



Surveillance of Injured Workers Raises Credibility Issues that are Compounded When Members Advertise their Side Hustle on Social Media, Including Voice Greeting & Emails Addresses Advertising your Electrical Contracting Business

By: Gary Majesky, *WSIB Consultant & Executive Board Member*



Over the years, and recently, I deal with cases where workers have been the subject of surreptitious surveillance, either initiated by an employer or the WSIB. In the past, I have successfully rebutted this evidence. In one case, the WSIB surveilled a member who was seriously disabled. The surveillance showed the member in a hockey arena who stood up to clap when a kid scored. However, the video also showed he placed his cane on his forearm in order to clap and needed his cane to move about. They also followed the same member when he drove from Hamilton to a Toronto Hospital to visit a dying friend. Again, nothing earth shattering.

Union Contractor Hired Uncleared Workers off the Street

Recently, I had two cases where video surveillance was an issue. In one case it involved a worker who was injured in 1993, and the employer placed him under surveillance in 1995, at which time he was seen playing soccer. The same employer in 1998 placed the same worker under surveillance again, which showed him working on a new build residential house. There were adverse inferences, and in fact, his credibility was an issue in a 1998 Tribunal hearing.

What I found odd after drilling down into this case was the 1993 accident employer, an IBEW contractor, hired uncleared workers to work on high-rise projects. In fact, when Bob Gill and Glenn McDougall visited these job sites in the early 1990s, the employer sent the uncleared workers home. It was a regular cat and mouse game. When this same member was surveilled in 1997 for a 2nd time, he was on a WCB work placement, and the contractor told WCB "all he does is drive around to job sites in a company car." Very quickly he moved into the field working on houses. Then during the 1997 low-rise organizing blitz, he became a member of Local 353.

WSIB Initiated Surveillance of Member

Fast forward to 2008, this member suffered another back injury lifting a heavy coil of wire from a truck. Afterwards, the contractor closed the business and the member was on WSIB benefits as he could not perform his pre-injury job. In 2013, the WSIB placed him under surveillance and concluded he was less disabled than he claimed. The private investigator surveilled him at the airport pre-boarding and moving his luggage, Casino Niagara going up stairs without assistance, grocery shopping, and shoveling 1" of fluffy snow. But the coup de grace was visiting a home with tools and material and coming out a few hours later.

Tarnished Credibility Impacts Reliability of Doctor's Opinion

The member's credibility was tarnished, which impacted the reliability of what he told doctors about his symptoms and function. Consequently, little weight was given to the doctor's opinions as they were likely deceived. In *Decision No. 1189/21*, Tribunal Vice-Chair noted:

Mr. Majesky submits that there are objective medical findings from numerous clinicians that support the worker's claim. I accept that there is clear investigative evidence that the worker has degenerative low back findings and I have accepted that he has a permanent impairment as a result of 1993 accident. However, on review, the medical reporting of the extent of his disability after 2009 is reliant on the workers subjective reporting of his pain complaints and his restrictions, and in particular on reports that the worker has an antalgic gait and walks with a cane. The videotape evidence demonstrates that was not the case.

What I found troubling was the WSIB knew in 1993 that the member did not have an electrical license. This was flagged in several reports from 1993-2013 that he was unlicensed. I argued, how can the WSIB, whose mandate is safety, conclude an injured worker can return to pre-injury electrician duties when they are unlicensed? In *Decision No. 1189/21*, the Tribunal Vice-Chair commented:

Mr. Majesky refers me to the provisions of the *Ontario Colleges of Trades Act* which imposes a regulatory requirement on both a person doing electrical work and their employer to ensure that only persons who are licensed to work as electricians may do so. This submission raises legal and policy issues that might need to be addressed if the context were different.

There's an expression, you'll reap 100% failure for the things you don't ask for. In spite of the surveillance challenges, the member did have lumbar spine surgery in 2019, which WSIB denied was related to his 1993 injury. Conversely, I felt there was a genuine claim of entitlement which we argued at the Tribunal. The Vice-chair agree with the union's position that the members back surgery was related to his 1993 back injury, in spite of 25-years of spirited denials.

Social Media, Greed and Poor Judgement

In another case, a member suffered a head, neck and shoulder injury. His graduated return to work plan was work 4-days, with 1-day off each week to rest. On his rest day, the employer hired a private investigator



and orchestrated a sting operation. The employer discovered a social media post where the member advertised his electrical services installing pot lights. A prospective home owner contacted him to visit their home, on his rest day, which he did. This house call was a set-up, with hidden cameras and mic's. He was observed climbing a chair and using his cell phone light to illuminate areas where the home owner wanted pot lights installed. The member said sure, no problem – and quoted \$1200 – CASH! There was another house call with a phantom home owner who needed electrical work. Same outcome.

I stumbled across the surveillance evidence after reviewing his WSIB claim file, which the employer's legal counsel sent to WSIB. I've known this member since 1998, and successfully represented this young man twice. In fact, I like him, because even when injured he produces like an able bodied worker. Rest assured when I discovered the surveillance, I wrote the member and expressed my concern because my reputation, and that of IBEW Local 353 is not negotiable. Whenever I represent people I cannot be used as a tool or dupe. In a recent employer appeal, the WSIB Appeal Resolution Officer relied on the employer's video surveillance and rescinded the members entitlement to a permanent impairment (NEL award), ruling he had fully recovered. The AROs rationale mirrors the Tribunal Vice-chair in the above case.

Law & Policy, Surveillance

Under Policy 22-01-09, 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. Surveillance involves discreetly observing one or more subjects. It may also involve the use of audiotape, video, film, and/or photographs.

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.

Under Policy 11-01-9, **Visual and Audio Recordings** sets out the process for introducing surveillance evidence.

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 surveillance, or the representative, is given the opportunity to review the information and provide an explanation.

Members frequently ask me WHY is my claim denied when others scam the system. My reply. The vast majority of injured workers are honest and have been treated shabbily by the workers compensation system. An illuminating statistic, 80% of WSIB regulatory compliance issues relate to employer breaches and financial malfeasance and not worker fraud.

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NextGen Committee

The NextGen Committee is looking for input from the membership on the implementation of a mentorship program for our local.

We believe it is necessary for us as a union to try to promote IBEW culture and strong unionism. In the foreseeable future we know that there is going to be a surge in apprenticeships, so let's get ahead of the game on this one.

If you have any interest, knowledge, or experience to share please connect with us.

Please email us at NextG@ibew353.org

In Solidarity Always,

Tim Shilson, NextGen Chairperson
The NextGen Committee