

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.

4 pages

Is the WSIB spying on its clients? *The Toronto Star says – Yes!*

My take? The WSIB had better prove this wrong or immediately change its ways (or confirm it already has)

In a June 16th article, “*Workplace Safety Insurance Board steps up spying on clients, documents show*” (http://www.thestar.com/news/gta/2014/06/16/workplace_safety_insurance_board_steps_up_spying_on_clients_documents_show.html), the *Toronto Star* accuses the WSIB of undertaking surveillance on claiming workers. Read the article. It tells an important and compelling story. If it is true the Board must immediately change its ways.

I have seen this type of case first hand

This is an issue with which I am very familiar. Four years ago I had a worker client who was subjected to an unwarranted WSIB surveillance. As a result, he had a very severe and continuing emotional reaction to the Board’s actions with very serious ongoing consequences. I worked extensively on that case and raised the issue, quite aggressively, to the highest levels of the Board. Frankly, the WSIB officials with carriage of the case conducted themselves . . . *well let’s just say* . . . at a standard less than expected. Eventually, the Board did a *mea culpa*, agreed it had acted improperly and after my strong demands, expunged the surveillance evidence from the worker’s record. I vividly remember that case to this very day. The initial actions and attitudes of certain WSIB officials were so out of place and were so wrong that they were totally out of character with the WSIB I had known.

I was left with the impression that this type of surveillance would be no more

Beyond that immediate case, I addressed how inappropriate it is for the WSIB to initiate a surveillance in any WSIB case (with perhaps the exception of those instances where the Board already has some evidence for a *prima facie* case for fraud where a worker is working while claiming benefits). I urged the Board to abandon the practice of WSIB surveillance where the purpose was to video worker activity seemingly inconsistent with the claimed disability. The long and the short of it is that I was left with the distinct impression that the Board *would* abandon that approach. If the facts of this article are true, it seems that the Board has either continued or returned to this

dreadful practice. The very type of case that in my view should *never* undergo a surveillance type investigation, that is, one where the concern is potential misrepresentation of level of disability, according to the *Star* is being green-lighted for this invasive type of investigation.

This is a serious issue that requires serious attention

Notwithstanding my derision for the Board’s treatment of my client four years ago, having secured a resolution of a needlessly tragic matter and believing that this type of investigation was history, I never wrote about that case in these pages. Perhaps I should have. *I will now.*

As far as WSIB cases go, the case was not particularly remarkable

These were the core facts:

December 12, Year 1: The worker slipped on ice, fell and injured his back.

January 2, Year 2: The worker returned to very light work but in extreme pain.

May 6, Year 2: The worker re-injured himself and subsequently went off work again.

December 22, Year 2: Medical investigations confirmed the need for further treatment. The worker was medically unable to return to even modified work.

March 2, Year 3: The WSIB closed benefits.

June 9, Year 3: The worker retains LAL who demands reinstatement of benefits.

July 2, Year 3: WSIB reinstated benefits. So weak was the case for benefit closure that no formal appeal was required.

October, Year 3: Precautions for work were identified.

June 16, Year 4: WSIB Case Manager contacts LAL to schedule a meeting to view a surveillance video which was undertaken of the worker. LAL attended and viewed the video which in LAL’s opinion showed nothing of consequence and amounted to nothing more than the worker driving his car and shopping in a few stores. LAL began discussions at the highest levels of the WSIB. **The bottom line:** While the WSIB was set to cancel benefits based on the surveillance, after intervention by counsel, full benefits properly continued for another four years (and are continuing).

A reasonable question: *What would have happened to the unrepresented worker in identical circumstances?*

There was never a sound reason for the surveillance

The WSIB never had any sound reason for surveillance in this case. The purported reasons were nonsensical and fell apart on their face. **The most important point is this:** The

WSIB had little regard for potential psychological damage that could be (and was) caused by a surveillance, let alone a totally unwarranted surveillance.

The Board's authority was so flagrantly misapplied that I alleged bias, an allegation never before or since raised by this counsel in any WSIB case (save one where the decision-maker agreed and withdrew). This is a small excerpt from one of my early letters to the section director:

... your explanation that the surveillance was conducted "to clarify contradictory presentation and recitation of abilities and activities" is in conflict with the very evidence you cite in support. **There was no contradictory presentation that an intrusive video surveillance could address.** You admit that the worker himself "recounted an ability to engage in a variety of regular personal and social activities without difficulty". What was the scope of the video surveillance? To covertly view the worker's "regular and personal social activities". Where is the contradictory presentation with respect to the worker's ability to engage in "regular personal and social activities"? There is none. **Your explanation confirms in absolute terms the Board had no sound reason to conduct an intrusive video surveillance of my client. In light of the worker's frail psychological state, which your investigator acknowledged, I submit that the Board's conduct is unconscionable under the circumstances, and directly sparked a severe psychological reaction, plainly foreseeable, and which has resulted in continued dire psychological consequences for the worker.**

In a later communication to more senior Board officials, I said this:

I also urge you to thoroughly review the use of surveillance in circumstances of this type and strongly recommend that you immediately change your policies. Frankly, even if there was some justification for video surveillance in this case, and let me be especially clear – **there was no such justification at all** – most often, unless the circumstances are exceptional and the conduct of the surveillance exceptional, video surveillance is an ineffective and dangerous approach in these types of cases. I encourage you to carefully read my response to (manager) where I set out the dangers associated with the use of such covert techniques by any party. When the Board engages in such behaviour, noting the very special and dependent relationship workers have with the Board, the potential for psychological damage is enhanced. Remarkably, when assessing the efficacy of this technique when engaged by employers, the Board understands and is in agreement with this risk, as I highlight in my response to (manager). **Yet, it engages in this very behaviour.** I am of the view that video surveillance by the Board must be limited to a very narrow set of circumstances, such as providing convincing evidence of an individual working while collecting WSI benefits, and only then when other credible evidence has previously surfaced.

The use of video surveillance as evidence

Let's take a look if this type of evidence is even of any value in a workers' compensation context. I am of the view it is not except in the rarest of circumstances. The submission of video surveillance evidence, once outright banned by WSIB policy, must undergo a special scrutiny by virtue of the overt prejudicial effect of such evidence and its limited reliability. Board policy recognizes this principle

with respect to employer created evidence [WSIB Operational Policy 'Adjudication Principles, Audio/Visual Recordings', Document No. 11-01-08, (October 12, 2004)].

To do otherwise will place every injured worker at jeopardy that every day activities of normal life occurring during a period claiming insurance benefits will be under the watchful and unreliable eye of active surveillance, and be open to an incorrect interpretation.

With respect to video surveillance evidence, often the images captured do not tell the true story. They certainly do not tell the whole story. Yet, the impressions left are usually very persuasive, and have significant effect, although these impressions are very often incorrect. Enthusiastic acceptance of videotape evidence adds a taint of unfairness to the workplace safety and insurance system.

The generally accepted leading analysis of the acceptance of video surveillance evidence in the Ontario workplace safety and insurance scheme is found in **W.C.A.T. Decision No. 688/97 (1987), 6 W.C.A.T.R. 198**. Portions of that decision warrant repeating here:

¶ 10 At first blush, videotaped evidence of a worker, taken when he or she is unaware that they are being observed, may appear to be valuable and probative evidence. It may appear to be particularly valuable evidence when it shows a worker performing physical activity which he or she has denied an ability to perform, or when it shows a degree of disability which is significantly less than that which is claimed to exist.

¶ 11 However, as pointed out by Larson "the courts have rightly observed that such evidence must be used with great caution."

¶ 13 These are examples of cases in which the videotape was introduced to try to prove more than it actually portrayed. Because videotaped evidence tends to be dramatic, high-impact evidence with great potential to influence the decision maker, the need for caution must be emphasized. The caution applies not only to the analysis of the admissibility of the evidence, but also to the weight to be given to it by the decision maker once it is admitted.

This question of course, has also been extensively canvassed in a labour relations context. The prevailing test for admissibility of such evidence has been set out as: *Was it reasonable, in all of the circumstances, to request surveillance? Was the surveillance conducted in a reasonable manner? Were other alternatives open to the company to obtain the evidence it sought?* [**Re Dominion Forest Products Ltd. (1990), 13 L.A.C. (4th) 275**]

Labour Arbitrators have held that relevance alone is an insufficient reason to allow the admission of videotape evidence. [see **Toronto Transit Commission and Amalgamated Transit Union, Local 113 (1999), 80 L.A.C. (4th) 53**]. However, by whatever test is applied, the use of videotape surveillance must be a last resort and must always be conducted in a reasonable manner [see **Re Pacific Press Ltd. (1997), 64 L.A.C. (4th) 1**].

The decision to accept video surveillance evidence must be carefully considered. In the additional reasons of

W.C.A.T. Decision No. 467/87 (July 15, 1987) it was set out that such evidence must be subject to very stringent safeguards to preserve the open and non-adversarial nature of workplace safety and insurance proceedings.

It is well understood that relevant evidence may be excluded if it is prejudicial to the party against whom it is led in the “*sense of having slight probative value to a fact in issue to its prejudicial effect*” [**The Law of Evidence in Canada, Chapter 6**].

The influential effect of such evidence was noted by the Panel in **W.C.A.T. Decision No. 918/94I (February 20, 1995)** [at par. 27]. The **Decision No. 918/94I** Panel accepted the analysis set out in the additional reasons of **Decision No. 467/87** and confirmed that video surveillance evidence must undergo careful scrutiny [at par. 45].

A surveillance may trigger a compensable psychological disability

Employer facilitated surveillance in workers’ compensation cases has been known to give rise to disabling emotional anxiety which in turn, has become a compensable condition [see **W.C.A.T. Decision No. 1212/97 (December 16, 1997)**]. In **Decision No. 1212/97**, the Panel presented an excerpt from the Board’s Appeals Officer decision [at par. 21]. The Appeals Officer commented upon the potential effects of surveillance which is all the more interesting in the context of the *Toronto Star* article:

It is not illegal for employers to arrange for independent surveillance of their employees in Ontario. In cases where entitlement under the Workers’ Compensation Act is in dispute, some employers do arrange for independent surveillance of their employees. At times the information obtained in these investigations is useful in adjudicating entitlement. ***It is not however an activity that the Workers’ Compensation Board itself ever engages in. A decision to order surveillance is not one that should be taken lightly by any employer. The employer must balance the likelihood of obtaining useful information for the purposes of determining entitlement under the Workers’ Compensation Act with the possible harmful effects of surveillance*** (if it were to become known) would have on future employer/employee relations or indeed the worker itself. [NOTE: **WSIB Policy Document No. 22-01-09 (Oct. 12, 2004) now allows WSIB surveillance**]

Similarly, in **W.C.A.T. Decision No. 732/93 (January 9, 1997)** employer arranged surveillance was accepted as being partially responsible for the worker’s depression, which was accepted as being compensable.

The WSIB has a special role

Board actions at all levels, at all times, must be considered in the larger workplace safety and insurance public policy context. Great caution must be exercised before this form of investigation is contemplated. If such evidence is readily accepted when it does not meet the appropriate standards, the Board inadvertently may be a factor in the development of worker psychological injury. If it is the Board itself producing that evidence, the problem is exponentially magnified.

The weight to be given to video surveillance evidence

Even should a video pass the test set out in **Decision No. 688/97**, the weight to be given that evidence is another matter.

Appeals Tribunal Panels often make use of visual evidence at hearings in their assessment of credibility and to understand duties, equipment, etc. However, the snapshot effect of video surveillance “*involves manipulation of a medium and choices are made in the presentation of the subject by persons who seldom are present at a hearing to respond to any questions which may arise during or after viewing*” [**W.C.A.T. Decision No. 644/90 (July 17, 1991)**, at page 3].

Video surveillance evidence, “*at best, provides a “snapshot” of the worker’s activities “but certainly not all his activities within any one day”*” [**W.C.A.T. Decision No. 209/97 (May 31, 2002)**, par. 29].

Even video surveillance evidence which has been accepted as being inconsistent with the worker’s stated abilities has not been considered persuasive. Surveillance which contradicted a worker’s claim that he was unable to drive was not considered definitive “*since it showed the worker performing activities on only a relatively small number of the days during the period of surveillance*” [**W.C.A.T. Decision No. 732/93 (January 9, 1997)**].

In that case, the employer telephoned the claims adjudicator, explained its modified work program, and reported that the worker was offered modified work. The employer advised the adjudicator that each time a return to work was planned, the worker failed to report to work claiming that he was in too much pain or that he was too nauseated from his medication to work.

The employer told the adjudicator that the worker could not be believed in light of the surveillance evidence that showed him driving his car, lifting parcels, and carrying on other activities consistent with those he would perform in light duty work [at page 9]. The worker in **Decision No. 732/93** was characterized by the employer as “*someone who manipulated the doctors, the employer and the Board to avoid returning to work.*” The employer argued that the employer did everything possible to accommodate the worker’s needs, but he remained unavailable and pain-focused [at page 17]. While the Panel accepted that the surveillance evidence contradicted the worker’s claim that he was unable to drive due to the effects of his medication, as clearly he was able to drive and did so at various points during the surveillance operation, the evidence was not definitive due the limited number of days which showed the worker involved in that activity [page 18].

In other words, surveillance of a short period of time (in the case of **Decision No. 732/93**, several days) is often of little probative value.

It is not being suggested that video surveillance evidence ought not to be ever considered by the WSIB. Given the right set of circumstances, when the probative value of the

evidence overrides the prejudicial nature of the form of evidence, then the evidence is able to be both received and considered determinative. But these cases are ever so rare. But I stand by my assertion that in view of the special relationship the WSIB holds with injured workers, under no circumstances should the Board be undertaking such surveillance.

In my case the written surveillance report did not even match the video surveillance

Back to my direct experience. When I viewed the video and compared it against the written surveillance report, I noticed that the video was missing several dates completely and was missing parts of the dates which it did show. The evidence didn't jive. The video was edited.

For example, although the report reflected that the worker was viewed on **December 2, Year 3**, the entire video for **December 2, Year 3 was missing**. Furthermore, the report noted that surveillance for **December 3, Year 3** started at 7.30 am. However, the video I viewed commenced surveillance at 3.45 pm on **December 3, Year 3**. The video was missing surveillance indicated in the written report for **December 2 and 11, Year 3** and **February 26, Year 4**.

Astonishingly, I was advised by the WSIB Manager with carriage of the case that the department that provided the video only provided 'snippets' (*yep . . . that was the word used*) of the surveillance. The Case Manager acknowledged that the file indicates there are reports of periods of no activity.

The Board glossed over an important evidentiary problem - evidence showing no activity is as relevant as evidence showing activity. The Board was of the view that a total of six minutes (!) of activity in a more than a twenty-four (24) hour period warranted attention. *Well, they were wrong.* Both the surveillance video and the written report were vetted to such an extent that I questioned the integrity and authentication of both items.

I proposed to the Board that the Board had coloured the evidence by editing the video to tell the story that *the WSIB was seeking to tell*. Most certainly, the whole story was not told. The Board's conduct, in my view, was unpardonable.

In **W.S.I.A.T. Decision No. 1476/0512 (July 12, 2006)** the Panel noted that there were unexplained gaps in the video, where the worker was observed leaving the house first thing in the morning and then not shown again on the video for several hours. The Panel stated at par. 102:

...There is no explanation as to why the worker was videotaped when he left the house first thing in the morning, then he is not shown again until several hours later. This is another example of how this videotape surveillance evidence is flawed and selective. This undermines the weight to be given to this evidence.

In the case I have outlined, there was no justification for surveillance. The Board's improper actions triggered a serious psychological impairment. I am still shocked that

the Board conducted itself in the manner that it did. In a final senior communication on that case, I said this:

This case also exposes a perpetual Achilles' heel of WSIB administration – its institutional inability to admit it was wrong. The justifications for the surveillance were fiction, and yet, rather than admit it never should have engaged in a video surveillance of my client, the Board attempted to justify its actions with reliance on an explanation which on its face was nonsensical. I urge you to read my response to the purported reasons for the surveillance. They fall apart at the end of the Board's own sentence. But, this affirms a deep-seated tendency of the Board to justify its actions as a line of defence no matter the circumstances rather than admit error, learn, change and move on. **An agency charged with the administration of hundreds of thousands of cases and issuing millions of decisions, will get it wrong from time to time. The Board was wrong this time. I encourage you to drive a cultural change to overcome this tendency so that needed change can find a genesis in other than the executive wings of the Board.**

As I have explained, after this case was championed at the most senior levels of the Board, a somewhat successful resolution of a tragic matter eventually came about. It however took many months. **A simple question – why was any of that necessary?**

The Board has to move forward

If the facts of the *Toronto Star* article are true, and they are eerily familiar to me, the Board must act. As readers know, I have high regard for the current WSIB leadership. I cannot believe that this type of behaviour is sanctioned. My presumption is that it is not. But, the Board has to be publicly engaged on this and related issues. I have a few suggestions. *First*, if this surveillance practice is continuing, it must stop – *now*. The WSIB must implement a clear and straight forward policy - **no surveillance except in cases of overt fraud** (i.e., where there is at least a *prima facie* case that a worker is working and collecting WSIB benefits). *Second*, the article feeds an emerging thesis that at least some of the Board's "turnaround" is driven by improper claims management and adjudication practices. While the Board insists that benefit cost reductions flow from more effective and faster return to work, and many facts bear this out, stories like this contradict that narrative. **To function, the Ontario workers' compensation program must have the full confidence of both Ontario's workers and employers.** **My final suggestion:** Allegations that the WSIB has improperly altered its benefit administration rules persist even in the face of WSIB denials and fact-based counter arguments. Something different must be done to shore up confidence. The WSIB (or government) should initiate a narrowly focused, short time-line, independent review into these allegations. *If true*, even in part, the Board must adjust its practices. *Even if not true* (which is my expectation), this will present a needed public forum for the Board to address underlying misgivings and perceptions head-on and help restore confidence, allowing everyone to move forward.