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Surveillance: Letting the CAT out of the Bag

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As insurance defence counsel I am often asked by my clients about the effectiveness of surveillance. Surveillance is expensive and insurers must consider whether it is money well spent. In my view every case is different and the effectiveness and perceived benefits of surveillance for each file must be assessed on a case by case basis. That having been said, on certain claims the old adage that “a picture is worth a thousand words” still has resonance.

The most difficult cases these days are the chronic pain and psychological/emotional impairment cases. You know the kind I mean, little by way of identifiable physical impairments but volumes of dismal medicals suggesting that the claimant will never be able to brush their teeth again, let alone hold a down a job. These cases are becoming more dangerous because they are becoming the subject of CAT impairment applications with increasing frequency.

The identified impairment criteria in these claims is often category (g), namely a class 4 or class 5 impairment due to mental or behavioural disorder. Setting aside the issue of whether it is even appropriate to use these criteria for chronic pain claims, can surveillance help you win the battle? The answer is yes. Recall that for class 4 or class 5 the impairment as defined must significantly impede or preclude useful functioning in 4 spheres:

- (1) Activities of daily living
- (2) Social functioning
- (3) Concentration, persistence and pace
- (4) Deterioration or decompensation in work-like settings (adaptation)

In two FSCO decisions, *G. v. Lombard*¹ and *Pastore v. Aviva*¹, catastrophic impairment was found based on category (g) in what are in essence chronic pain cases. In neither of these cases was surveillance referenced in the Arbitrator’s decision and medical evidence only was relied upon.

More recently in *Knechtel v. Royal & Sunalliance*¹, the Arbitrator had the benefit of surveillance in assessing qualification under category (g). The surveillance activity was significantly at variance with the claimant’s treating

pain specialist’s contemporaneous notes, to the extent that the Arbitrator found Ms. Knechtel did not accurately portray her symptoms and disability when she appeared to healthcare professionals. On a category (g) assessment, Ms. Knechtel’s expert’s opinion of severely curtailed social function was undermined by surveillance showing her actively going out with friends or family to shop, eating at restaurants, casually socializing with other children’s parents at her son’s daycare and conversing with service people at her home. Particularly:

“The extensive surveillance of Ms. Knechtel’s social activities leads me to conclude that she is not socially isolated as Dr. Nelson pessimistically portrays her”.

On this basis, the category (g) claim was dismissed. A mild social impairment was accepted by the Arbitrator as consistent with Ms. Knechtel’s admitted abilities in daily activities and the surveillance showing her engaged in normal daily activities as well as socializing. Can surveillance help to keep the CAT in the bag? In certain cases, absolutely. Recall as well the best surveillance comes from the claimant themselves, so continue to monitor Facebook and other social networking sites.

¹ FSCO A06-000209, October 4, 2007

¹ FSCO A04-002496, February 11, 2009

¹ FSCO A07-000011, June 15, 2009

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