

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS
FROM: JOE TRUCE
DATE: January 29, 2002
RE: ADMISSIBILITY OF SURVEILLANCE VIDEOTAPES

In this day and age of full discovery we are faced with ever increasing demands of the applicants' attorneys to turn over surveillance tapes as soon as they are obtained by our surveillance investigators.

Most applicants' attorneys have incorporated such a demand in their form representation letters and throughout the pendency of the case will from time to time make demands for the production of surveillance tapes.

Clearly it would appear to be the law that all investigation including surveillance must be disclosed at the Mandatory Settlement Conference pursuant to Labor Code §5502 but applicants' attorneys are now claiming that unless these surveillance tapes are produced on demand (before the Mandatory Settlement Conference) they are inadmissible at trial.

I am enclosing the Writ denied case of **Michael Demotte v. WCAB, American Building Supply, 3 WCAB Rptr. 10,356** in which the Board held that even though the defendant failed to produce the surveillance videotapes prior to the MSC the surveillance video tapes were admissible at trial since they were identified as a trial exhibit and provided to the applicant and/or the applicant's counsel at the Mandatory Settlement Conference.

In the Michael Demotte case the surveillance videos were taken in March, 2000 and defendant deposed the applicant in October of 2000 and the applicant was questioned extensively about his activities.

Immediately subsequent to the deposition, applicant's counsel made written demands for any video films taken of the applicant and although the surveillance videos were not served on the applicant's attorney they were sent to defendant's QME and the QME report (apparently containing a description of the videotapes) was faxed to applicant's counsel on April 18, 2001.

Applicant's counsel then requested immediate production of these surveillance videos but these were not produced until the MSC .

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At the MSC, the WCJ apparently gave the applicant's attorney the option of taking the case off calendar for further discovery or allowing discovery to remain open for the purpose of having applicant's counsel obtain a supplemental report from his own doctor after reviewing the videotapes.

Applicant's counsel chose to proceed to trial and close discovery.

In holding that the videotapes were admissible, the WCJ noted that the videotapes were identified as defendant's evidence at the MSC and therefore were admissible pursuant to Labor Code §5502.5(d)(3).

On Reconsideration the WCAB adopted and incorporated the decision of the WCJ and applicant's Writ was denied on November 15, 2001.

WJT:wf
Enclosure  WCAB Rptr. 10,357