



WORKERS' COMPENSATION COMMENTARY



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Surveillance: It's O.K., ...if you do it right!

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It has just been too darn long since I heard the nursery rhyme, so I can't remember whether it was Chicken Little or Henny Penny who ran about the barnyard raising the hue and cry about the sky falling. Whichever one it was, they would be pleased to know that their contemporary soul mates have forever been running about the workers' compensation system worrying about the dire consequences of legislation and judicial decisions. Now, admittedly, the legislature has designed a playing field in workers' compensation which is more reminiscent of a Serbian minefield, but nevertheless the workers' compensation system has not come to a screeching halt as a result of their activities.

Employers, insurance companies and private investigation companies were thrown into a panic last year when advised that there was some draconian legislation passed that forbade surveillance and taking videotaped evidence. I thought this wave of hysteria had subsided until recently when I overheard a group of defense lawyers passing on this interpretation to each other, although they didn't seem to know whether the legislation was in the Penal Code, Evidence Code or Code of Civil Procedure.

Quite frankly, it is in none of them. What is being referred to (and, of course, being blown completely out of proportion) was California Civil Code Section 1708.8, commonly referred to as the "anti-stalking" bill.

First let us sit back calmly and look at the reason for the enactment of such a statute in the first place. I think it comes as no surprise to anyone who is the least bit familiar with what is going on the world today, that celebrities of almost any sort are being mercilessly stalked by a core of investigative photographers, referred to as

"paparazzi." It is not a new phenomena but the ardor with which these individuals pursue their activities has increased so substantially that a day hardly passes when one doesn't hear some news about some celebrity and these "free-lance journalists" getting into some sort of a fracas. Added to these overzealous individuals the threat of criminal stalkers, mentally deranged anti-social or asocial individuals who track their victims down mercilessly and allow them no privacy.

It was in response to a very strong effort backed by a lot of money from Hollywood, supported by the police and others in the public limelight that led to the enactment of this legislation.

The section is quite long and I certainly do not want to bore you with the duplication of the entire legislation in this letter and I would refer you to the code section itself if you wish to review the entire text. What this section does do is saddle liability not only upon the individual who becomes liable for "physical invasion of privacy" either physically or constructively, it also saddles liability upon a person who engages the perpetrator to become involved in the activity. With the understanding that this dissertation is not intended to convey all of the nuances of this legislation, suffice it to say that a physical invasion of privacy involves an individual, 1) knowingly entering on to the land of another without permission (or otherwise trespassing), 2) in order to physically invade the privacy of the plaintiff with the intent to film or otherwise record 3) the plaintiff, engaging in a personal or familiar activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

A constructive invasion occurs when 1) the defendant attempts to photograph, videotape or record the plaintiff engaging in a personal or familiar activity under circumstances when 2) an individual had a reasonable expectation of privacy, 3) and this

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was done through the use of a visual or auditory enhancing device (telephoto lens) whether or not there is a physical trespass if the image could not have been achieved without a trespass unless that enhancing device was used.

What are the penalties for violation of this section? Any damages of a general or special nature that are incurred because of a violation of the section, (whatever the jury will find) is increased by three times and an individual may also be liable for punitive damages (and deprived of any commercial value of the footage). Anyone who directs or solicits this activity is liable for any general special or consequential damages resulting from each violation and may be liable for punitive damages.

Boy! that sounds serious and frankly, for such activity as the paparazzi has engaged in, the law is very serious.

As it applies to workers' compensation, however, I would like to offer the following observations:

1. In the first place, it is important now and has always been important for an employer, self-insurance administrator or workers' compensation insurance carrier or their counsel to select the highest quality surveillance investigator to carry out necessary surveillance;
2. Any surveillance activity carried out by operatives should be carried out by companies that are bonded;
3. It would be quite appropriate for a defendant to draft up a protocol and provide this to subrosa surveillance companies that they utilize, to indicate the expected limits of the investigation;
4. There is no question that surveillance can and is being carried out without violating the terms of this legislation. As long as an applicant is engaged in activity in a public place, driving in a car, walking about in the front yard in plain sight of the sidewalk or walking, for that matter, in any public place, there is no expectation of privacy. If a surveillance operative were to use a telephoto lens of activity in such areas, it would not, in our opinion, violate

the statute because the telephoto lens is not being utilized to peep into areas of the individual's life where there is an expectation of privacy.

What sort of conduct is prohibited by this statute? Well, it clearly refers to "offensive" conduct and I think that is the essence of this legislation. Admittedly it does appear pretty offensive to see someone, even if they are Hollywood celebrities (who in my opinion largely invite such conduct) tracked by hordes of camera toting pariahs trying to goad them into unseemly behavior that can be captured on film.

It is the essence of surveillance in workers' compensation that the investigator not be seen since, if he, or she is, chances of obtaining any useful footage will probably have ended for good.

The filming of the individual in a fenced-in backyard from a higher angle through the window of a house or in any other area where one would expect to carry out their activities privately would be in violation of this section. But for the most part, good quality surveillance investigators have not engaged in such conduct since "invasion of privacy" is a viable tort here in California where the right of privacy is explicitly protected under our state constitution.

There is an exception carved out within the law which permits law enforcement, other employees of government agencies or private entities, when supported by a qualified suspicion, to obtain videotaped evidence of suspected fraudulent conduct. Thus, it appears that if there is at least some reasonable suspicion of such activity, a broader latitude will be granted to allow the filming of activity.

Obviously, in most cases, there may be a suspicion of "puffing" rather than fraud and thus the exception will not be widely utilized and probably will be narrowed somewhat by further judicial decisions. We believe that the advent of this legislation makes it abundantly clear that, in the future, defendants must be more circumspect in ordering surveillance, must maintain better control over the operatives and use high quality surveillance companies for such tasks. I think that just as in the case of the passage of the law which prompted the mantra "use a fork, go to jail" in connection with the legislation aimed at scaling back entertainment of clients in this industry, that if workers' compensation defendants are respectful of the legislation and proceed in a responsible fashion, there will be

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very little, if any, litigation which is brought to bear against them. I can almost promise you that any litigation which does ensue will be as a result of someone doing something stupid... isn't that always the way!

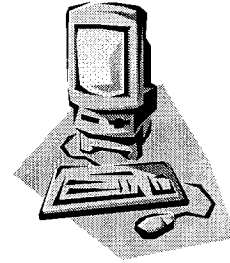
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In our last newsletter, we discussed the recently passed amendments to the Confidentiality of Medical Information Act and to the "Employer's Bill of Rights" (Specifically Section 3762 of the Labor Code). We expressed our opinion as to the interpretation of the legislation, trying to focus on the spirit of the law. Well, there has been such a firestorm over the advice and interpretation that has been provided in response to the bill throughout the industry, that CCR and other insurance industry representatives met with staff members of Ellen Corbett (author of the Bill) on January 28, 2000, and it was agreed that a supplemental "clean-up" bill will be drafted with an eye to its passage by July of this year. As soon as we are aware of the final terms of that bill we'll let you know. Suffice it to say that preliminary reports display a willingness to liberalize the terms of the bill significantly.

Next Month:

Some pointers regarding earnings and computation of benefits.

We're headed for



cyper-

space

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O u r
w e b -

site is currently under construction, and we're really excited! When it is completed, our clients will be able to access and download the current and back issues of our newsletter, e-mail queries to our doctor database, seek assistance with 90-day AOE-COE claims evaluations and access links to other helpful sites. We can hardly wait until we can assist and inform our clients on the internet! We'll keep you posted on progress, it won't be long.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.