

KNOWLEDGE

'What You Do This For'

By Robert L. Kaiser



To GS workers' compensation attorneys, fighting fraud is personal—especially in joint-defense cases involving a related liability suit that puts the client at risk of losing millions.

He carried, by turns, a dog, a circular saw, a gallon of paint, and many other heavy or awkward things.

He maneuvered a wheelbarrow and a hand truck. He used a shovel.

He even rode a motorbike, though doing so taxes the very parts of the body he claimed to have hurt—the lower back and left foot, which a rider must use to maintain correct posture and shift gears.

Workers' compensation claimant Antoine Lee allegedly was unable to do his job for Monadnock Construction Inc. of Brooklyn because he injured himself at work; a scaffold beam fell on his foot, allegedly fracturing it and causing him to limp, which led to back problems. But at home, in St. Albans, Queens, Lee was pushing, pulling, digging, hauling, hefting, and lugging almost daily, and private investigators had video-recorded much of it with secret remote cameras.

Now, on an overcast January afternoon in Jamaica, Queens, the trial over Claim G2355774 was underway and an expert witness who had reviewed the 18 hours of Lee video recorded between July and September 2019 was rattling off the highlights in testimony that consisted of reading aloud from a list.

“Turn to 9/2/19,” Monadnock’s attorney, Goldberg Segalla partner **Asha V. Edwards**, instructed the witness, Andrew Chenevert. “What time was the claimant first observed?”

“The claimant was first observed at 12:26 a.m. on that day,” Chenevert said, “arriving at his residence on the motorcycle.”

Later that morning, a little after 11 a.m., Lee worked in the yard. Carried a bag of grass seed. Shoveled dirt into a wheelbarrow. Moved a ladder.

Then came September 3.

“Pulled down and carried large tree branches as they were trimmed by an unidentified individual.”

To a criminal judge, the activities the witness had spent the past 15 minutes ticking off may have seemed innocent. But to Workers' Compensation Part 31 Law Judge Lucky Enobakhare they were something else.

“I don’t think I need to hear it,” the judge said, his soft voice tinged with weariness.

“I don’t think I need to hear any more, to be honest.”

‘THE BEST RESULT FOR THE CLIENT’

On this blustery winter afternoon—January 13, 2020, a Monday—Edwards was in Enobakhare’s courtroom chasing a 114-a, a ruling that Lee committed fraud under that section of New York State law. She was among eight attorneys from Goldberg Segalla’s Workers’ Compensation practice defending clients in Jamaica, Queens, their cases playing out in a Spartan, beige-brick building shared by the New York State Workers’ Compensation Board, a furniture store, and a falafel takeout.

At 1:30 p.m., a few minutes before Edwards’ trial began, she and her colleagues sat elbow-to-elbow with lawyers from other firms at the narrow blue counter lining the walls of the Attorney’s Room, peering at their computers. Some of them had more than 200 open workers’ compensation cases.

Since the firm’s Workers’ Compensation practice started, in 2007, it has grown from a club of one—partner **Damon M. Gruber**, who launched the group—to a team of more than 125 attorneys distinguished by their nuanced and battle-proven approach to defending clients.

That approach ranges from fostering lasting, one-on-one relationships between attorneys and clients to orchestrating investigations by private detectives whose methods may include tailing someone in a car, staking out a house, or joining the same gym as a fraud suspect to see what he’s lifting. Ten pounds? Eh. His attorney can pass that off as exercising to get better. But 230? That’s weightlifting—and compellingly detailed evidence that the claimant isn’t injured.

Such sleuthing is critical in defending employers, insurers, and other clients hit with fraudulent claims, and it’s not all done by detectives. An attorney often does the preliminary work showing an investigation is warranted—that of, say, checking medical records for red flags or searching social media for video of a claimant with an allegedly blown-out knee swing dancing or shooting a jump hook—and an attorney may even steer the investigation.

That puts Goldberg Segalla workers’ compensation attorneys on the front line in a high-stakes fight. Rooting out fraud in a workers’ compensation case can effectively short-circuit not only that claim but also any general liability suit that may be related and that puts the client at much greater risk.

“A fraud finding in a workers’ compensation claim has a profound effect on a general liability case moving forward,” says Goldberg Segalla partner **Sean J.**

McKinley, co-chair of the firm's Workers' Compensation practice.

The link between workers' compensation and general liability cases is especially strong in the New York City construction industry, whose shifting insurance market has become dominated by Owner Controlled Insurance Programs (OCIP) and Contractor Controlled Insurance Program (CCIP) projects.

Such construction projects, some of them costing a billion dollars or more, unify liability on the workers' compensation and general liability sides in a single carrier—the project's owner or general contractor. “So you defend the cases jointly,” McKinley says. “You work together to get the best result for the client.”

Goldberg Segalla has been uniquely qualified to do just that since McKinley created a workers' compensation-labor law joint-defense program, the first of its kind in the state of New York. Construction disputes amount to 75 percent of the joint-defense program's caseload.

“You can use evidence on both sides of a case,” McKinley says. “So it's litigated in two or three years instead of five or six. ... (Otherwise) the minute there is a labor law action as part of overall litigation, it grinds the entire process to a halt.”

Not all workers' compensation cases have attendant liability suits. Nor are all related workers' compensation claims and general liability cases handled by a single firm. But even when that's the case, the attorney handling the claim and the one defending the suit often work in concert, with the former helping the latter by attending hearings to answer questions and provide evidence.

So it was with Edwards in the Lee case. She wasn't handling the multimillion-dollar general liability suit related to Lee's workers' compensation claim, but she would be giving the attorney who was defending Monadnock in that dispute a gift if she won a fraud ruling from Enobakhare.

Such a ruling not only would blow up Lee's \$600,000 workers' compensation claim and lead to the case's being referred to the New York Attorney General for possible criminal charges; it also would undermine the related \$3 million lawsuit. All thanks to an investigation that Edwards estimates cost \$60,000.

'I DIDN'T THINK'

The return on a fraud investigation can be well worth the investment, especially in joint-defense cases. The average cost of a single “fall from elevation” by a roofer, for example, is \$106,000, according to the U.S. Bureau of Labor Statistics. Add to that a multimillion-dollar employee lawsuit and the risk to a business or insurer can be huge.

Lee’s risk to Monadnock stemmed from a construction-site accident October 17, 2018. He and a co-worker were carrying a 12-inch steel scaffold beam to place it on a stack of other beams when it fell and landed on his foot.

Lee, who, on average, then made \$1,200 per week, filed a workers’ compensation claim that was established for his left foot. Medical evidence later showed a lower-back injury caused by Lee’s limping. But Edwards noticed something odd. The claimant wore an orthopedic boot to hearings even though he didn’t seem that injured. Her client noticed the same thing. Though a doctor had prescribed the boot on November 13, 2018, Lee looked like he no longer needed it or perhaps never did. So Monadnock decided to have him surveilled.

The first private-investigation agency watched Lee from December 5, 2018, through February 19, 2019, the second from April 26 to October 24, 2019. On February 10, 2019, Lee left his home to drive himself to an appointment for what’s known as an Independent Medical Exam. Lee was wearing the boot when he arrived for the exam but never wore it again while under surveillance between December 2018 and February 2019—not even the day he pulled seven bags of cement onto a dolly. Or the day he pushed a wheelbarrow filled with tools, bricks, and a cooler. Or the day he placed a tree in a garbage can.

Though one doctor recommended that Lee not bend, stoop, or lift anything for long, he was seen “performing physical laborious yardwork and renovation outside his home as well as driving his motorbike,” according to the investigator’s report.

“I did some yardwork,” Lee was overheard saying at one hearing. “I didn’t think.”

For the private detectives investigating Lee, the task was, by turns, boring and eye-opening. An investigator who staked out Lee’s house on a cool and overcast Friday in April 2019 wrote:

“11:45 a.m.: I arrived at the claimant’s residence, which is a two-story single-family

home. The ground floor is brick-faced with dark brown shingles facing the driveway at the left side of the property. The second floor is comprised of beige vinyl siding.

...

“6:10 p.m.: The claimant walked up the front steps and entered his residence. He was not observed wearing or using any medical devices.

“1:56 p.m. The claimant departed. As I was unable to discreetly initiate mobile surveillance, the claimant drove out of view as he turned left on 200th Street.

“I departed.”

A TARGETED INVESTIGATION

The Lee investigation yielded damning evidence.

At a hearing November 7, 2019, Lee’s attorney said that, per the advice of his client’s attorney in the related third-party liability case, the claimant no longer wished to pursue his claim and wanted the case closed. But Edwards reminded the judge that the fraud allegation she’d raised against Lee was a serious offense; a decision on whether to close the case wasn’t the claimant’s alone to make, she said.

Edwards asked to produce an expert who could testify about the mechanics and physical requirements of riding a motorbike. Already she had secured and reviewed an owner’s manual for Lee’s model, which showed the rider must shift gears with the left foot.

The judge continued the case until January 13, 2020. That day there would be a 75-minute trial and testimony, he said, and the stage was set for the conclusion of a yearlong dispute that turned on the one small but ultimately consequential detail of Lee’s wearing an orthopedic boot he didn’t seem to need.

The boot was key. So was the client’s being suspicious of it right along with Edwards. Monadnock had to sense something was off and want an investigation for one to occur. While some insurance carriers do their own sleuthing, other workers’ compensation clients must pay private detectives to do it and justify the expense with something. Maybe the claimant’s use of a cane at hearings. Or a social media search that finds damning video the claimant himself posted—the kind of preliminary evidence a Goldberg Segalla workers’ compensation attorney might dig

up.

“Our job is to recognize when and where surveillance may be beneficial and how best to utilize it,” Goldberg Segalla partner James V. Durgana says.

“We always want a full social media audit before we do surveillance,” says McKinley. “We need indicators so we don’t send investigators out blindly. Surveillance is expensive. That’s why the use of social media is so big. It gives you more of a targeted investigation.”

Once an investigation begins, a Goldberg Segalla workers’ compensation attorney might make sure it proceeds with focus and coherence, according to some plan.

“We definitely work with private investigators in a way other firms don’t,” McKinley says. “We work with investigators to put clients in the best position. We’re having conversations, getting calls from the field, getting real-time information.



“But what makes us different as a workers’ compensation practice also makes us different as a handler of these fraud cases.

“We do not handle claims as volume- or commodity-based practice but as a traditional practice. It’s one attorney handling one file, not one attorney to handle everything on the docket that day. What that allows for is continuity of file handling from beginning to end, as opposed to a hot-potato approach.

“The attorneys here have an incredible institutional knowledge of the files that allows them to do a better job. And they create industry specialties. ... They’re getting very close to their clients and their clients to them, and that puts us significantly farther down the playing field.”

All of which is to say Goldberg Segalla attorneys are successful.

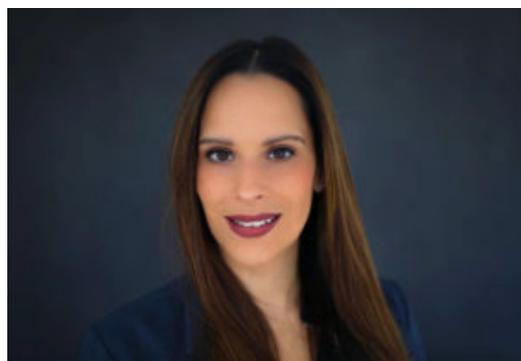
In one claim, defended by McKinley and Durgana, an allegedly injured construction worker who fell down stairs on a jobsite and then filed a Labor Law case as well as a

workers' compensation claim was caught building a patio on his home.

Durgana and McKinley won that case with a fraud finding that included permanent disqualification of any monetary payments. And the related Labor Law case, whose plaintiff at one point was demanding more than \$3 million for lost wages, future medical care, neck surgery, and a toe injury, ultimately dwindled to just the toe fracture and settled for \$100,000.

"I've been doing this for about five years now," Durgana says, "but, really, over the past year and a half to two years, everything has kind of ramped up with the amount of crossover work we've been able to do (on the general liability side).

"We've really seen an increase in the level of interest in doing investigations and pursuing fraud because of the effect it has on the general liability side. We're really in a better position to lay the groundwork for a fraud finding."



Thais E. Rodriguez says:

"I don't go into every case thinking a claim is fraudulent. There are certain red flags. Maybe the medical records don't show much but he shows up in court with a cane and you wonder if he's putting on as show. But we do always look at the medical records."

'YOU LOSE YOURSELF IN THE MOMENT'

On the same January day as Edwards's Lee trial, Rodriguez had a conference call about a case. The claimant's Facebook page showed a recently posted live video that had caught Rodriguez's attention. *She's not walking with a cane.*

A big part of the strategy in fraud cases is deciding when to start surveillance, Durgana says. "I try to think when someone is most likely to play up an injury or try to pull a fast one."

In one case, Durgana said, the claimant was moving back and forth between New Jersey and Florida, "so we never knew when he would be at a certain address." Durgana had an idea: Investigators could find him when he showed up for his

Independent Medical Exam and start their surveillance there.

“He said he couldn’t move his right arm,” Durgana says. “Later that day we had him doing all kinds of stuff. He took off his sling and never put it back on. He was taking out the garbage making a choice to use his right arm over his left. He was doing work on a car. He took a gallon bottle of motor oil and held it up with his right arm.”

The claimant also shook out some heavy car-floor mats, Durgana says.

“Flipped them over his head and shook them out to get the dust out. That was a biggie. Violent motion.”

Another claimant, a construction worker who said he couldn’t work because he had undergone recent knee surgery was seen building a patio and walking with a friend while carrying a basketball under his arm.

“All I needed him to do,” Durgana says, “was to take a step back and hit a jump shot.”

“I love being a lawyer. This is what I’ve wanted to do for I can’t even tell you how long. And I tell people that when I really make a passionate argument about something I literally feel like I lose time off my life. I get to this space where the motion plus the law just come together and I’m able to make my argument. And when I’m done, I have to literally take a breath.

“You lose yourself in that moment and everything else takes over and you’re in this zone, and no one can really take you out of it.”

Some cases sear themselves into the memory. Of one claimant, Rodriguez says: “I can picture his face. He probably can’t stand to see mine.”

In an exchange between the two during testimony at a hearing, Rodriguez questioned the man about his seemingly selective use of a back brace and cane.

“Do you wear the back brace when you go see your doctors?” Rodriguez said.

“Sometimes,” the claimant said. “Lately, no. They winded up giving me a handicapped plaque that actually slows me to park a lot closer to places. But I used to once in a while. Especially like the (Independent Medical Exam) doctors. I used to get stuck walking blocks. It was amazing. Then they asked me to—”

“Sir, there is no question in front of you,” Rodriguez said.

“Okay.”

“So, let’s talk about the cane.”

Rodriguez’s ferocious and focused approach to workers’ compensation cases has served her well. She won a fraud ruling against 34-year-old workers’ compensation claimant Ronell Daniel, an ironworker hurt on the job in July 2016 when a pipe burst and flame retardant sprayed into his eye. The ruling disqualified Daniel from receiving any future indemnity payments.

If there’s a downside to the job, it’s the stress of forever navigating the razor’s edge between victory and defeat. How a case turns out isn’t entirely up to the attorneys. Sometimes it depends on the judge understanding or technology working or an out-of-state expert witness showing up.

Rodriguez once handled a workers’ compensation case in which she didn’t get a fraud ruling despite having what she thought was compelling video evidence, including footage of the claimant’s lifting 230 pounds at the gym. She had to relive the frustration of that at mediation in the general liability case. There, at a long conference table with the plaintiff’s party on one side and the defense on the other, third-party counsel replayed the video and Rodriguez grew so angry watching them McKinley could see it on her face. The workers’ compensation case and liability suit now are both in settlement negotiations.

“It’s a lot of pressure to handle these files,” Rodriguez says. “You get invested because it’s a lot of work and because of everything you go through. You want to get it right. Your client has spent so much on surveillance.”

On a scale of 1 to 10, the pressure of the job is an 8, Edwards says.

Effectively serving the client is paramount.

“I remember one (case),” Durgana says, “because our client literally had told us in our prep that this case, what happens with it, will make a multimillion-dollar difference.”

“I emailed her back saying, ‘No pressure, right?’”

'LET'S TALK ABOUT THE CANE'

Monadnock wasn't only at risk of losing \$600,000 in Edwards's workers' compensation case. The company also stood to lose \$3 million in the related lawsuit. So almost \$4 million hung in the balance, and the fight to save the client a highly costly outcome started with Edwards and her band of detectives.

In all, eight investigators were involved in the Lee case. Some of them flew in for the January 13 trial while others were prepared to testify remotely, on a video monitor in Enobakhare's spare little courtroom.

Who investigates a workers' compensation claim and how they do so varies from case to case. Many insurance carriers have certain investigators they like to use, Rodriguez says. "So generally it's outside our control." But sometimes a client wants an attorney overseeing a fraud investigation. With one construction client, Rodriguez says, "I directly correspond with investigators. 'Hey, there's an (Independent Medical Exam) coming up, why don't we (stake out the place).' Or, 'Hey, please make sure you download those videos in the event she deletes her Facebook account.'"

On the afternoon of Lee's trial, Edwards anxiously awaited and then greeted and talked with investigators as they arrived, one-by-one, from various parts of the country, huddling with them in front of the rows of pews in the third-floor workers' compensation lobby and waiting area.

"So you have all your reports, and you've highlighted it?" she asked Chenevert, the expert witness who had reviewed 18 hours of video.

Chenevert, clutching a red paper folder, said he had. "I've tried to familiarize myself with everything."

"Okay," Edwards said. "So do you have any questions for me? ... The case is scheduled for 2 p.m. I intend to call you as my second witness. ..."

"The judge directed us to be ready to produce all of our investigation, but we don't think he'll get to it all."

"Yeah. There's so much footage," Chenevert said.

Back in the attorney's room, Edwards checked one last time to make sure everything

was in order—that the video matched Chenevert’s report and was available in several forms, including a DVD, a USB drive, and a link. “In case my laptop crashes,” she said.

So single-minded is Edwards she can seem like two people—the one before she wins and the one after. Preparing to give her client good news after a trial, she is animated and talkative. Preparing for the trial itself, she’s a poker player—serious, quiet, locked in. Determined.

The Monadnock case’s high stakes weren’t its only stressor. There were a lot of moving parts. An attorney has to ensure procedural rules are followed, Edwards says. “Having all the video evidence submitted to all necessary parties. Making sure every investigator testifies. Prepping their testimony. Any screw-up on the procedural side can cause our case to be dismissed.”

Edwards had a lot of evidence to keep straight and show the judge, and, though all of it was compelling, none of it would present itself. She had been up until 1 a.m. preparing for the trial, but she hadn’t missed a beat getting to work this morning, and she had brooked no distractions as she pored over evidence in her office.

Edwards’s blond-wood desk is configured so her chair is angled toward a wall of windows, but she’s not one given to sitting back and enjoying the view, which on this day was a restless gray sky. Instead, her eyes were locked on the screen of her desktop computer, which showed windows of a different sort: various overlapping web pages, documents, and other digital elements.

To Edwards’s right were DVDs of the video that investigators had surreptitiously recorded.

The lawyer in the maroon-and-black dress had more than 160 active workers’ compensation cases, but at that moment only one was on her mind.

THE JOURNEY FROM MAY TO NOW

Lucky Enobakhare’s courtroom is a stark place with no windows and nothing on the eggshell walls.

On the afternoon of January 13, there also was no Antoine Lee. Per his attorney’s announcement at the last hearing, the claimant, facing a fraud investigation, was

done with the case. Wanted it closed. And it would be. Soon.

Just not the way he wanted.

“Judge,” Edwards said, “if you would like to hear from the investigator from his earliest investigation where the claimant is seen wearing a boot, going to the doctor, and then not wearing a boot ... I would like to present that investigator ...”

But Enobakhare had just listened to 15 minutes of testimony from a surveillance expert describing laborious things Lee had done at home while allegedly unable to work, and he didn't want to hear any more.

“I don't think I need to,” he said.

“The evidence shows that this is one of the most egregious (cases) I've seen,” he said moments later. And a trial scheduled to last 75 minutes was over in half that.

Edwards had her 114-a. Not only would Lee be getting no more money from his claim; if he ever filed another, he would have to pay back what he had received for this one.

“This journey took from May to now,” an exultant Edwards said moments later as she stood in the corridor outside Enobakhare's courtroom. “And it took a lot of work.

“But getting to tell the client I saved them \$4 million—that's what you do this for.”

Learn more about Goldberg Segalla's workers' compensation and general liability joint-defense program for construction clients



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