



WORKERS' COMPENSATION COMMENTARY



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“HERE'S LOOKING AT YOU, KID”

Sub Rosa in the 21st Century

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Occasionally as I sit in my office reviewing a surveillance tape, particularly one that substantially impeaches the testimony of an applicant, I am transported back to the early days of my law practice. I remember sitting at the counsel table at hearings assisting an applicant in enhancing his factors of disability prior to springing sub rosa films on the unsuspecting witness. I'd suggest that perhaps, instead of being unable to lift just heavy items that he perhaps was unable to lift any items over the recent past and has been entirely unable to bend, twist, push, pull or engage in any other such arduous activity. I remember seeing that earnest and agreeable expression on the applicant's face as he acknowledged that and more while nodding vigorously. Of course, just a few minutes later, at the conclusion of the applicant's cross examination and the presentation of his witnesses, I would announce that I had a witness to present with some “documentary evidence.” Very little in litigation today can take the place of the warm fuzzy feeling that would envelop me as my investigator strode into the Hearing Room with his movie screen and 8 mm projector under his arm to display film of the applicant engaging in some pretty arduous activity. Those were the days!!

Well, if we had just managed to keep liberal Trial Lawyers from getting on the bench and insinuating themselves into the Appellate Courts and if we could have injected a little common sense into some unscrupulous investigators and eliminate counsel who were either too unprincipled or too dumb to reign in the investigators, we might still, today, have an opportunity to drop such a bombshell on an applicant.

Instead, there have been a series of deci-

sions handed down by the Appellate Courts and the Supreme Court in this State dedicated to removing the “surprise” element, (what they call, the “sporting theory” of Trial) from our hearings based on their perception that it is “not fair”. I, frankly, have never understood that, but of course I have at least a vague idea in my mind that if someone lies and they are caught that they should pay the consequences. Nowadays, the concept of personal responsibility has been so eroded that I guess that sort of sounds old-fashioned.

Regardless of the pleasant daydreams, the system is what it is at present and defendants must know the rules associated with the obtaining of sub rosa surveillance evidence and the timeframes during which disclosure must be made to the opposition.

With regard to the acquisition of sub rosa surveillance evidence (generally obtained by means of videotape at present) one must first understand that, unlike the Constitution of the United States, the Constitution of the State of California provides a “right of privacy”. That means that persons residing within the State have an expectation of privacy with regard to their activities in certain areas or under certain circumstances. If a surveillance activity were to invade those areas, both the sub rosa operative and the company that engaged the services of that sub rosa operative would be liable in damages to the victim of the breach of privacy.

Many young claims persons have inquired as to why surveillance films are always silent. The reason is that the surveillance is generally taken from a distance. While an individual's activities can be filmed out in the public domain or even on

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their own property when they are in plain sight of a public area such as a sidewalk or street, they have an expectation that they will be able to converse confidentially when no stranger is in close proximity. Any conversation that is then picked up by the sub rosa surveillance operative at a distance would have to be picked up with some sound enhancement equipment and that would constitute a trespass.

Even if the sub rosa operative were standing next to the applicant with a hidden camera in a lapel or briefcase, a sound recording with respect to any conversation without the consent of the other party would also be illegal. That is why surveillance films are silent.

In addition to the concerns relative to speech, even the act of surveillance itself and the acquisition of videotape has limitations placed upon it. For quite a long time, surveillance films taken of activity that the applicant performed that was induced by the defendant or which he was forced by circumstances (created by the defendant) to perform have been denied entry into evidence. Such conduct is generally referred to as a "rope job". (See *Redner v. WCAB*, (1971) 36 CCC 371). The limitations surrounding surveillance have grown since then particularly here in California with the enactment of the "Anti-Paparazzi Law" in 1992".

That legislation was promoted and demanded by Hollywood celebrities for the most part (*who, if you haven't noticed have a lot of clout in Sacramento*) and the intention was to reduce invasive behavior.

Surveillance activity is prohibited by Civil Code §1708.8 during certain activities or if done in a certain manner. Among these are filming family or personal activities, or, if the way in which the taping is done happens to be offensive. If the subject has an expectation of privacy in the activity being filmed or enhancement devices are being used (this would be something beyond a telephoto lens when someone is out in the public area). If a telephoto lens is used to view activity within a dwelling or a long range microphone were used this would clearly violate this section.

Fortunately, there is an exception (Civil Code §1708.8 (f) that specifies that the section does not apply to *suspected fraudulent claims*. It is important to note however that only when there is an **articulable suspicion of insurance fraud** does the exception come into play.

First, let us be clear with regard to the issue of "insurance fraud". Obviously, we all know that if an applicant is exaggerating his symptoms or engaging periodically in some activity in which he claims he can never engage, the Appeals Board is very unlikely to find that this is "fraudulent" since exaggerating and "puffing" concerning a claim are modern day expectations. About the only time that "fraud" is proven has to do with the receipt of benefits while someone is otherwise working or if the exaggeration reaches egregious proportions.

However, it would appear that even if evidence does not ultimately rise to the level where fraud will ultimately be found, that if there is a good faith belief that a specific level of disability is being mischaracterized and will result in a larger payment of benefits then that should be sufficient to trigger the exception.

The question is what is a "articulable suspicion." This particular terminology seems to have arisen primarily out of criminal statutes trying to define a reasonable basis for a police officer to stop and question a suspect. Generally speaking, it appears that the Courts have looked at this term as defining a circumstance that is a product of a given set of facts and the experience of the person reviewing those facts. Thus it would appear that if, as a blanket policy, all lost time injuries triggered some surveillance to see whether any of them were engaged in inappropriate activity, that would clearly not fall within the exception. If the surveillance activity violated any of the principles of the Civil Code Section, the employer would then be liable in damages, perhaps punitive damages. If however, the employer selected and relied upon experience and a set of facts that, to them, appeared to warrant further investigation, that should be adequately protected by the exception to the Civil Code.

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Once the sub rosa surveillance videotape has been acquired, what are the rules governing its disclosure to the opposition? Obviously, the acquisition of evidence by this means comes to a screeching halt the second that the other side becomes aware of the fact that surveillance is taking place. Thus, it obviously makes no sense whatsoever to accede to a demand contained in the initial letter from applicant's counsel to disclose videotape and investigative reports. That demand however is there not with the expectation that disclosure will take place immediately but because, at the appropriate time in the future, the disclosure will either have to be made or the videotape will arguably be excluded from evidence.

The question of the timing of the disclosure was dealt within the case of *Downing v City of Hayward* (16C.W.C.R. 76 (1988)) in which the determination was made that the defendant could delay disclosing sub rosa surveillance videotape or even the existence of the investigation until the applicant's deposition had been taken.

It appears by that determination that the Board condones some element of "surprise" insofar as the applicant is concerned so long as it takes place during the discovery process and not in the court room. Presumably the idea is that if the applicant had so exaggerated the claim as to have it substantially weakened by surveillance film that the parties can informally resolve the matter prior to trial and the Court's time will not be wasted.

Interestingly, the "deposition" after which the disclosure would be required does not necessarily have to be exclusively the deposition of the applicant. The underlying philosophy of non-disclosure before a deposition is not that the applicant be deposed, but that the deposition is to be taken of any person who would otherwise potentially alter their testimony following a viewing of film to "meet evidentiary disadvantages that may be suggested by what the film shows". Therefore, the disclosure of the videotape might be withheld not only prior to the applicant's deposition but the deposition of another witness on behalf of the applicant whose testimony may be impeached by the activity shown on the tape.

This is a relatively simple concept when we

are dealing with the applicant, perhaps a spouse or co-worker, a friend or other lay person... but what about a physician? An argument could be constructed that even in that circumstance, the videotape could be withheld. Perhaps, in that case, the grounds to be cited would be that further surveillance was still being carried out with regard to the applicant.

In a relatively recent case, the Appeals Board was confronted with a situation where a defendant had taken videotapes of activities that were then shown to the primary treating physician who subsequently issued a report modifying his findings. A demand was made for the production of the videotape which the defendant ignored and then established a date for the deposition of the physician. The defendant also wanted to first take the deposition of the applicant before disclosing the content of the video. The Workers' Compensation Judge specified that once evidence has been disclosed to a medical examiner who bases an opinion upon it, it must then be disclosed to the applicant. (*Nisle v Albertson's Inc*, 28 C.W.C.R 299 (2000)). The defendant wanted to rely upon the decision in the *Downing* case previously referred to but, in this particular circumstance, the Judge specified that the videotape was no longer a secret and therefore it could no longer be suppressed.

Assuredly, the defendant is required to disclose the existence of the videotape at a Mandatory Settlement Conference and a failure to serve evidentiary documents including videotape is considered sanctionable by the WCAB unless resulting from mistake, inadvertence or excusable neglect.

Pity poor Harold Schmidt, a highly respected and highly ethical defense practitioner who had the misfortune in 1976 of paying the price for ignoring (*as had virtually all of the other practitioners up to that point*) the California Supreme Court's decision in the case of *Suezaki v Superior Court*, 58 Cal 2d 166 (1962). The Court had specified that surveillance film offered as evidence at Trial must be provided to the opposing party upon proper request. In his case, he had withheld the surveillance film as well as medical reports commenting upon it until the day of Trial. Unfortunately Mr. Schmidt got a surprise along with the applicant due to that conduct and he was ultimately adjudged to be in contempt of the WCAB for delay in filing and service of the medical reports "to surprise the

applicant at a compensation hearing when the films are shown.” It was, of course, the late filing of the medical reports and not specifically the videotape that was the crux of the problem but there is no question that the late filing of the surveillance film was a key element of this decision.

In summary, therefore, we can say:

1. That if a claims professional or defense counsel see a factual circumstance that reasonably leads to a suspicion that an individual is greatly exaggerating their disability or that the individual may be employed etc. surveillance can be implemented.
2. That claims personnel and law firms are well advised to utilize high quality surveillance groups who will operate within the legal parameters of surveillance.
3. That once the videotape has been acquired and it is unnecessary or impractical acquire any additional videotape, that, pending the deposition of the applicant or another key witness, the videotape may remain a secret despite demand that has been made by the applicant’s attorney for disclosure.
4. That videotape may remain a secret up to the disclosure and service of a copy of the videotape required at the time of a Mandatory Settlement Conference.
5. If a videotape is shown to a physician in advance of the deposition of the applicant and that physician relies upon that videotape in reaching his conclusions, the videotape must then be provided to the applicant even if the applicant’s deposition has not been taken. Therefore, it is important to carefully time the disclosure of the videotape to a physician and ensure that necessary depositions of the applicant and other witnesses have already been taken so they have committed themselves in writing.



***ON BEHALF OF ALL
OF THE ATTORNEYS
AND STAFF AT
LISTER, MARTIN &
THOMPSON WE WISH
YOU A VERY HAPPY
HOLIDAY AND A PROS-
PEROUS AND JOYOUS
NEW YEAR***

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