

The Effect of Strong Surveillance is in the Eye of the Beholder – The Judge

In the recent decision of *Unger v. Mooney Construction* (decided February 20, 2020), the Appellate Division upheld the Workers' Compensation Judge's (WCJ) opinion on compensability.

In the underlying workers' compensation case, the petitioner sustained an injury while working for Mooney Construction when he fell approximately 16 feet off a scaffold. The petitioner underwent surgery on both ankles, which resulted in the placement of plates and screws. He also underwent arthroscopic surgery to the shoulder. The petitioner testified that the problems from his injuries prevented him from returning to work as a framer. However, he did begin to work as a handyman. He testified he was able to work a couple of hours a day doing tasks such as installing doors, painting and tile work.

Following the filing of a claim petition and expert evaluations, the matter proceeded to trial on the issue of permanency. In addition to the experts testifying, three witnesses by Mooney testified to the surveillance of the petitioner. The surveillance showed the petitioner's work over several days as a handyman. The petitioner's activities included landscaping, riding a lawnmower, trimming bushes, using hand-held power saws to cut branches, carrying a putty knife and tray into a home, taking paint cans and rollers into a house, repairing siding doors, moving a ladder, doing brief shoveling, picking up an empty trailer with both arms and throwing two cement blocks under a trailer.

Following the testimony, the WCJ described the petitioner as "a very credible witness," and the petitioner's expert had "outstanding credentials and an excellent witness." He also stated he carefully reviewed the surveillance footage. The WCJ noted that the surveillance did not show anything that was inconsistent with the petitioner's testimony. As the Judge stated, "In a light most favorable to Mooney Construction, the surveillance showed movement beyond what I expected. But, nothing that contradicted his testimony. He has permanent restrictions and now works part-time, making significantly less money." The WCJ, therefore, found permanency of 45% partial total disability.

The employer appealed contending the WCJ did not have objective credible medical evidence to support his finding and failed to consider the petitioner's ability to work after the accident properly. The Appellate Division confirmed the WCJ decision, noting the testimony was consistent with the actions seen on videotape. They were satisfied with the record, and testimony presented sufficiently objective medical evidence to support the WCJ determination of disability, and the opinion was not based solely on subjective complaints. Secondly, they confirmed the change in the petitioner's work-ability, noting he can only work several hours doing a different job making less money than his former occupation representing a considerable impairment of his working ability.

Comment: This decision once again confirms that the Appellate Division won't overturn a Workers' Compensation Judge on credibility calls. While the surveillance evidence appeared to be reliable, if the WCJ is not impressed, then the Appellate Division will not overturn the decision as it is a credibility decision.

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