

# WINNERS & LOSERS: Can You Videotape Workers to Prove Lies about Injury?



When workers are injured on the job, they may be entitled to certain things, such as workers' comp. And when they're ready to return to work, they may be entitled to accommodations for any physical limitations due to their injury. Some workers may take advantage of these rights and exaggerate the nature or extent of their injury to, say, get an easier job or more favourable hours. If an employer suspects that a worker is lying about an injury, can it videotape the worker to prove its suspicions? Here are two cases in which workers were fired for lying about their physical condition based on the results of video surveillance. The arbitrators in each case came to different conclusions as to whether employers could rely on such surveillance.

## **CAN RELY ON VIDEO**

### **FACTS**

A newspaper reporter seriously injured her ankle while on assignment and required three surgeries. When the reporter eventually returned to the office, she told the paper she couldn't drive or use mass transit. She also claimed to be limited in how much she could walk, stand and lift. In the office, she walked slowly and used two canes. But outside of work, co-workers saw her walking without the canes and much faster. So the paper had an investigator follow and videotape the reporter. The videos confirmed that she could, in fact, drive, walk without assistance, shop and stand in line. The paper fired her for lying about her restrictions.

### **DECISION**

An Ontario arbitrator upheld the reporter's termination.

### **EXPLANATION**

The arbitrator said co-workers gave the paper information about their observances of the reporter outside of the workplace, which reasonably lead it to suspect that she wasn't being honest in representing her abilities to perform work. Thus, the paper had 'reasonable and probable cause' to investigate her conduct and videotape her outside of the work. The videotape evidence undercut the reporter's claims about her physical limitations. It proved that she'd knowingly misled the paper about her restrictions and ability to do her job, undermining the accommodation process and her relationship with her employer. The arbitrator concluded that the reporter's 'dishonesty was planned, deliberate and ongoing. [She] was happy to do as little work as she could possibly get away with in the workplace.' As a result, the paper had just cause to terminate her.

*Toronto Sun v. Unifor Local 87-M*, [2014] CanLII 22359 (ON LA), April 7, 2014

## **CAN'T RELY ON VIDEO**

### **FACTS**

A worker requested vacation from Oct. 7-11. His supervisor told him he could have Oct. 7-8 off but not Oct. 9-11. On Oct. 4, the worker reported a back injury to First Aid. He took the 7<sup>th</sup> and 8<sup>th</sup> off. He again requested the rest of that week off and was again denied. On Oct. 9, the worker called his supervisor, saying he couldn't come to work due to a back problem. He was out the remainder of that week. Suspecting the worker was lying to get the days off he'd requested and hearing that he'd planned to take a trip, the employer hired an investigator to conduct surveillance of him. The investigator videotaped the worker during the three days in question in his yard and public places, observing him engaged in activity that undermined his claims of a back injury. So the employer fired him. The union filed a grievance and asked the court to exclude the video and other surveillance evidence.

### **DECISION**

A BC arbitrator excluded the surveillance evidence, ruling that it violated the

worker's privacy rights.

## **EXPLANATION**

The arbitrator acknowledged that the worker's repeated requests for vacation for those three days generated a suspicion of abuse of sick leave when on the first of those days he called in claiming to have a back problem. In response, the employer immediately hired investigators to follow him. But there was no evidence that the worker, who'd worked for the employer for more than 34 years, was a problem employee or a dishonest or uncooperative person. In addition, the employer had other, less invasive options it could've taken to verify the worker's condition, such as asking for the doctor's note and contacting the doctor to confirm the worker's visit. Given the circumstances, conducting 'speculative surveillance' on him without his consent wasn't a reasonable step, concluded the arbitrator. Because the employer didn't have a reasonable basis for conducting the surveillance, it couldn't use such evidence in the proceedings on the termination grievance.

*Unifor, Local 433 v. Crown Packaging Ltd.*, [2014] CanLII 18105 (BC LA), April 13, 2014