

Surveillance Evidence

1.0 This Practice Direction:

- explains what constitutes surveillance evidence
- explains how a party may introduce surveillance evidence
- explains how the Tribunal determines the admissibility of surveillance evidence
- explains what weight is to be given to surveillance evidence.

2.0 What Constitutes Surveillance Evidence?

2.1 Surveillance commonly involves a person discreetly observing another person, situation, or object. Surveillance evidence includes any record of audio or visual observations.

3.0 Tribunal's General Practice on How a Party May Introduce Surveillance Evidence

3.1 The Tribunal has the authority to accept such oral or written evidence as it considers proper, whether or not it would be admissible in a court.¹

3.2 Parties are permitted to rely on surveillance evidence in Tribunal proceedings where the evidence is relevant and of sufficient probative value to assist adjudicators without warranting exclusion.

4.0 Procedure for Disclosing Surveillance Evidence

4.1 Parties who wish to rely on surveillance evidence in Tribunal proceedings must provide a copy of the evidence, the surveillance report and an affidavit authenticating the evidence. The affidavit is to be signed by the person that conducted the surveillance ("the Investigator") or prepared the evidence.

4.2 The party submitting the evidence must be prepared to call the Investigator as a witness (see *Practice Direction: Disclosure, Witnesses and the Three Week Rule*) to authenticate the evidence. The Investigator is expected to attend the hearing, testify about how the evidence was made, and answer questions from the parties and the Vice-Chair or Panel.

¹ See section 132 of the *Workplace Safety and Insurance Act*.

- 4.3** If the Investigator is not called as a witness to authenticate the evidence, a signed affidavit accompanying the evidence may be acceptable. The affidavit must address the creation of the evidence and authenticate it, where possible.
- 4.4** If the Investigator is not called as a witness or if the evidence has not been authenticated, the Vice-Chair or Panel may not admit the surveillance evidence or may give it less weight.
- 4.5** Surveillance evidence commissioned by the Board is sometimes received by the Tribunal as a part of a worker's claim file. In such instances, the Tribunal does not require the Investigator to attend as a witness at the Tribunal hearing. However, the Tribunal would normally expect the surveillance evidence would be authenticated by affidavit, and section 4.4 would apply.

5.0 Admissibility of Surveillance Evidence

5.1 Tribunal case law sets out three criteria that generally form the basis of the Tribunal's reasoning in deciding the admissibility of surveillance evidence. In considering whether it will admit the surveillance evidence, the Panel or Vice-Chair may consider any relevant factors, including three criteria that have been identified in Tribunal case law as the relevant "categories of inquiry":

- the relevance of the evidence to the issue in dispute
- the authenticity of the evidence
- exclusion due to special circumstances (such as inherent flaws in the evidence).²

6.0 Weight of Surveillance Evidence

6.1 In considering how much weight will be given to the surveillance evidence, the Panel or Vice-Chair may consider any relevant factor, including:

- the extent to which surveillance evidence has been properly authenticated
- the extent to which surveillance evidence has been edited or provides a selective snapshot and not a whole picture

² *Decision No. 688/87*

- the quality and clarity of the surveillance evidence
- the duration of the surveillance
- any strengths and weaknesses in the surveillance procedures
- whether the subject of the surveillance has had an opportunity to explain the activity depicted in the evidence
- whether the investigator attended the hearing.

6.2 Surveillance evidence will be considered in context and in conjunction with all other evidence on record. See *Practice Direction: Disclosure, Witnesses and the Three Week Rule*.

7.0 Related Practice Directions

- *Disclosure, Witnesses and the Three-Week Rule*

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Workplace Safety and Insurance Appeals Tribunal