

# DISABILITY CLAIMS SOLUTIONS CLIENT NEWSLETTER UNDERSTANDING SURVEILLANCE

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## Invasions of Privacy

By Linda Nee, BA, HIA, ALHC, DIA, DHP, CPM, ACAP

I am often asked if disability insurers have the right to conduct surveillance in order to obtain visual evidence of what is called "inconsistency of report". The answer to that question is, "Yes they do." Since disabled insureds are entitled to monthly benefits based on a "condition" of contract there is, of course, no expectation of privacy protection from surveillance. In fact, to my knowledge, the courts (both workers' comp and disability) have upheld the right of an insurer to conduct surveillance in order to fully investigate the credibility of claims presented for payment.

While I was still employed with UnumProvident in 2001, one of my group LTD claimants telephoned one day to tell me she noticed Unum spies hiding behind her trees and that they had been there for about a week. I asked her how many there were to which she replied, "several." Although I tried very hard to reassure her I had NOT ordered surveillance, my claimant remained absolutely convinced she was being harassed by Unum 'spies' hiding behind the oak trees in her yard.

Disability insurers are not spendthrifts. Dollars expended in the investigation of disability claims is normally proportional to the expected financial reserve profit the company receives if the claim is denied. A three-day tag surveillance costs the insurance company \$1,200 - \$3,000. Third party reinsurers like DMA and DMS hire cheaper private investigators so their costs per claim are significantly less, roughly in the neighborhood of \$900-\$1,200.

Therefore, disability insurers do not pay for surveillance unless they have liability for the claim. Except under very unique circumstances, surveillance generally does not take place unless a claim has already been approved for payment. *If there is no future liability to pay the claim, why shell out the bucks for surveillance?* It's just money thrown out the door if the claim can be denied for other valid reasons.

As a former claims specialist most of my surveillance referrals were the result of a phone call I received from an employer, a neighbor, a friend, or a relative who informed me the claimant was not being honest and was engaging in physical activity well beyond his claimed levels. One employer called me to report a claimant who was seen by co-workers loading as many as ten cases of Root Beer into the trunk of a car after being out of work for total disability due to back problems. You never really know who's watching.

### Activities Check

**The disability insurer may request a private investigator interview your neighbors, peers and friends. Typically, neighbors are asked to describe your physical activities, comings and goings to your house, visitors to your home, and other observed activities taking place in the yard, such as playing with your kids, taking out the trash, gardening and other routine-type tasks. Although it is not always possible, claimants might consider asking neighbors and friends to call you if someone shows up at their house asking questions about you and your activities. Internally, Activities Checks require signed authorizations, another reason to be careful.**

*From the disability insurer's perspective, the purpose of surveillance, recording, and taping is to obtain written documentation which clearly verifies the insured (and/or their physician) is reporting restrictions and limitations precluding work capacity which are "inconsistent" with the insured's actual physical activity in order to collect on a disability claim.*

As I've mentioned in previous issues of the DCS Newsletter 10 to 15 percent of claims presented for payment are in fact fraudulent. I remember one claimant who had been on claim for several years due to failed back surgery. After a neighbor called me and reported the claimant, I referred the claim for surveillance for an entire weekend. The claimant was observed "climbing" up a ladder to his roof where he stayed for two days hammering roofing tiles on his house.

Claimants caught by insurance surveillance always use the same "yes, I walked around the Mall for 5 hours, but I was in bed for a week after" excuse which is a horrible and inadequate defense of their physical activity. It never works! (Stay with me now, I'm going to tell you what DOES work later in the newsletter, so read on!)

Unfortunately, surveillance is a probable reality for anyone receiving benefits from an insurance company. While the insured has no expectation of privacy while on claim, there are many ways in which insurance "surveillance" can be managed thereby preventing the insurance company from using it to document the denial of any claim.

We hope this issue of the DCS Newsletter clears up some of the many, many questions we've received on the subject of surveillance over the years. Enjoy this issue and let us know if DCS can help you in any way.

### ***Managing Surveillance – Blow Their Cover***

The whole concept of insurance surveillance is based on the fact that representatives from an insurance company actually see you engaging in physical activity when you don't know they're watching. In other words, the success of any surveillance record is that it remains covert and secret. Obviously, surveillance loses its value if the claimant or insured KNOWS they are being watched.

Therefore, one of the best ways to “manage” surveillance is to “blow their cover” – let the PIs know you know they're there. Once you do this, the surveillance is over – busted! Everyone goes home.

As one of my PI friends commented recently, “if the target identifies you three times, you're burned”. Some claimants actually “play to the cameras” when they identify a surveillance team, but I don't recommend that. Honesty works, not drama.

Of course, “blowing the cover” of a surveillance can take place in several ways. You can actually approach the spying vehicle and let the PIs know you identified them, or you can call the local police and ask them to remove any vehicle watching your house. In fact, anytime you are placed in a situation of fear, we strongly recommend that you DO call the police and request them to ask the investigators to leave.

Surveillance investigators are supposed to inform the local police of their presence near your house anyway, but most of them don't follow the rules. Also, don't expect a professional private investigator to tell you the truth – most investigators will tell you or your neighbors anything they think you'll believe. Most surveillance teams use bogus plates on their vehicles so their agency can't be traced.

Private surveillance teams are required to follow the laws in the state you are in, but they rarely do. Normally, surveillance PIs must ask permission to surveil you from your neighbors property; must be licensed in your state as a private investigator; are prohibited from breaking any laws while engaging in surveillance activity. The best way to stop an insurance surveillance is to blow their cover and let them know YOU are watching THEM. Everyone goes home.

Anytime you become fearful because of an identified surveillance team, blow their cover and send them backing. The insurance company will have wasted their money!



Private investigators actually make a lot of mistakes following the wrong person. One of our client's daughters was surveilled by The Hartford for several days. Field representatives are required to take the claimant's picture so he/she cannot be misidentified in any future surveillance. Now you know why your disability insurer asked for a copy of your picture driver's license for the claim file. Sneaky aren't they?

### ***How To Recognize Insurance Surveillance***

- 1. You've been asked to submit to an IME. Great chance for a tag surveillance. (3-day)***
- 2. Strange car in the neighborhood, or unidentified car showing up more than once in 24 hours. Or, strange car following you on the road, or circling the street in front of your house.***
- 3. Same person sitting in your doctor's reception room, whom you later identify as following you in a car ,or into a public place.***
- 4. Odd phone calls about delivering a package to you at another location. Calls from vendors you don't know asking where you will be at certain times of the day.***
- 5. You see a person walking in front of your house with a camera or video recorder. Likewise, person clearly taking pictures of your home or car.***
- 6. Problems with neighbors and others who have threatened to report you to the insurance company.***
- 7. Doctor tells you someone came by and requested a copy of your medical records.***
- 8. Field representative asks you if he/she can take a picture of you and your house.***
- 9. Insurance company calls you out of the blue for a long “TPC” (telephone interview). These calls always take place before a surveillance because the rep is trying to catch you in a lie.***
- 10. “Arbitrary and capricious” behavior on the part of the insurer. (Insurance company suddenly begins to manage your claim in other directions–frequent requests for information etc.)***

## **Adversarial Surveillance Prevention – The Importance of Your Physician Treatment Plan – Editorial by Linda Nee**

As mentioned earlier, claimants do not have specific privacy protections from insurance surveillance, but there are actions which can be taken by the insured to prevent the use of surveillance as credible documentation in support of a claim denial. First of all let me state emphatically that disability claims cannot be denied solely on the basis of surveillance. Internally, surveillance is normally requested by the insurer to bolster otherwise weak documentation in support of a claim for denial. Surveillance is only one of many “risk management tools” used by the disability insurer to document proof of “inconsistency of report”, meaning the insurance company actually sees you performing physical activity greater than you and/or your physician previously reported. Surveillance is just “one piece” of documentation among others which eventually leads to the allegation the insured “does not meet the definition of total disability” in the policy.

Therefore, the best way to support a disability claim and prevent misuse of surveillance data is to have a clearly documented “medical treatment plan” written by primary treatment physicians, which support certain levels of physical activity. For example, most claimants with fibromyalgia are recommended to engage in daily exercise and physical activity as is able. This is also true for many impairments including diabetes. In fact, DCS recommends to our diabetic clients that they obtain an actual prescription for daily exercise from their physician as part of a formal treatment plan for the disability. **The point is, all persons receiving disability benefits from an insurance company should discuss and obtain a written treatment plan from their primary care physician clearly documenting various levels of physical activity.**

Appropriate treatment plans usually state something like, **“Patient is to be seen for bi-weekly consultation and medication management in combination with 10-15 minutes of daily walking, or other physical activity as is able depending on varying levels of fatigue and joint pain.”** (Fibromyalgia patient.) This treatment plan, written by DCS for a Rheumatologist does not give the patient work capacity, but does recommend up to 15 minutes of walking, if possible. If this patient is subsequently observed walking for up to 15 minutes a day, the surveillance is useless since the observed activity is allowed within the treatment plan documented by the physician. In other words, the insurance company should already know, through the treatment notes, that physical activity is allowed because of the treatment plan provided by the primary care physician.

**Once the insured is given a clear, specific treatment plan by their physician he/she should never be observed engaging in physical activity greater than that certified by the treating physician.** I am well aware insureds (and regrettably, their attorneys) attempt to defend observed levels of physical activity with the adage, “Yes, I went to the Mall with my friends and walked around for 4 hours, but I was in bed for a week after.” I know there are differing opinions about this, but here at DCS we do not defend surveillance activity with comments characterized with the stereotype “I have good days, and I have bad days”. This type of defense is relatively useless since normal, healthy people who over exert themselves will, no doubt, suffer for a few days afterward. For example, if I usually walk 2 miles a day on my treadmill and then walk 5 miles, I’m going to be sore for a week. Healthy, normal people who engage in physical activity greater than they are used to will also “suffer” for the effort. It is therefore presumed a disabled person will also be affected by overexertion – so is everyone else.

Exercise is as important to a diabetic as the insulin or glucophage taken daily. Therefore, ask the physician to actually document the need for exercise and activity by writing a prescription as part of your formal treatment plan. This could also be true for claimants and insureds with failed back surgeries, MS, fibromyalgia, and depression. If the doctor includes a 20 minute work-out at a gym twice a week, or swimming, or any other reasonable activity, it should be documented in the office consultation notes as part of the physician’s treatment plan and goals.

Treatment plans should not recommend physical activity which could be interpreted by the insurance company as work capacity, but if the physician documents exercise as part of his/her treatment plan, any surveillance observing the same level of activity cannot be used against you to deny your claim.

**Bottom line, whatever it is you are telling your insurance company you cannot do on the monthly Claimant Statements, you should not be seen doing it.** Most disability insurers will send the surveillance DVD to all of your primary care physicians and ask them to comment. A physician who has been documenting a limitation of “patient is unable to walk > 10-15 minutes” who later sees the same patient walking for hours on a Unum surveillance DVD will most likely drop that patient like a hot potato. The best way to manage a disability claim is to discuss your allowed activity with your physicians and ask them to document it in the consultation notes.

Sometimes claimants do not use common sense either. If you recently wrote on your Claimant Statement that you never visit the place of your former business, then don't go there! If you used to work at home, but don't anymore, then take down the business sign in front of your house and change your voice message, “Hello, you've reached Charley's Auto Repair Center.” Using common sense can save a claimant an unwanted visit from the surveillance team or field representative. Manage your claim by talking with your physicians about your allowed activity and stay in control of the process of what's reported to the insurance company and what isn't.

In reality, surveillance is the least effective “risk management” tool because not all impairments can or should be observed. For example, I've often wondered why insurance companies spend their “risk” dollars surveilling depression claims when nearly all therapists recommend daily exercise and varying levels of activity for that group. Although disability insurers usually go for “the biggest bang for the buck”, surveillance, like the definition of disability, requires a stretch of the viewer's imagination to support most claim denials. Dollars spend on IMEs probably result in twice as many claim denials as surveillance. Despite this, I remember a time when Unum Life Insurance management required surveillance for all fibromyalgia claims. Clearly, it must have been profitable for the company to do that.

The truth is, insurance surveillance causes disabled persons to feel worse about themselves, and their impairment than they already do. Surveillance IS an invasion of privacy, and can have significant emotional effects on those who depend on their financial support from disability insurers who are also doing everything they can to NOT pay claims.

Claimant reactions to insurance surveillance can be overwhelming fear-induced stress, anger – “*How dare they follow me to the Mall!*”, paranoia, tearfulness, hopelessness, and an intense feeling of not being in control of one's life, family or finances. One client asked me recently, “Does the insurance company know how terrible surveillance makes me feel?” Unfortunately, they do know, but in their world how a claimant feels about spying and invasions of privacy is not relevant to any claims decision.

Insurance companies will tell you surveillance is imperative to the identification of fraudulent claims. This is particularly true of Workers' Compensation claims which seem to encompass a more broad spectrum of the middle class population. Nevertheless, it is unfortunate that so many honest insured's claims are denied in the process. Remember to: 1) have frank and open discussions with primary care physicians about including levels of activity and exercise into their consultations notes and medical treatment plan; 2) use common sense concerning what you report to the insurance company about your activities; and 3) blow the cover of any surveillance you observe.