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

# Smile for the Camera: Surreptitious Surveillance, Self-Surveillance and Surveillance as Retort

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**Smile for the Camera: Surreptitious Surveillance, Self-Surveillance and Surveillance as Retort**

**By Ken Stuebing[1]**

Sometime in the last ten years it became trite to critique the widespread dissemination of personal electronic devices and the normative changes these pernicious products have advanced. Amateur surveillance has become grist for the scandal mill, whether exposing Candidate Romney's view of 47% of Americans, or more recently (reportedly) exposing the Mayor of Toronto's unfortunate choice of personal pastime. Naturally, these recording devices have an increasing role in providing evidence—compelling or mundane--atall levels of legalproceedings. A review of recent prosecutions by the Workplace Safety and Insurance Board's Regulatory Services Divisionhighlights the role and relevance of video surveillance in prosecutions under Part XII of the *Workplace Safety and Insurance Act.* Oftentimes video evidence is the chief if not sole basis for accusations that an injured worker has committed an offence by, for instance, failing to report a material change in circumstances. It is therefore crucial for workers' representatives to consider the challenges posed by video evidence, its admissibility/weight as well as any implications for their own professional obligations. Workers representatives must further be mindful of broader forms of electronic evidence-gathering beyond surreptitious video surveillance, especially evidence generated by their own clients: namely, social media as self-surveillance. Finally, workers representatives must contend

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with their clients' wish to respond to workplace ills with surveillance of their own. They say a picture speaks a thousand words; in what follows I hope to provide a few snapshots' worth of practical suggestions for effectively managing this information overload.

***Surreptitious Surveillance***

One of the key attributes of surreptitious surveillance conducted on a workers' compensation claimant is the obliviousness of the subject being documented. As loathsome as a worker may find the practice of video surveillance upon discovering that he/she has been caught on tape, the normal course of this surveillance is not unlawful. Of all the civil liberties we enjoy, freedom from being filmed in public is not one of them. Most urban centres have so many cameras embedded in the downtown geography that a person can be photographed hundreds of times in the course of a daily commute. We generally do not own our own public image. Upon stepping out of our private domicile, to drive to a store or even to perform maintenance outside of our home, we no longer have a reasonable expectation of privacy, and become fair game for surreptitious surveillance. We abandon our privacy interest we enter areas to which are readily accessible to members of the public.[2]

While secret taping itself may not be unlawful, there are invariably rules governing the admissibility of such recordings in a legal proceeding. In the workers

[2]See ***R. v. Wong***, [1990] 3 SCR 36 and, more recently, the Supreme Court of Canada's discussion of public alleyways in ***R. v. Patrick***[2009] 1 S.C.R. 579

compensation context, the party seeking to rely on surveillance evidence—usually the WSIB or accident employer—bears the onus of establishing admissibility in accordance with *Operational Policy Manual* ("*OPM*") Document No. 11-01-08. This Policy defines the threshold for the WSIB (and WSIAT) toaccept audio/visual recordings as evidence: the recordings must provide new or more complete information than is already in the claim file; must be relevant and pertain to the WSIB's duty to hear, examine, and decide issues under the *WSIA*, and; must be authenticated. The readeris encouraged to review my co-panelists' papers for fulsome review of these critical factors for admissibility. Generally speaking, so long as the evidence is not redundant and has been authenticated with a signed statement from the "author" in accordance with *OPM* Document No. 11-01-08—subject to your right to cross-question the recorder--then you are down to arguing relevance. The WSIAT has previously held, in respect of admissibility disputes, that *prima facie* relevant audio/visual evidence is admissible, subject to discretion to exclude where the probative value is outweighed by its prejudicial effect.[3]The representative must speak to a specific prejudicial effect that might flow from admitting and considering the audio/visual evidence—eg., the evidence depicts highly embarrassing conduct with little to no connection to the worker's functions or even the worker's overall credibility.

Once surveillance is deemed admissible, the worker's representative may still draw guidance from *OPM* Document No. 11-01-08 to challenge the weight accorded to such. *OPM* Document No. 11-01-08 acknowledges the "dramatic impact on the viewer"

[3] See for instance ***Decision No. 1104/07*** and ***Decision No. 2020/121***

of surveillance evidence and warns that "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." Upon receiving disclosure of surveillance evidence, the representative should carefully review the footage (not just the summary reports) and go through this evidence with his/her client to gather the full context in which the recordings were gathered. The representative should seek in particular to ascertain crucial details such as:

- How frequently did the worker perform the activities featured on film? Was this a one-off exercise?
- Had the worker consumed medication prior to the activities in question;
- Was the worker performing activities authorized by his/her physician?
- What was the duration of the activities featured in the surveillance evidence?
- Were there breaks between the activities filmed?
- How was the worker's condition following the performance of activities filmed? Did the activities aggravate his/her compensable condition? How was the worker's recuperation from such?

In short, workers' representatives must hone in on the activities not featured on film, and the broader context of the activities captured on film that may balance the impact of the video recordings.

While the threshold established by *OPM* Document No. 11-01-08 tends to favour admissibility of such evidence, it is worth noting that in the wake of the Ontario Court of Appeal's landmark decision in *Jones v. Tsige* [2012] O.J. No. 148 (C.A.), a worker may not, in extreme circumstances, be without legal recourse if he/she feels that his/her

privacy rights have been violated through the acquisition of such evidence. In *Jones*, the court found that intrusion upon seclusion is a cause of action after the defendant had accessed a co-worker's personal bank records on several occasions without reason or cause. Upon a detailed review of existing causes of action, statutory protections, and case law, Sharpe J.A. determined that the tort of intrusion of privacy is a cause of action in Ontario, the elements of which are:

> [F]irst, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action.[4]

Depending on the particular facts, a civil action against aparty who violates an employee's privacy right may be an available avenue to address bad faith video surveillance provided the above threshold is met.

Aside from the privacy interests at stake, a party's use of surveillance evidence as a basis for denying benefits under an insurance contract can give rise to an award of damages, as recently held by the Ontario Superior Court in *Fernandes v. Penncorp*2013 ONSC 2803. In *Fernandes*,the Court issued a rebuke ofan insurance company'soverreliance on surveillance evidence against a long-term disability claimant. In that matter, a former bricklayer's LTD benefits were terminated when 140 hours of video surveillance were relied upon by the insurer as proof that he was not totally disabled within the meaning of the insurance policy. Hambly J. held that the insurer

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[4]*Jones* (*supra*) at para. 71.

demonstrated bad faith in its termination of benefits on the basis of video evidence showing the plaintiff performing light work for short periods of time (often relying on painkillers to do so). Hambly J. accepted the plaintiff's evidence explaining, *inter alia*, the lengthy periods of recuperation not captured on film, and adopted what Justice Cavarzan said in *Lalonde v. London Life*, [2001] O.J. No. 6088 as follows:

> The difficulty with video surveillance is that it is incapable of recording the periods of time when Lalonde was out of sight recuperating, and the days when he was unable to leave his residence. As he testified, he has good days, bad days and horrible days. The videotape evidence shows portions of 17 days of a four-year period since May 14, 1997.[5]

Likewise, Hambly J. essentially found the surveillance evidence an insufficient basis for the insurer to conclude that the plaintiff had the capacity to perform his pre-disability bricklayer duties. Hambly J. ordered $300,000 in punitive and aggravated damages against the insurer. While section 179 of the *WSIA*clearly immunizes the WSIB and its officers/employees/etc. from any action or other proceeding for damages so long as its officers act in good faith, it is conceivable that an action could potentially be commenced in an extreme case of bad faith tortious surveillance.

In a similar recent decision arising from the labour arbitration context, *GTAA v PSAC* (2011) ONSC 487, the Ontario Divisional Court recently upheld Arbitrator Owen Shime's jurisdiction to award tortdamages—includingdamages for mental distress and punitive damages—against an employer for bad faith use of video surveillance as a basisfor terminating a long service employee. The grievor in that matter had

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[5] ***Lalonde*** **(*supra*)** para 59

beencooperating in early return to work following a workplace injury to her knee. The employer elected to subject the worker to video surveillance, which showed her walking in and out of stores on errands. In spite of thissurveillance evidencefalling far short of cogent evidence of misconduct/malingering, she was terminated for dishonesty and breach of trust. The Arbitrator condemned the employer's conduct "in both its investigation and also its ultimate determination [which] was not only unreasonable but also in bad faith" and ordered in excess of $500,000 in total damages. While the reviewing Court found that the quantum of mental distress and punitive damages was insufficiently explained, the Court upheld the Arbitrator's fundamental jurisdiction to award such damages. The Court commented:

> While a unionized employee may be less vulnerable than the non-unionized because of the protections of a just cause clause, the remedy of reinstatement and union representation, such an employee is still vulnerable to mental distress if the employer acts in bad faith in the manner of dismissal, as the GTAA did here.
>
> The arbitrator set out in detail his reasons for finding bad faith on the part of the GTAA, for finding significant mental distress caused to a particularly vulnerable individual and for finding that the GTAA had knowledge of that vulnerability. In the circumstances of this case, his decision to award damages for mental distress based on the bad faith of the employer in the manner of dismissal fell within a range of reasonable outcomes.[6]

The Court's affirmation of various heads of tort damages for the bad faith actions that included surveillance confirms unionized employees' ability to access meaningful redress for arbitrary/bad faith surveillance and disciplinary action in relation to such.

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[6] *GTAA* (*supra*) at paras 109-110.

***Self-Surveillance***

While the above cases reflect that a worker may have independent actions against his/her employer for bad faith surveillance, the worker has no means of redressing his/her own self-surveillance in the form of online social media activities—apart from being pre-emptively judicious about deciding when and how much to post online. Social media users' capacity for un-self-aware oversharing is endlessly surprising.

While I am as-yet unaware of decisions of the WSIAT/Provincial Court directly involving workers' compensation claimants' "self-surveillance" via social media—Facebook postings have been referred to in WSIAT decisions in passing but have yet to form a significant focus of a Vice-Chair or Panel's findings—there are several cases in the labour arbitration context dealing with discipline (including discharge) assessed for employees' off-duty social media activities involving denigrating comments about the employer, co-worker and/or breached employer confidentiality policies.[7] In each of these cases, an employee's reasonable expectation of privacy is a key defence to an employer's case for just cause for dismissal or discipline grounded in an employee's off-duty communications on social media sites. Civil and arbitral jurisprudence, as well as federal and provincial statutes, set limits to how much an employer is permitted to probe into an employee's private life. Where an employer seeks to establish a nexus

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[7] See ***Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127***[2007] 159 L.A.C. (4th) 321; ***Alberta v. Alberta Union of Provincial Employees (R. Grievance)***[2008] 174 L.A.C. (4th) 371; ***Wasaya Airways LP v. Air Line Pilots Association International*** [2010] C.L.A.D. No. 296;***EV Logistics v. Retail Wholesale Union, Local 580*** [2008] B.C.C.A.A. No. 22

between the employee's social media activities and workplace misconduct, the degree to which the employee acted to ensure the communications were private—and the degree to which the employer intruded on this expectation of privacy—can be a compelling mitigating factor. For instance, Facebook users can limit their intended audience through privacy settings—disparaging comments made by an employee in his Facebook postings are less damaging to an employer if the employee sedulously maintains strict privacy settings. By contrast, if the employee's online communications are on a website easily accessible to the general public, his/her activities can be readily reviewed by the employer and may provide a basis for assessing discipline.[8]

By contrast to this discipline/discharge context, however, if an employee's fraudulent claim for WSIB benefits is exposed by his online postings, the intended private nature of the communications may become moot. If an employee's Facebook activities lead to charges of providing misleading information to the WSIB, there is little mitigating value in the employee's original intent that the communications were private in nature. Once such communications are discovered, the *bona fides* of the activity disclosed in such communications become the whole of the issue under review. The classic example is a worker calling in sick—or even seeking benefits for an injury or recurrence—and providing a contemporaneous, detailed account of Ferris Buelleresque activities on his/her social media account. Such an employee readily invites legal consequences ranging from discipline to potential prosecution in Provincial Court;

[8] See ***Chatham-Kent (supra)*** for a leading discussion of the consideration of confidentiality in discipline cases involving online activities

while I am presently unaware of specific WSIAT or Provincial Court decisions involving posting inculpatory evidence posted on a social media site, it seems inevitable that this type of circumstance will be heard by the WSIAT/Court in the foreseeable future.

George Orwell famously foretold of a big brother era, but it was less clear in his day that the chief intrusions on our privacy would turn out to be our own self-disclosure via blogging/social media. As such, it is important for representatives to provide basic guidance to their clients as to how to minimize the potential exposure and impact of clients' online activities. Guidance could include the following tips:

- Do not identify your Employer/colleagues/clients by name or refer to them in a way that could lead to identification;
- Do not discuss confidential information about your Employer, clients or company practices;
- Use a different name from your given name for your account (i.e. use your first and middle name or a nickname);
- Use **common sense:** do not post comments that disparage; threaten or mock the Employer, colleagues or Employer's business.
- Adjust your Facebook Privacy Settings:
    - Set "**Control Your Default Privacy**" from "Public" to "Friends" or "Custom". Custom allows you to determine specifically who can or cannot see your Page;
    - Change your passwords regularly (i.e. every 6 months); and
    - Adjust "**Profile and Tagging**" to limit who can post to your wall,see other posts on your Profile, see posts you've been tagged in on your profile and limit the audience for past posts.

Above all, it is important to remind workers to be careful before "friending" their employer's representatives online; if a worker insists on granting his/her manager access to his/her social media profile, he/she must govern postings accordingly.

Representatives must be particularly vigilant to ensure that they do not advance claims they know to be false, or otherwise knowingly mislead the WSIB or WSIAT decision maker. If a representative is presented with *prima facie* compelling video surveillance evidence, he/she must carefully review it with the worker to determine whether the worker's claim is still legitimate. It is an offence under s. 147.1 of the *WSIA* towilfully provide false information to the WSIB, for instance, by arguing that the worker was unemployable when in light of incontrovertible surveillance evidence the worker has been regularly performing work for employers other than the accident employer. Representative are likewise obligated under, *inter alia*, the *Rules of Professional Conduct*,[9]*Paralegal Rules of Conduct*[10]andthe WSIAT's*Code of Conduct for Representatives*[11] to refrain from knowingly advancing any information known to be untrue and/or assisting any party to mislead or misrepresent the facts.If a worker insists on proceeding with a claim that the representative has determined is false in light of surveillance evidence, the representative is bound by the above guidelines to withdraw from further representation in the matter at hand.

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[9] Rule 4.01(1)
[10] Rule 4.01(5)
[11] Section 2.1.

***Surveillance as Retort***

In view of all of the above-described scrutiny to which employees may become subject for a variety of purposes, it is understandable that the employee might be eager to indulge the same impulse that leads employers and/or the WSIB to engage in surveillance. In particular, workers often wish to provide photographic or even video evidence of the workplace hazards and practices. An employee may for instance wish to document the supposed "light duty" position that an employer has made available in order to support his/her claim that the duties entailed in that position are not suitable. In general, an employee's surveillance of the workplace is subject to the same admissibility threshold noted above, with one significant additional dimension for workers' representatives to consider. Namely, if an employee insists on conducting surveillance of the workplace and/or work duties, he/she must be particularly mindful of whether or not such surveillance breaches any known workplace policies, including confidentiality policies in particular. An employee would be well-advised to exercise caution in ensuring that his/her audio/visual recording in the workplace does not itself constitute a form of misconduct that could subject him/her to disciplinary repercussions. Otherwise, what is good for the goose should be good for the gander.

In all matters in which surveillance evidence is admitted, it is worthwhile to consider the caveat in *OPM* Document No. 11-01-08 that "Evidence from audio/visual recordings is considered in conjunction with all other evidence." Workplace parties may become particularly obsessed with the razzle-dazzle factor of video evidence, to the

detriment of considering its probative value in conjunction with all other evidence. No video surveillance will ever stand on its own without a worker having an opportunity to explain or distinguish the evidence in the course of testimony evidence. The Court's admonishment in *Fernandes (supra)* on the generally limited utility of surveillance evidence should be carefully considered by all workplace parties. Unless surveillance evidence tendered is capable of speaking conclusively for itself, it will be just one factor among many to weigh, not the whole picture.