

Workers' Comp LAW BLOG

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To Produce or Not to Produce - That is the Question

Your claim starts with the all too common red flag of whether this is an accepted or denied claim. You secure a statement from the claimant. While litigating this claim, your defense counsel recommends surveillance. You put surveillance on Claimant for three days and capture 15 minutes of Claimant doing work and activities in contradiction to his current out-of-work restrictions. Shortly after you review the surveillance report, you receive a subpoena from Claimant's counsel requesting copies of "any and all statements, recorded statements and/or video surveillance..." Do you have to produce the requested material? If you do produce the requested material, when are you obligated to do so? Finally, does the attorney work product doctrine protect you from having to produce the material?

A recent Federal Court decision in the District of South Carolina may shed some light on how to answer these questions. In the case of *Jimmie Dale Bryant v. Trexler Trucking*, CCA No. 4:11-CD-2254RBH,WL 162409 (DSC Jan. 18, 2012), United States Magistrate Judge Thomas E. Rogers III ruled on whether a request and Motion to Compel video surveillance of a Plaintiff and witness statements were protected by the work product doctrine. The Court divided the work product doctrine into two types: (1) opinion work product and (2) non-opinion work product. In discussing the non-opinion work product, the Court first analyzed witness statements.

Witness Statements:

To determine if and when witness statements are discoverable, the Court relied upon Fourth Circuit and District of South Carolina case law. Generally speaking, "there is no substantial need for a document protected by the work product doctrine when the requesting party can gather the information contained within the document by way of deposition." *Id.* at 3. However, a party may establish a substantial need for statements made contemporaneously with the incident at question. The Court reasoned such statements are "unique in that they provide an immediate impression of the facts, and a lapse of time may itself make it impossible to obtain substantial equivalent material." *Id.* The Court determined if the witness statement is made shortly after the incident (a week or less after the initial accident or incident), the work product doctrine can be penetrated, and the statement becomes discoverable.

Video Surveillance:

With respect to video surveillance, the Court held surveillance is generally found to be work product when it is gathered in anticipation of litigation by or at the direction of counsel for a party. *Id.* at 5. “Where the party intends to use the films at trial, however, courts generally find that work product privilege is waived given the Plaintiff’s (1) substantial need for evidence that may prove critical at trial, and (2) inability to obtain the substantially equivalent of this record of Plaintiff’s condition at a particular time and place.” *Id.*

In *Bryant*, Defendants were willing to produce the video surveillance of the Plaintiff but only after the deposition of the Plaintiff. The Court determined the delaying of producing the surveillance video until the subject of the video had testified under oath was appropriate. *Id.*

Practice Point:

When confronted with a Subpoena or Request for Discovery, the party must consider the use of the materials in the future at trial and the cost in defending the right of a work product defense. As is required by the Federal and State Rules of Civil Procedure, at a minimum, a party must disclose through a privilege log the material that is requested. Should you find yourself with a question as to whether to produce materials, please feel free to contact any of the attorneys at Collins & Lacy, P.C.

About Christian Boesl

Christian is a shareholder and chair of the firm’s Employment Practice Group. His practice focus includes both employment law and workers’ compensation. Although Christian’s practice concentrates in State Court, Federal District Court and the Workers’ Compensation Commission, he also maintains an active practice pursuing alternative dispute resolution for his clients. Christian joined Collins & Lacy as a law clerk and stayed on as an attorney after being admitted to the South Carolina Bar. During law school, Christian was an Honor Council Justice, 2002 Moot Court Champion and quarterfinalist in the Herbert J. Weschler National Criminal Law Moot Court Competition.

About Collins & Lacy, P.C.

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