

# Major ECAB decision on OIG surveillance video<sup>1</sup>

**Injured letter carriers who draw wage loss compensation** should assume that investigators associated with the USPS Office of Inspector General (OIG) have covertly filmed them or will film them. The Employees' Compensation Appeals Board issued a decision on Sept. 26 (Docket 11-863) that addresses a number of issues involving Postal Service OIG surveillance videotape.

All branch contract enforcers and injured worker advocates should be familiar with this important decision. It is important because it addresses a critical distinction between use of surveillance videotape for the purposes of 1) fraud investigation and 2) for claims development.<sup>2</sup>

**Background—A mailhandler had an accepted on-the-job injury.** She was off work following two surgeries. The Postal Service OIG conducted surveillance and videotaped her. The OIG had direct, in-person contact with the mailhandler's attending physician and showed him edited surveillance video. The mailhandler was not aware in advance that her employer intended to present surveillance video to her doctor, and she did not have an opportunity to obtain a copy of the video and offer any explanations or comment. The attending physician then signed under oath a Postal Service questionnaire, signed an official statement drafted by the OIG agent, and completed a CA-17 noting that the mailhandler could return to work full time with no restrictions. OWCP then terminated the claim based on the attending physician's opinion.

**ECAB reversed the termination on several grounds—two** are detailed below:

First, the Postal Service violated the regulations prohibiting direct contact with the treating physician, 20 CFR 10.506. The Board wrote:

It is clear that the agents of the employing establishment took an active, and in some issues decisive, role in developing appellant's claim and building the case for termination of her benefits. The Board finds that OWCP departed from the implementing regulations by relying on evidence obtained through direct contact between agents of the employer and appellant's treating physician. OWCP should have rejected evidence generated by a violation of the applicable regulations.

Second, the injured worker was not afforded the required notice regarding the existence of the surveillance video and its intended use for the purpose of obtaining an adverse medical opinion. The Board stated:

The Board [has] imposed upon OWCP an obligation to disclose the existence of videotape evidence to the

employee before it is shown to a doctor and to allow the employee to comment on and explain the events captured on tape.

The Board also quoted the relevant prior holding from an earlier case, 58 ECAB 478:


Under certain circumstances, videotape evidence may be of value to a physician offering an opinion regarding a claimant's medical condition. It may reflect on the patient's reliability as a historian or the actual ranges of motion, lifting or other physical activities the claimant may perform. However, a videotape may be incorrect or misleading to a physician if there are errors, such as identity of the individual recorded on the videotape or whether certain activities were facilitated by the use of medication. The Office has the responsibility to make the claimant aware that it is providing videotape evidence to a medical expert. If the claimant requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording.

OWCP has incorporated the holdings in 58 ECAB 478 into the FECA Procedure Manual, under provisions regarding Second Opinion Examinations and Independent Medical Examinations. See FECA PM 2-0810.9(g), 2-0810.11(c) and 2-0810.12a.

**ECAB cautioned that its opinion should not be read as criticism of OIG fraud investigation efforts** and that it did not have jurisdiction over USPS OIG investigative practices. The Board explained:

This opinion should not be read as a criticism of efforts to investigate possible instances of fraud... The Board recognizes that OWCP and employing establishments have an affirmative duty to maintain the integrity of the system under which FECA benefits are provided. ECAB also recognizes the need to maintain an appropriate separation between the nonadversarial system of managing FECA claims and the investigative process of determining whether an employee is receiving unwarranted benefits and services.

The investigative practices of the Postal Service Office of Inspector General are not within the jurisdiction of ECAB...

In this appeal, the nonadversarial claims administration process was impermissibly mingled with the investigative process. 

1. The ongoing series "Decisions, Decisions, Decisions" on the OWCP appeals process will resume early next year.

2. Links to the ECAB decisions and to the sections of the FECA Procedure Manual discussed in this article can be found on the webpage of the Compensation Department at [nalc.org](http://nalc.org) under "Major ECAB decision on OIG surveillance video."