowledge its cost to organizations, we view the expenditure as necessary given that, pursuant to PIPEDA, the personal information of any individual can only be collected, used and disclosed without consent in very limited and specific situations.

The need to document

Proper documentation by organizations is essential to ensuring that privacy obligations are respected and to protect the organization in the event of a privacy complaint. Organizations should have in place a general policy that guides them in the decision-making process and in carrying out covert video surveillance in the most privacy-sensitive way possible. There should

also be a documented record of every decision to undertake video surveillance as well as a record of its progress and outcome.

I. Policy on covert video surveillance

Organizations using covert video surveillance should implement a policy that:

- sets out privacy-specific criteria that must be met before covert video surveillance is undertaken;
- requires that the decision be documented, including rationale and purpose;
- requires that authorization for undertaking video surveillance be given at an appropriate level of the organization;
- limits the collection of personal information to that which is necessary to achieve the stated purpose;
- limits the use of the surveillance to its stated purpose;
- requires that the surveillance be stored in a secure manner;
- designates the persons in the organization authorized to view the surveillance;
- sets out procedures for dealing with third party information;
- sets out a retention period for the surveillance; and
- sets out procedures for the secure disposal of images.

II. Documenting specific instances of video surveillance

There should be a detailed account of how the requirements of the organization's policy on video surveillance have been satisfied, including:

- a description of alternative measures undertaken and their result;
- a description of the kind of information collected through the surveillance;
- the duration of surveillance;
- names of individuals who viewed the surveillance;
- what the surveillance was used for;
- when and how images were disposed of; and
- a service agreement with any third party hired to conduct the surveillance, if applicable.

Best practices for using private investigation firms

Many organizations hire private investigation firms to conduct covert video surveillance on their behalf. It is the responsibility of both the hiring organization and the private investigation firm to ensure that all collection, use and disclosure of personal information is done in accordance with

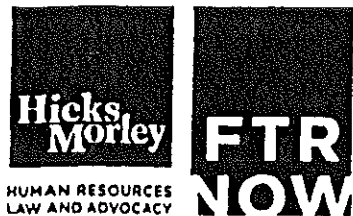
privacy legislation. We strongly encourage the parties to enter into a service agreement that incorporates the following:

- confirmation that the private investigation firm constitutes an "investigative body" as described in PIPEDA "Regulations Specifying Investigative Bodies";
- an acknowledgement by the hiring organization that it has authority under PIPEDA to collect from and disclose to the private investigation firm the personal information of the individual under investigation;
- a clear description of the purpose of the surveillance and the type of personal information the hiring organization is requesting;
- the requirement that the collection of personal information be limited to the purpose of the surveillance;
- the requirement that the collection of third party information be avoided unless the collection of information about the third party is relevant to the purpose for collecting information about the subject;
- a statement that any unnecessary personal information of third parties collected during the surveillance should not be used or disclosed and that it should be deleted or depersonalized as soon as is practicable;
- confirmation by the private investigation firm that it will collect personal information in a manner consistent with all applicable legislation, including PIPEDA;
- confirmation that the private investigation firm provides adequate training to its investigators on the obligation to protect individuals' privacy rights and the appropriate use of the technical equipment used in surveillance;
- the requirement that the personal information collected through surveillance is appropriately safeguarded by both the hiring organization and the private investigation firm;
- the requirement that all instructions from the hiring company be documented;
- a provision prohibiting the use of a subcontractor unless previously agreed to in writing, and unless the subcontractor agrees to all service agreement requirements;
- a designated retention period and secure destruction instructions for the personal information;
- a provision allowing the hiring company to conduct an audit.

¹ For information on whether your organization is subject to PIPEDA, please see "A Guide for Business and Organizations" online at http://www.priv.gc.ca/information/guide_e.cfm

² By "third party", we mean the person who is not the subject of surveillance.

May 2009



JULY 29, 2009
BY: SCOTT T. WILLIAMS

COVERT SURVEILLANCE GUIDELINES FOR FEDERALLY REGULATED EMPLOYERS

On May 27, 2009 the Office of the Privacy Commissioner of Canada issued an *OPC Guideline Document: "Guidance on Covert Video Surveillance in the Private Sector"*. The Guideline Document outlines the Commissioner's recommendations to private sector organizations engaging in covert surveillance in the course of commercial activity, as well as to federally regulated employers engaging in covert surveillance with respect to their employees. These activities are governed by the *Personal Information Protection and Electronic Documents Act ("PIPEDA")*, which the Commissioner is responsible for enforcing.

The Commissioner applies a fairly stringent test in order to justify the undertaking of covert surveillance, and identifies four factors to be considered when determining whether it is appropriate:

- First, the organization must have a strong basis to support the use of covert video surveillance, and not a mere suspicion.
- Second, the surveillance must be clearly related to a legitimate business purpose, and there should be a strong likelihood that the surveillance will help achieve the purpose.
- Third, an organization should first weigh whether the loss of privacy is proportional to the benefit gained.
- Fourth, an organization should also first consider whether other less "privacy" invasive means of collecting the personal information would be more appropriate prior to engaging in covert surveillance.

The Guideline Document notes that consent is normally required when engaging in covert surveillance. According to the Commissioner, consent may be implied in certain cases, such as when an individual has initiated legal action and such surveillance is necessary to defend the action. The



Guideline Document further notes that, in many cases, covert surveillance will be conducted without consent and that, in such cases, the organization must justify the surveillance under one or more of the statutory exceptions to PIPEDA's consent requirement.

The Guideline Document also provides recommendations on documenting covert surveillance and developing a covert surveillance policy, and also provides recommended steps when engaging private investigation companies to engage in covert surveillance.

Federally regulated employers, such as banks and inter-provincial transportation companies, as well as provincial companies which engage in covert surveillance in relation to their commercial activities are advised to review the Guideline Document, which can be found on the Commissioner's website at:

http://www.priv.gc.ca/information/pub/gd_cvs_20090527_e.cfm

While the guidelines are not legally binding, they provide some insight into how the Commissioner may adjudicate in cases involving covert surveillance.

For more information, please feel free to contact any member of the firm's Information and Privacy Group.

This document is a Confidential Information and the Ministry of Justice and Attorney General of Canada. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form without the prior written consent of Hicks Morley Hamilton Stewart Storie LLP.

Hicks Morley Hamilton Stewart Storie LLP
www.hicksmorley.com

TORONTO
Toronto Dominion Tower
7A Wellington St. W.
10th Floor, Box 171
Toronto, ON M5K 1K8
Tel: 416 362 1011
Fax: 416 362 9683

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519 746 0411
Fax: 519 746 4037

LONDON
148 Fullarton St.
Suite 1408
London, ON N6A 4P3
Tel: 519 433 7515
Fax: 519 433 8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613 549 6353
Fax: 613 549 4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel: 613 234 0386
Fax: 613 234 0418

APPENDIX J
RECOMMENDATIONS AND OPINIONS OF THE ATTORNEY GENERAL'S
ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE,
AND RESOLUTION DISCUSSIONS

CHARGE SCREENING

The Threshold Test for Commencing or Continuing a Prosecution

1. The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a "reasonable prospect of conviction" be adopted for all offences.
2. The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.
3. The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.
4. The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.
5. The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6. The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

Various Public Interest Factors that May be Relevant

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.
8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not consider any political consequences for the government flowing from the prosecution.
9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.
10. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.
11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not consider the status in life of either the accused or the victim.
12. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.
13. The Committee recommends that the agent of the Attorney General should take into account national security and international relations in determining whether a prosecution is in the public interest.
14. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the **availability and efficacy of alternatives to prosecution.**

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

Charge Screening in Ontario

20. The Committee recommends that there exist in Ontario a system of charge screening by agents of the Attorney General.

21. The Committee recommends that there exist in Ontario a system of post-charge screening by agents of the Attorney General.

22. The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence.

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

Charge Screening in Ontario

20. The Committee recommends that there exist in Ontario a system of charge screening by agents of the Attorney General.

21. The Committee recommends that there exist in Ontario a system of post-charge screening by agents of the Attorney General.

22. The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence.

The Mechanics of Post-Charge Screening

23. The Committee recommends that the Attorney General's agents should be required to conduct their post-charge review prior to setting a date for a preliminary hearing or trial.

24. The Committee recommends that the investigators should provide to Crown counsel for the purposes of screening charges, all information necessary to ascertain if the threshold test for conducting a prosecution has been met, and all information necessary to assess the impact of any relevant public interest factors in the prosecution. This material will necessarily include, but will not be limited to, that which is required for disclosure.

25. The Committee recommends that the Attorney General require his or her agents to be duly diligent in making efforts to obtain all information that relates to a case for purposes of screening and disclosure.

Presentations

OBA Professional Development

Current Issues in Workplace Safety and Insurance Law: Diagnosis,
Analysis and Resolution

**Surveillance, Privacy & Social Media Issues: the Regulatory Services
approach at the WSIB**

**Mike Johnston,
Executive Director, Regulatory Services,
Workplace Safety & Insurance Board**

May 23, 2013

wsib
cspaat
ONTARIO

Workplace Safety and Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Table of Contents

A.	Introduction.....	3
B.	Policy.....	3
C.	The decision to conduct surveillance.....	5
D.	The surveillance assignment.....	7
E.	Surveillance evidence.....	8
F.	Social Media.....	9

A. Introduction

The WSIB has a duty to hear, examine, and decide issues under the Workplace Safety & Insurance Act, and may use surveillance to gather evidence for this purpose. Surveillance is an investigative tool used by the Workplace Safety & Insurance Board ("the WSIB") to gather point-in-time evidence regarding an allegation of potential non-compliance, to support or refute the allegation.

Compliance Specialists in Regulatory Services review all requests for surveillance by Case Managers which may result from concerns in reviewing a claim, or from allegations received through our confidential Action Line (1-888-745-3237).

The WSIB requests surveillance to be conducted by approved private investigations firms that we contract with and pay on a per-assignment basis. The surveillance evidence that is requested is video only, with no audio. The video surveillance conducted cannot exceed the subject's reasonable expectation of privacy.

If surveillance video originates externally (eg arranged by an employer), the Compliance Specialist in Regulatory Services will support Case Managers by viewing the video product for quality, relevancy, and authentication. If considered reliable, surveillance evidence is considered by a Case Manager along with other evidence in the claim when making an entitlement decision.

B. Policy

There are several relevant policies to consider.

The acceptance and use of surveillance evidence is guided by WSIB Operational Policy **11-01-08**, which is a policy covering the use of many types of audio/visual recordings including audiotapes, videos, films, and photographs. The WSIB will accept audio/visual recordings as evidence if, and only if, they

- Provide new or more complete information than is already in the claim file,
- Are relevant and pertain to the WSIB's duty to hear, examine, and decide issues under the *WSIA*, and
- Are authenticated.

A recording is authenticated when it is accompanied by a signed statement from the author

- Setting out when (date and time) and where the recording was made, and
- Confirming that the recording was not altered, and is a true representation of its subject.

The WSIB audio/visual recording policy refers to the WSIB being provided with this evidence by someone with an interest in the claim, and there are 4 occasions where the WSIB may use the evidence:

- When there is an issue in dispute
- When it is necessary to assess a worker's ergonomic needs,
- When it supports the investigation of an issue, and/or
- When an issue is being investigated by Regulatory Services or Legal Services.

The audio/visual policy also provides guidance on the caution that a WSIB decision-maker must exercise in weighing the information revealed in a recording, and ensuring that it is considered in conjunction with all other evidence. In particular, the evidence may be selective- information relevant to an issue in dispute, such as when a worker rests or experiences pain, may not be recorded. In any event, the workplace party who is the subject of the information, or their representative, is given the opportunity to review the information and provide an explanation.

There are also provisions in the policy for disclosure of this evidence at a hearing, to ensure fairness.

While **11-01-08** covers the acceptance and use of recordings provided externally, the WSIB also has an operational policy for when it seeks to obtain a surveillance recording. The Operational Policy on surveillance, **22-01-09**, simply states that the WSIB has a duty to hear, examine and decide issues under *WSIA* and may use surveillance to gather evidence for this purpose.

In every case, however, a director in Regulatory Services must approve the use of surveillance, and if a surveillance recording is made, the recording must be transcribed and added to the claim or employer file. Access to the surveillance recording and or the transcript will not be granted until a Regulatory Services investigation is complete; thereafter, if there is an issue in dispute the parties will have full access to these materials.

C. The decision to conduct surveillance

A referral for surveillance may be sent from a Case Manager after reviewing discrepancies in a claim, and/or evidence including external surveillance received from an employer, and/or an allegation received through our Action Line. In each case, a Compliance Specialist In Regulatory Services reviews the referral carefully in the context of the specific claim. Typically, this would include:

- a review of the allegation against current benefit entitlement to assess the merit of the allegation, and whether surveillance might inform a benefit entitlement decision;
- a review of all previous claims of the worker to identify other options for investigation;
- have all appropriate administrative options been considered first?
- a review of all additional sources of reliable information (eg MTO, CRA information).

The decision to conduct surveillance is made bearing in mind that the privacy of the individual is being weighed against the need to protect the integrity of the system in each and every case. The Compliance Specialist must prepare a detailed request requiring two levels of managerial approval. The request itself must consider the potential impact surveillance evidence could have on the worker's entitlement to benefits. It must clearly articulate the rationale for conducting surveillance, and the

instructions to the Private Investigator ("PI") must follow that rationale with clearly stated instructions. If these standards are not met, the request will be denied. Speculative requests for surveillance will not be approved.

In addition, the impact of covert surveillance on an individual, if discovered or following disclosure to the worker, needs to be considered when balancing the benefits of this investigative tool with its potential negative effects.

Surveillance should only be considered where less-invasive investigative tools have been attempted first, or ruled out. In many cases, a Compliance Specialist will identify other evidentiary sources which may focus, limit, or even eliminate the need for a surveillance assignment. Increasingly, social media has been relied on as an alternative evidentiary source in determining the scope or need for surveillance evidence. *Social media searches are discussed in greater detail below.*

A Director in Regulatory Services must approve the use of surveillance in every case. First, our Compliance Specialists will review and analyze all requests for surveillance to determine whether:

- the request is feasible and appropriate under the circumstances, and that
- all reasonable administrative options other than using surveillance have been considered.

If recommended by the Compliance Specialist, the second level of review is conducted by the Compliance Specialist' Manager, who must review and approve the request prior to sending it to the Director. An auditable "paper trail" is created in each case to document the request/review/recommendation/approval process.

D. The surveillance assignment

Once approved, the Compliance Specialist is responsible for ensuring that the surveillance assignment is made and managed according to WSIB standards, guidelines and contractual obligations. This includes:

- selecting the appropriate PI firm;
- negotiating terms of the assignment;
- forwarding assignment letter to firm;
- managing assignment operations on a daily basis through regular contact with PI(s);
- documenting surveillance product received;
- assessing surveillance evidence for authentication and admissibility;
- evaluating performance of firm in carrying out the assignment (Report Card).

The WSIB currently has a roster of private surveillance firms it has contracted with, following a stringent open, competitive procurement process. These firms are located throughout the province. Report Cards are maintained for each firm to monitor service for quality, professionalism, and customer service (eg ability to follow our careful instructions). A database for surveillance firms is maintained to reference the PI firm profile and current performance scores.

For each surveillance request received in Regulatory Services from a Case Manager, the Compliance Specialist will consider the performance profile of the firm, together with many other criteria in determining which firm will be assigned to conduct surveillance. Other criteria include, but are not limited to geographic location of firm, availability of resources at specific times and/or durations, special needs associated with the assignment, physical resources of the firm, etc.

The assignment letter is an offer which the selected PI must sign to accept. In the letter, the Compliance Specialist provides specific terms and requirements for the assignment, including but not limited to:

- authentication of video recording, including type of equipment used;
- legal compliance with applicable privacy laws, WSIB, and PI licences;
- confidentiality & Conflict of Interest;
- documentation preparation, delivery, and retention;
- adherence to instructions, and daily reporting to Compliance Specialist;
- expectations regarding positive identification of subject, objective reporting etc.

The assignment letter then describes the background of the subject, details of the claim and the claimant (physical description, address, vehicle plate number, etc). Most importantly, the assignment states the allegation made (eg it is alleged that he is misrepresenting his level of disability, or it is alleged that she is working in her pre-accident occupation for another employer) and the special instructions connected to that allegation.

Daily contact between the PI and the Compliance Specialist ensures that the assignment is being conducted in accordance with our instructions, with due respect for personal privacy, and allows the Compliance Specialist to assess the appropriate duration of the assignment and further investigative opportunities not previously anticipated.

E. Surveillance evidence

A Compliance Specialist will review the proceeds of surveillance (photos, video, written report) and ensure that it is within policy and privacy guidelines, and the worker has been positively identified. Next, the Compliance Specialist must determine whether the evidence gathered, including the surveillance evidence, suggest the need for general and/or specific deterrence of the wrongdoing through formal investigation and

prosecution. If so, the matter goes through the normal referral process for investigation within Regulatory Services, for offences under s. 149 of the Workplace Safety and Insurance Act.¹

If a matter is under investigation with a view to prosecution, the surveillance evidence will not be sent to the relevant claim file until the investigation has been completed, at least to the point where access to this information would not compromise the integrity of the investigation.

The surveillance evidence obtained may support or refute an allegation of wrongdoing by the worker. Even when the surveillance evidence tends to support an allegation of wrongdoing, in the majority of cases² surveillance evidence does not result in a referral for formal investigation and prosecution. *In every case*, the authenticated surveillance report is directed to the relevant claim file.

F. Social Media

The WSIB does not have a specific policy governing the use of social media evidence in assisting a decision maker who has a "duty to hear, examine and decide issues" under the Act. However, as noted earlier, a review of publicly available information on the internet can focus, limit or eliminate the need for more intrusive investigative tools such as surveillance.

Applying the same principles as with obtaining surveillance evidence, the WSIB must ensure that the engagement in social media does not exceed an individual's reasonable

¹ 149(1) A person who knowingly makes a false or misleading statement or representation to the Board in connection with any person's claim for benefits under the insurance plan is guilty of an offence.

149(2) A person who wilfully fails to inform the Board of a material change in circumstances in connection with his or her entitlement to benefits within 10 days after the change occurs is guilty of an offence.

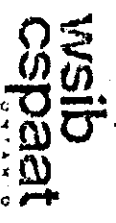
² In 2012, 149 surveillance assignments were completed, of which 22 were referred for enforcement.

expectation of privacy. Given the various different social media channels and formats, the privacy line is far from clear.

Where information is publicly accessible, Compliance Specialists in Regulatory Services have obtained evidence which has proven useful both in the adjudication of claims and as an aid to more focussed surveillance assignments. In the past year, our Compliance Specialists have gained valuable, publicly available information through Internet websites, Facebook, Twitter, LinkedIn, and YouTube.

Covert Video Surveillance and the WSIB

General Presentation for
Management 2013



Workplace Safety and Insurance Board | Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Surveillance and the WSIB

The WSIB has a duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act) and may use surveillance to gather evidence for this purpose. Surveillance is used by the WSIB to:

- inform benefit entitlement decisions
- verify or confirm an allegation of non-compliance
- inform a general or specific deterrent – e.g. POA charges

Addressing Privacy Concerns

- We must have a strong basis to support the use of covert video surveillance, not mere suspicion
- Surveillance must be clearly related to a legitimate business purpose; there needs to exist a strong likelihood that surveillance will help achieve the business purpose
- We need to weigh whether the loss of privacy is proportional to the benefit gained
- We need to consider whether other less privacy invasive means of collecting personal information would be more appropriate

Surveillance Oversight

- Referral from decision maker must be copied to their manager
- A Compliance Specialist will review the referral and recommend surveillance if appropriate
- The Acting Manager of the Confirmation Team reviews the request and approves if appropriate
- The Director of the Compliance Branch is the final level of approval

Where it starts – Red Flags

- Personal Relationship with employer
- Accident occurs shortly after being hired
- Occurred before seasonal shut down or work shortage lay-off
- **Lack of compatibility between diagnosis and accident history**
- Accident history changes supporting a more serious injury
- Has not returned Form 41's
- **Never home, returns calls after hours, noise in background**
- Frequent change of doctors/specialists
- Unreasonable distance traveled by worker to see GP
- Prolonged healing - **lack of supporting medical evidence and/or objective findings**
- Indication of drug dependency
- Anonymous Tips

First, Make a Telephone Call

- Prior to making a referral for surveillance, decision makers need to contact the Compliance Specialist attached to their sector/regional office to discuss the referral
- A preliminary review of the claim will be undertaken by the Compliance Specialist to determine whether the allegation on its face has merit and whether or not suitable administrative options are available
- If after the initial review a referral appears appropriate, the Compliance Specialist will ask that a formal request be e-mailed to them copied to their manager

Process - Claim Review

A typical review will include the following steps:

- the allegation is reviewed against current benefit entitlement to assess whether or not it is reasonable to believe that the allegation has merit and that surveillance will inform a benefit entitlement decision
- the Compliance Specialists will ensure that the claim is in order and appropriate administrative options have been considered
- previous claims for the worker are identified and reviewed for information applicable to the issue at hand and to identify potential new administrative opportunities
- once pertinent WSIB records have been reviewed, additional sources of reliable information are identified and considered

Search for New Information

Searches are conducted of pertinent external sources of information for new evidence. The new information often in and of itself has the potential to impact benefit entitlement decisions and/or inform a direct referral for investigation by RSD without the need for surveillance.

- Canada Revenue Agency
- Ministry of Transportation
- Internet including Facebook
- Ministry of Government Services
- Contact with compliance partners
- Site visit

Surveillance Assignment

- The WSIB utilizes a roster of private investigation firms contracted through an RFP to conduct surveillance
- Firms are selected case by case by the Compliance Specialist matching a firm's skill set to each particular assignment
- Surveillance is monitored day by day through direct contact between the Specialist and the operative
- Duration of surveillance (number of days) determined by the complexity of the decision to be informed – e.g. strict level of disability decisions require additional days as compared to proving unreported employment

Barriers to Success

- No recent activity on claim, restrictions have not been updated or are too generic
- Inability to locate the worker
- Lack of activity
- Location – rural properties and apartment buildings pose great challenges
- Surveillance in isolation can't prove income

Proceeds of Surveillance

A Compliance Specialist will review the proceeds of surveillance in each case ensuring that:

- the surveillance evidence meets policy/privacy guidelines
- the worker has been positively identified
- in those cases where the identity of the worker remains in question, takes extra steps to confirm identity prior to the surveillance evidence being directed to claim
- determines whether surveillance requires/warrants further investigation/potential charges

Post Surveillance Impacts

Surveillance evidence often has the ability to significantly impact benefit entitlement yet not meet the standard set by the courts to warrant a prosecution.

In those cases where an investigation is not to be considered, the Compliance Specialists will direct the new evidence to the relevant decision maker/claim file and offer other assistance as required.

In those cases where an investigation is warranted, the file will enter the regular RSD investigative intake stream, however, carriage of the claim and all related decisions will remain with operations throughout the course of the investigation/prosecution.