

## **ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES**

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### **RE: GEORGE THE BARTENDER AND THE CHAIN OF CUSTODY MYTH**

#### **FROM THE LOBBY BAR AT THE HYATT:**

Frank Falls, noted workers' compensation defense attorney, was not enjoying himself.

Having been Frank's drinking partner for the past week I knew what the problem was and I couldn't blame him!

Next Monday Frank is set to try a case with Ron Summers, George the Bartender's workers' compensation attorney, and things look bleak.

One of the problems in Frank's case was due to the fact that the date of injury was five or six years old and over the course of that time Frank's client, a major insurance carrier, had sporadically assigned surveillance on the applicant to various panel investigation firms, three total.

When the case was set for trial Frank felt he had it in the bag as not only were the reports received from the investigation companies "glowing" but the reports did not exaggerate as he had viewed the surveillance films personally and they were excellent.

That was the good news.

The bad news was that two of the three surveillance companies advised Frank that the actual investigators who obtained the surveillance films were no longer with the surveillance company. When Frank asked the surveillance companies to try and locate their former investigators they told him: "That's not our problem."<sup>1</sup>

The office managers for each surveillance investigation company had told Frank that this should not be a problem anyway as they would be able to testify at trial as to the "chain of custody" of the surveillance films and this should be sufficient to authenticate the films for admission into evidence.

Last night Frank had asked my opinion as to whether or not this would be enough to convince a Workers' Compensation Judge to admit these surveillance films into evidence.

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<sup>1</sup> The above reply to Frank regrettably has a basis in fact. I have been told by several large national investigation companies that their contract with the carrier does not require them to produce an investigator after said investigator terminates employment.

Much to Frank's chagrin I told him that the "chain of custody" requirement for the introduction into evidence of surveillance films was a myth and had no relationship to the actual law.

Tonight I was not going to make Frank's day any better because I brought with me the case of *Brinks Incorporated v. Workers' Compensation Appeal's Board, Barbara Taylor* 68 Cal Comp cases 1612, filed on September 16, 2003.<sup>2</sup>

The defendant in *Brinks* was the Liberty Mutual Insurance Company and although they won the battle (the admissibility of their surveillance films), they lost the war (their case).

In *Brinks* the defendant attempted to admit surveillance films and/or videotapes of the applicant into evidence and the Workers' Compensation Judge (WCJ) erroneously required the defendants to establish a "chain of custody" with respect to the videotapes.

Liberty Mutual lost at the trial level and filed a Petition for Reconsideration.

However, in denying reconsideration the Board noted in relevant part as follows:

'We specifically note that the establishment of a "chain of custody" of the disputed tapes is a foundation requirement for the *admissibility* of the tapes. The WCJ correctly found that defendant failed to meet the requirements for establishing this foundation. The issue of whether a videotape "actually represents what it purports to depict," and the calling of witnesses to so testify, arises *after* the film has been admitted into evidence. Absent defendant's having established a foundation, the WCJ properly excluded the tape from evidence.  
[Emphasis by WCAB]'

Defendant Liberty Mutual then filed a Petition for Writ of Review which was denied but in denying the Writ the Court of Appeal noted as follows:

. . . that the WCAB erred in requiring Defendant to establish the chain of custody of the videotape of applicant's industrial injury as a prerequisite to its admissibility, when Defendant offered to have an eyewitness to the events on the Applicant's date of injury authenticate the videotape. (emphasis added)

Therefore, Liberty Mutual won the battle but lost the war as the Court of Appeal found that the error by the WCJ was not prejudicial as substantial evidence supported the finding of the WCAB.

The admission into evidence of surveillance videos is controlled by the Rules of Evidence as set forth in the Evidence Code.

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<sup>2</sup> Anybody wishing to obtain a copy of the *Brinks* case should request so via e-mail.

What's that I hear? You don't have an Evidence Code in your office? No worry!

Most, if not all of us, have the blue bound volume which we erroneously refer to as the Labor Code. Actually this is entitled Workers' Compensation Laws of California and although it does include division two and division four of the Labor Code, it also contains the appropriate sections relevant to workers' compensation in the Evidence Code, the Civil Code, the Code of Civil Procedure, etc.

For example in the 2010 edition of the Workers' Compensation Laws of California we find on page 601 the "Selective Provisions of the Evidence Code."

The admissibility of surveillance films is directly controlled by Evidence Code §250 (on page 602) as follows:

'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation including letters, words, pictures, sounds, or symbols or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

This section has been interpreted to apply to surveillance video.

As indicated by the Court which observed in *Brinks* as follows:

The testimony of a person who was present at the time the videotape was made stating the videotape accurately depicts the event is legally sufficient foundation for its admission into evidence (*Jones v. City of Los Angeles* (1993) 20 Cal. App. 4<sup>th</sup> 436, 440, fn5 [24 Cal. Rptr. 2d 528].)

The Appeals Board also is concerned about the "chain of custody" myth. It addressed this very issue in a recent panel decision on May 21, 2009, entitled *Wayne Johnson v. Tenant Company* (ADJ 1620559) in which the Board overturned a decision by a Workers' Compensation Judge who excluded surveillance films on the basis that said films were not authenticated as defendant did not establish the "chain of custody."<sup>3</sup>

In *Johnson* the Board noted as follows:

In any case, we note that even in criminal and civil cases, a chain of custody is not necessary to establish the authenticity of a video. "[T]he reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness.

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<sup>3</sup> Anybody wishing to obtain a copy of the *Johnson* case should request so via e-mail.

Under this theory . . . the requisite foundation may, and usually will, be laid by the photographer, it may also be provided by any witness who perceived the events filmed.”<sup>4</sup> (emphasis added)

**DISCLAIMER:**

The mythical case involving Frank Falls is a product of my imagination, as are all characters of the lobby bar aside from Kim, George and myself.

However, the myth, seemingly perpetuated by some investigation companies, that all we have to do is establish a “chain of custody” for introduction of surveillance video into evidence still goes on.

In contracting with an investigation company the most important requirement in my opinion is that the investigation company stand behind its product, which includes being able to locate and produce surveillance investigators when they are needed.

Great pictures without a surveillance investigator are useless.

In my opinion the best practice for any surveillance investigator is to review the surveillance film immediately after performing surveillance on the applicant and make a note to the file (while his memory is fresh) that his review of the surveillance films obtained is an accurate representation of what he actually viewed when he observed the applicant.

Make mine a double, George.

-Joe Truce

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<sup>4</sup> Years ago one of our attorneys actually authenticated for the purpose of admissibility video surveillance by showing it to the applicant on cross-examination. The applicant conceded that the video tape accurately depicted his activities and that it was he in the surveillance film.