



Private Eyes: They're Watching You When to Use a Private Investigator in a Workers' Compensation Claim

by James B. Yates and A. Brooke Phelps
(inspired by the musical stylings of Daryl Hall and John Oates)

Hopefully, a private investigator is not actually watching you, but you may want to use one to perform surveillance on a claimant whom you believe is engaging in activity inconsistent with an alleged injury. In the right circumstances, surveillance footage can play an important role in managing a workers' compensation claim. Not every claim is appropriate, however, for enlisting this sometimes expensive tool. Thus, before deciding to use a private investigator to follow a claimant, there are a number of factors to consider.

Private Eyes, They're Watching You (Well, Actually Your Claimant) – But Should They Be?

Frequently, an employer will receive a tip from a coworker that a claimant is engaging in activity inconsistent with his or her alleged injury or restrictions. The workplace, whether it is an office or a factory, can be an environment fraught with gossip. Thus, not all tips received from coworkers will prove to be trustworthy. If a co-worker is able to provide specific details regarding where he or she spotted the claimant or what kind of activity the claimant was performing, then utilizing a

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private investigator may be advisable. In contrast, if a co-worker simply makes a statement that "I heard that Joe Worker is faking his injury," this may not warrant use of a private investigator. Similarly, if a tip comes from a claimant's ex-spouse or another individual outside the workplace with whom the claimant has personal problems, the tip may not be valid. It is important to evaluate from whom the tip came as well as what kind of relationship the "tipper" has with the claimant.

Additionally, an employer should analyze the potential cost of the workers' compensation claim before utilizing a private investigator. Often, employers may believe that an employee is dishonest or untrustworthy and may immediately discount a report of an injury because of past history with the employee. If the employee is alleging only a minor injury, however, the employer would not likely want to immediately place the employee under surveillance. As much as the employer believes the employee is faking the injury, it may not be advisable to incur the cost of surveillance. For example, an employer may hear through the grapevine that Joe Worker, who filed a claim for a lumbar strain, has been out water-skiing all weekend. If Joe Worker has not been off work and has been receiving only minimal conservative treatment for his lumbar strain, then surveillance is not likely warranted under a strict cost/benefit analysis. In contrast, if Joe Worker has alleged a herniated disc and has been off work receiving temporary total disability compensation, and the employer receives a tip that Joe Worker is out water-skiing every weekend, surveillance may very well be warranted and beneficial in managing the claim. Each workers' compensation claim is unique, and the specific facts should be closely examined in order to determine if use of a private investigator can help manage a claim.

They're Watching You, Watching You, Watching You – Will They Ever Stop?

If an employer chooses to utilize a private investigator, the employer should provide as much information as possible so that the investigator has a better chance of conducting useful surveillance. As noted above, surveillance can be costly, so the employer should do everything in its power to help the private investigator get useful information as quickly as possible. In addition to basic information such as the claimant's address and physical description, an employer should send the investigator the list of activities that the claimant alleges he or she is unable to perform as a direct result of his or her injury. This will help the investigator possibly obtain footage of the claimant engaging in those activities. Also, if the employer knows that the claimant will be in a specific location at a specific time (at an independent medical examination, for example), this information should be provided to the investigator. Often, a claimant, who is allegedly suffering from an injury that causes an altered gait, will be able to walk without any trouble through the parking lot of a doctor's office. Upon entering the office, however, the claimant suddenly will develop a severe limp. Or maybe the claimant with ten-pound lifting restrictions that are preventing her return to work will be seen carrying her thirty-pound toddler across the parking lot. Successful surveillance depends greatly on timing, and an employer can help a private investigator succeed by sharing as much information regarding the claimant's activities as possible. This may prevent prolonged surveillance that produces unusable footage. Conversely, surveillance may demonstrate that a claimant's complaints are legitimate and support continued treatment or payment of temporary total disability benefits.

They See Your Every Move – But Can Those Moves Help?

Once a private investigator obtains footage of a claimant, the footage must be closely analyzed to determine how it can best be used. Just because a claimant is filmed walking around the grocery store pushing a cart does not mean that he or she is not temporarily and totally disabled from his or her job. If a claimant is receiving TTD compensation, he or she must be temporarily and totally disabled from his or her former position of employment. Thus, in order to use the footage to cut-off TTD compensation, the footage must show the claimant performing activity which is inconsistent with his or her alleged inability to perform his or her former position of employment. For example, if the claimant's former position of employment required her to lift 50-pound parts and her back injury prevents her from performing this type of lifting, footage of her carrying her six-pound Chihuahua is not helpful. However, footage of the claimant helping to lift a refrigerator into a moving truck can be very useful. This type of surveillance can help defeat a request for TTD compensation, or if the claim has not yet been allowed, result in a denial of the claim.

Additionally, obtaining information that a claimant is working and receiving compensation while also receiving TTD compensation can be extremely useful. If a claimant receives TTD compensation or other benefits to which he or

she is not entitled, the claimant is committing fraud. The Ohio Bureau of Workers' Compensation defines fraud as "an intentional act or series of acts resulting in payments or benefits to a person or entity that is not entitled to receive those payments or benefits." Fraud is committed when a person knowingly receives benefits which he or she is not entitled to receive by law. The C-84 form, which is the form used by claimants to apply for TTD compensation, requires the claimant's signature and the following declaration:

I understand I am not permitted to work while receiving temporary total compensation. I have answered the foregoing questions truthfully and completely. I am aware that any person who knowingly makes a false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation as provided by BWC or who knowingly accepts compensation to which that person is not entitled is subject to felony criminal prosecution and may, under appropriate criminal provisions, be punished by a fine, imprisonment or both.

Thus, any person who signs a C-84 and requests TTD compensation for a time period during which he or she is working for another employer is knowingly requesting benefits to which he or she is not entitled by law. This action is considered fraud, and the BWC can prosecute the claimant. Additionally, the employer can seek a finding that benefits were overpaid due to fraud and recover the amount overpaid. Thus, if a private investigator observes and records a claimant working for a different employer while receiving TTD compensation, chances are good that the claimant is committing fraud. This type of surveillance can also be turned over to the BWC's special investigation department, and the BWC will initiate its own investigation of the claimant's activities.

In sum, using a private investigator can help reveal information that can change the way a claim is managed, or even result in the denial of the claim. Surveillance video can achieve results that mere medical evidence cannot achieve. Thus, utilizing a private investigator can prove to be very beneficial. Employers should, however, carefully analyze the facts of each claim before deciding to incur the often costly assistance of a private investigator. Also, once surveillance video is obtained, there are several ways to use it, and this is also a decision that must be carefully scrutinized . . . and is a subject for another article.



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